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Novel Perspectives on Due Process Symposium: Doctrinal Redundancy and the Two Paradoxes of Personal Jurisdiction

Robin J. Effron

Brooklyn Law School, nstewart14@law.fordham.edu

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DOCTRINAL REDUNDANCY AND THE TWO PARADOXES OF PERSONAL JURISDICTION

*Robin J. Effron**

INTRODUCTION

The quandaries in modern American personal jurisdiction jurisprudence are myriad. The overarching question, “why is personal jurisdiction doctrine such a mess?” has been a guarantor of full employment for civil procedure professors for decades,¹ and the subsidiary questions are also well worn. What is the relationship between personal jurisdiction and constitutional due process?² What is the relationship between personal jurisdiction and venue?³ Between personal jurisdiction and forum non conveniens?⁴ Between personal jurisdiction and notice?⁵ Why has the federal government chosen via Rule 4(k) to rely heavily on the states for the content of the scope of personal jurisdiction?

A broader question lies at the heart of many of these inquiries: what is personal jurisdiction *for*, and are we asking personal jurisdiction to do the work that either is or should be done by other doctrines? Stated differently, one might ask: is personal jurisdiction redundant of other procedural doctrines? Or are other doctrines redundant of personal jurisdiction? Professor Ingrid Wuerth’s Article, *The Due Process and Other Constitutional Rights of Foreign Nations* (“*Constitutional Rights of Foreign Nations*”),⁶ offers the opportunity to focus on an important but often overlooked side of personal jurisdiction redundancy, that is, the extent to which constitutional personal jurisdiction does (or does not) occupy some common space with doctrines of foreign sovereign immunity.

* Professor of Law, Brooklyn Law School. Thanks to Michael Cooper for excellent research assistance and to Dean Michael Cahill for support from the Dean’s Summer Research Fund.

1. See Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1403 n.2 (2018) (citing the major personal jurisdiction articles over the past few decades).

2. See generally Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071 (1994).

3. See Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463 (2019).

4. See Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390 (2017).

5. See Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23 (2018).

6. Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633 (2019).

Constitutional Rights of Foreign Nations is an important and comprehensive contribution to the civil procedure and foreign relations law literatures. With regard to procedure, it advances the debate about personal jurisdiction and due process along two key axes. First, it documents the extent to which foreign states have been excluded from the protections of the due process rights to resist the exercise of personal jurisdiction. Professor Wuerth then constructs an elegant argument for including foreign states as the subjects of personal jurisdiction due process protection under the U.S. Constitution and then uses that reasoning to make larger points about the relationship between personal jurisdiction as a due process protection and personal jurisdiction's role in Article III's allocation of power to the federal courts. Professor Wuerth highlights personal jurisdiction⁷ as a core site of judicial attention to the due process status of foreign states under the U.S. Constitution, and she rightly argues that

[a]s foreign states and foreign state-owned enterprises expand their commercial activities and engage with the United States in new ways, especially in the cyber, terrorism, and economic-espionage contexts, litigation against them is increasing in scope and importance. Questions about their constitutional status, which to date have been litigated mostly in the context of personal jurisdiction, are likely to assume greater significance in many additional contexts, including in criminal prosecutions of corporations owned by foreign states.⁸

This is an important observation. Much of the attention paid to the transnational complications in personal jurisdiction has centered around the problem of non-resident alien defendants whose due process protections have been strengthened to the point that American litigants have trouble suing such defendants in a convenient forum state or in any American forum at all,⁹ a problem that I have called the “non-resident alien paradox.”¹⁰ Far less attention has been given to the equally paradoxical result that when the non-resident alien defendant is a foreign state, the due process protections for personal jurisdiction fall to zero.¹¹ In this brief Essay, I argue that both paradoxes share a conceptual origin: the problem of redundancy in constitutional personal jurisdiction doctrine. To do so, I highlight the parallel stories of personal jurisdiction and foreign sovereign immunity that Professor Wuerth weaves throughout her Article. Considering these two stories in the same space gives further evidence of the extent to which personal jurisdiction overlaps with other procedural doctrines. But it also shows how the peculiar

7. Professor Wuerth also addresses the associated notice doctrines. *Id.* at 668 (“Notice was often described as a fundamental aspect of ‘judicial’ power.”).

8. Wuerth, *supra* note 6, at 636.

9. See William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205 (2018).

10. Robin J. Effron, *Solving the Nonresident Alien Due Process Paradox in Personal Jurisdiction*, 116 MICH. L. REV. ONLINE 123 (2018).

11. See Wuerth, *supra* note 6, at 647 (criticizing recent doctrine as requiring “courts to draw a constitutional distinction between foreign corporations and foreign states”).

historical path of each doctrine can mask the extent of the shared space and thus delay a reckoning with the extent and consequences of the overlap.

One problem with personal jurisdiction redundancy is the extent to which courts have stubbornly refused to acknowledge much of the overlap or take seriously the implications of redundancy.¹² This lack of engagement is partly responsible for the double paradox of extraterritorial personal jurisdiction where private alien defendants seem to enjoy *greater* constitutional protections than domestic defendants, while their sovereign counterparts are granted the least of them all.¹³ My thesis here is not mutually exclusive with the many other theories and explanations of the scope and provenance of constitutional personal jurisdiction doctrine. But there is a particular doctrinal history to tell here. By the time that personal jurisdiction had come to occupy some serious shared space with several other procedural doctrines, the lack of engagement both furthered the detachment of the doctrines and solidified much of the redundancy.

At several junctures, scholars have wondered what constitutional personal jurisdiction doctrine can and should add to procedural doctrines that regulate access to courts and parties' amenability to suit in U.S. jurisdictions, and procedural doctrines that sort lawsuits into geographically suitable or appropriate locations. Professor Wuerth's Article invites us to refocus on the question of what doctrines can and should regulate the amenability of foreign sovereigns (as well as the agencies and instrumentalities of foreign sovereigns) to suit in American courts.

I. THE ORIGINS OF REDUNDANCY IN PERSONAL JURISDICTION

In the first century of the republic, personal jurisdiction was largely an affair of state law, with its origins in natural law, the "general law," and international law principles of comity.¹⁴ The federal constitutional dimensions of personal jurisdiction were limited to questions of full faith and credit and other structural federalism concerns.¹⁵ The affirmative requirements for personal jurisdiction came in the form of state statutory and common law rules for service of process—this was how personal jurisdiction

12. There are in fact ways in which personal jurisdiction redundancy may be problematic on its own terms, but I decline to take up that larger issue in this short Essay.

13. Cf. Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325, 372 (2018) ("[I]t makes little sense to draw dramatic distinctions between sovereigns and private parties when the entire structure of the FSIA is premised upon the principle that, when sovereigns act like private parties, they will be treated like private parties.").

14. See Wuerth, *supra* note 6, at 668; see also Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1252 (2017) (arguing against "the main holding of *Pennoyer*: that the Fourteenth Amendment's Due Process Clause . . . imposes rules for personal jurisdiction"); Effron, *supra* note 5, at 30 (2018) (observing that, prior to *Pennoyer*, courts approached personal jurisdiction primarily as a limit on a court's authority—one grounded "first and foremost in notions of territoriality").

15. See Effron, *supra* note 5, at 30; Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 850–84 (1989).

was “perfected” and it also served the purpose for fulfilling the natural and general law requirements of notice of the pendency of an action.¹⁶ The law of service of process served multiple purposes, but it would be a stretch to say that personal jurisdiction itself was redundant of other procedural doctrines, at least not in any significant way.

It was not until *Pennoyer v. Neff*¹⁷ that personal jurisdiction became a doctrine, national in scope, that was meant to “do” something, although the identity of that “thing” was unclear at the time of *Pennoyer* and remains the subject of intense debate through the modern era. In *Pennoyer*, the Supreme Court held that impermissible exercises of personal jurisdiction by state courts were in fact due process violations of the Fourteenth Amendment.¹⁸ Here was born the personal jurisdiction redundancy problem: if personal jurisdiction was, in fact, a feature of constitutional due process, what is the “process” in personal jurisdiction that is due to the defendant? By the end of nearly 150 years of personal jurisdiction jurisprudence, the Supreme Court was struggling to articulate what personal jurisdiction *itself* had to offer beyond the constitutional enforcement of the territorial limitations of the power of a forum state.¹⁹

Although the due process question is ostensibly connected to a standard of “reasonableness,”²⁰ the attempt to define what sort of exercise of personal jurisdiction is constitutionally unreasonable has not produced anything approaching a clear or workable standard. One reason for this is that courts and commentators have had some difficulty in answering the due process nexus question in a manner that is not duplicative of other procedural doctrines, both constitutional and rule-based. Once personal jurisdiction became “A Thing” under the Fourteenth Amendment, courts needed to know what it was “for” in order to locate or justify the due process violation.

Although one can identify *Pennoyer* as the conceptual origin of personal jurisdiction redundancy, this puzzle remained relatively submerged until the Supreme Court announced the minimum contacts test as the due process standard for personal jurisdiction in *International Shoe Co. v. Washington*.²¹ The *Pennoyer* rule required personal, in-hand service of process, mostly within the territory of the forum state.²² Efforts to push the boundaries of the

16. See Effron, *supra* note 5, at 30–31.

17. 95 U.S. 714 (1877).

18. *Id.* at 733.

19. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017).

20. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477–78 (1985); see also Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 510–18 (examining and questioning the link between due process and several putative interests addressed by personal jurisdiction doctrine).

21. 326 U.S. 310 (1945).

22. See RHONDA WASSERMAN, *PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 207–61 (2004) (history and status of due process doctrine for personal jurisdiction).

Pennoyer rule with substituted service or service outside the territory of the forum state centered around cases that seemed to fit within *Pennoyer*'s exceptions, such as in rem proceedings,²³ or efforts to expand the jurisdictional reach of states with aggressive uses of explicit and implied consent to suit in the forum state.²⁴ But, for the most part, the pre-*International Shoe* cases maintained the *Pennoyer* framework, which was largely consistent with the older general law and comity framework with the additional veneer of due process as the doctrinal hook for the idea of a constitutionally based outer limit on the exercise of jurisdiction.

The *International Shoe* minimum contacts standard opened up a world of long-arm jurisdiction possibilities. The minimum contacts test itself was borne of frustration with trying to discern the territorial “presence” of an ever-increasing number of non-natural defendants (mainly corporations), transacting business and engaging in other actions within and across any number of jurisdictions beyond their state of organization or primary business operations. The minimum contacts test freed courts from the rigid and often artificial territoriality of *Pennoyer*. But it generated a new set of questions about the constitutional grounding of personal jurisdiction.

In the seven decades since the Court announced the minimum contacts test, various theories of personal jurisdiction and its relationship to minimum contacts and due process have gone in and out of vogue.²⁵ Among the many criticisms of the Court's personal jurisdiction jurisprudence are the claims that personal jurisdiction in general and the minimum contacts test in particular are duplicative of other procedural doctrines or procedural tools—procedural devices that are, perhaps, better suited to addressing the various concerns that courts and commentators have voiced. The rules of venue and doctrine of forum non conveniens are tools to sort cases into geographically sensical forums.²⁶ The rules of service of process and constitutional dimensions of notice address the concerns of how and when to reach the defendant and inform it of the pendency of a lawsuit.²⁷ Underlying substantive law can or should be constructed and interpreted so as not to

23. See Effron, *supra* note 5, at 36–47 (analyzing the following exceptions to the rigid *Pennoyer* regime: in rem cases, cases involving marital status, cases involving service of process on state officials in their capacity as agents for corporations, cases involving consent to a forum state's jurisdiction, and in personam out-of-state service, i.e. when a resident of a state is served with process to appear in their home state while they are *currently out of state*).

24. *Hess v. Pawloski*, 274 U.S. 352, 356–57 (1927).

25. See Effron, *supra* note 5, at 35 n.36 (collecting scholarly articles on the history and theories of personal jurisdiction).

26. See Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman?: Forum Shopping and Outcome Determination under International Shoe*, 28 U.C. DAVIS L. REV. 769, 841 (1995) (“Rather than having venue become increasingly reliant on jurisdiction doctrine, a more sensible approach might be for the jurisdictional rules to mirror the federal venue statute, or the state law equivalents.”); 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, 855 (2012).

27. See Effron, *supra* note 5, at 31, 38.

surprise a defendant that it is subject to suit in a forum state.²⁸ Or, substantive contract law is an able vehicle for determining the effect of a forum selection clause.²⁹

This redundancy has further complicated the project of discerning the purposes and scope of constitutional personal jurisdiction, but it has also muddied the waters of some of the other doctrines mentioned above. Perhaps, for example, it is forum non conveniens that is in need of rethinking, and not (only) personal jurisdiction.³⁰ The overall effect, though, is worth noting. The redundancy of constitutional personal jurisdiction doctrine creates somewhat of a ping pong effect in which critics of one doctrine can point to the existence of the other in order to promote the demise of the disfavored doctrine. For example, it is reasonable to critique either forum non conveniens doctrine or personal jurisdiction doctrine for failing to properly or consistently allocate cases fairly or efficiently to different geographical forums. But shoring up those arguments by pointing to the other doctrine as “backup” has had the odd effect of bolstering the existence of both.

II. THE RELATIONSHIP BETWEEN THE DEVELOPMENT OF PERSONAL JURISDICTION AND FOREIGN SOVEREIGN IMMUNITY DOCTRINES

This brings us to an important thread woven throughout Professor Wuerth’s Article, a story that deserves special attention. Running alongside Professor Wuerth’s elegant description of and argument about the constitutional status of foreign sovereigns as viewed through the lens of personal jurisdiction and due process, is the story of foreign sovereign immunity. As other scholars have already noted, the current law governing foreign sovereign immunity, the Foreign Sovereign Immunities Act of 1976 (FSIA), “muddles the traditional ways one thinks about subject matter jurisdiction, personal jurisdiction, and immunity.”³¹

28. Cf. Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101, 153 (2010) (criticizing the personal jurisdiction “notice of suit” theory as circular because of its dependence on the existence of jurisdiction in the first place and its relationship to the underlying substantive law).

29. The Supreme Court has increasingly favored a federal, procedural approach to the enforceability of forum selection clauses rather than a searching look at whether underlying state contract law would permit such enforcement. See generally Adam N. Steinman, *Atlantic Marine Through the Lens of Erie*, 66 HASTINGS L.J. 795 (2015) (arguing that, despite Supreme Court support for the enforcement of forum selection clauses, federal courts should defer to state law on this issue).

30. See Gardner, *supra* note 4, at 429 (suggesting that forum non conveniens is redundant with several existing doctrines including personal jurisdiction).

31. Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 N.Y.U. L. REV. 344, 369 (2016); see also Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 120–22 (1983) (discussing the relationship between subject matter jurisdiction, personal jurisdiction, and foreign sovereign immunity).

The question of whether and when foreign states (and their associated subdivisions or instrumentalities) are immune from suit in American courts has a history as long as that of personal jurisdiction. But because of the early structure and scope of each doctrine, the potential for overlap simply did not manifest itself until the modern era. I will return to the implications of this redundancy in Part III. What follows here is a brief outline of how foreign sovereign immunity has interacted and then overlapped with issues of jurisdiction.³²

Sovereign immunity is actually a collection of doctrines that govern when a litigant can bring an action against a government, or a governmental agency or instrumentality.³³ In the United States, the sovereign immunity of domestic sovereigns is governed by the U.S. Constitution and assorted statutes that waive immunity.³⁴ The immunity of *foreign* sovereigns from suit is not governed by the Constitution.³⁵ This absence, however, does not imply that foreign sovereign immunity is a new or exceptional doctrine. At the time of the founding, the litigation immunity of foreign sovereigns was well-recognized. Courts operated under the presumption that sovereign immunity applied unless the lawsuit fell into one of the established exceptions, such as consent.³⁶

During the time period that roughly corresponds to the pre-*Pennoyer* era through *International Shoe*, the sovereign immunity of foreign states meant “absolute immunity.” Under absolute immunity, foreign governments that the U.S. deemed “friendly sovereigns” were granted the same absolute immunity as domestic sovereigns, and the executive branch, through the State Department, requested immunity in all actions against friendly sovereigns.³⁷ Like the early personal jurisdiction doctrines, absolute immunity was grounded, in part, in international law principles of comity. Absolute immunity, which was fairly categorical and largely controlled by the executive branch, kept excessive litigation over the scope of foreign sovereign immunity at a relatively low level. Recall that the pre-*Pennoyer*

32. Much of this history is covered throughout Professor Wuerth’s Article. My goal here is to draw out this story for special consideration on its own terms.

33. Foreign sovereign immunity actually concerns *both* when foreign states are subject to suit and when actions to enforce judgments can be brought against them. For purposes of this Essay, I refer generally to immunity from suit.

34. U.S. CONST. amend. XI. *See, e.g.*, N.Y. CT. CL. ACT §§ 8–12 (McKinney 2019) (waiving immunity and consenting to be sued pursuant to the requirements of the N.Y. Court of Claims Act); FLA. STAT. ANN. § 768.28(1) (West 2017) (waiving immunity for government entities in certain situations).

35. Sovereign immunity is currently governed by the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602–1611 (2012)).

36. *See The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 125 (1812) (noting that in areas where “sovereignty is concerned,” there is no implied assent to a foreign court’s jurisdiction).

37. 15A Martin A. Redish, *Moore’s Federal Practice* § 104.02 (2019); *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004) (noting that, until 1952, the Executive Branch followed a policy of requesting immunity in all actions against foreign sovereigns).

and *Pennoyer* regimes of personal jurisdiction had a similar effect—litigation about the scope of constitutional personal jurisdiction coalesced around the *Pennoyer* exceptions.

Thus, these two forces converged to minimize litigation of the larger questions concerning the scope of foreign sovereign immunity. Territorially centered bases of personal jurisdiction (both pre- and post-*Pennoyer*), would have seriously limited the number of cases that plaintiffs on American soil attempted to bring against foreign sovereigns and governments. Combined with the doctrine of absolute immunity, this legal landscape meant that courts did not confront these questions with the regularity that we have come to experience in the modern era.

Just as personal jurisdiction changed significantly in the mid-twentieth century, so did foreign sovereign immunity. The legal, economic, and social conditions that led to these changes have been well-documented. In short, by the end of World War II, the United States was a modern, interconnected economy in which parties conducted more and more business and other activities at a distance and across state and international borders. A strict territorial jurisdictional regime proved frustrating, resulting in the twin due process revolutions of *International Shoe*, which established minimum contacts as the constitutional test for in personam jurisdiction, and *Mullane v. Central Hanover Bank & Trust Co.*,³⁸ which governed the due process standard for notice. These cases significantly broadened a forum state's ability to assert personal jurisdiction over absent defendants, particularly with regard to non-natural persons whose physical "presence" within a forum was difficult to articulate.

Foreign sovereign immunity doctrine was also in need of reform because the theory of absolute immunity was becoming difficult to reconcile with the myriad ways in which foreign states and state-owned enterprises engaged in widespread commercial activity. In 1952, the State Department issued the "Tate Letter," in which it informed the Attorney General that the State Department, in deciding whether to advise in favor of or against a grant of sovereign immunity, would abandon the absolute theory of sovereign immunity in favor of the "restrictive theory of sovereign immunity," under which "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."³⁹ This shift aligned the United States with several other nations that had already adopted the restrictive theory. As the Second Circuit succinctly asserted:

[t]he purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the

38. 339 U.S. 306.

39. Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Attorney Gen. (May 19, 1952), in 26 DEPT. OF STATE BULL. 984–85 (1952).

interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts.⁴⁰

These mid-century changes, then, are of a piece, characterized by a recognition that the older, more rigid rules did not accord with modern economic reality. This new era of procedural due process and of restrictive sovereign immunity brought neither closure nor clarity to these doctrines. Within just a few years of *International Shoe*, the Supreme Court began its decades-long odyssey to define the scope and theoretical basis for the minimum contacts test and its relationship to due process.⁴¹ Restrictive sovereign immunity, for its part, was similarly volatile. The State Department purported to make its decisions of immunity recommendations based on the substantive criteria of restrictive immunity. In reality, however, many decisions continued to be politically motivated.⁴² Although the purpose of the new approach was to accommodate the changing economic

40. *Victory Transp. Inc. v. Comisaria Gen.*, 336 F.2d 354, 360 (2d Cir. 1964).

41. *See generally* *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) (holding that a defendant must have sufficient contact with the forum state in connection with the claim at bar for jurisdiction); *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (holding that a subsidiary's minimum contacts with a forum cannot be imputed to the parent company to obtain jurisdiction); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (holding that the defendant must intend, through its actions, to submit to the power of the sovereign for jurisdiction to be proper); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (holding that a parent company's minimum contacts with a forum state cannot be imputed to a subsidiary for purposes of obtaining jurisdiction and that, for a court to have general jurisdiction over a company, it must be "essentially at home in the forum State."); *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987) (holding that placing an item into the "stream of commerce" alone is insufficient to confer jurisdiction); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (holding that a contract alone was insufficient to confer jurisdiction, one must look at the circumstances holistically and determine the defendant purposefully targeted the forum); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (holding that, because the plaintiff was injured every time a magazine was sold, jurisdiction was proper in all forums where the magazine was available); *Calder v. Jones*, 465 U.S. 783 (1984) (holding that intent to cause harm in the forum state is sufficient to grant jurisdiction); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (holding that foreseeability of litigation in a forum state is insufficient without other contacts and introducing "fairness factors" for help in determining whether jurisdiction would be proper); *Shaffer v. Heitner*, 433 U.S. 186 (1977) (holding that the minimum contacts test also applies to in rem actions); *Hanson v. Denckla*, 357 U.S. 235 (1958) (holding that a plaintiff's unilateral action is insufficient to confer jurisdiction over a defendant); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957) (holding that one contact can be sufficient for personal jurisdiction depending on the circumstances).

42. *Verlinden B.V. v. Cent. Bank of Nigeria* 461 U.S. 480, 487 (1983) (the application of the restrictive theory "proved troublesome"); *see also* Clinton L. Narver, *Putting the "Sovereign" Back in the Foreign Sovereign Immunities Act: The Case for a Time of Filing Test for Agency or Instrumentality Status*, 19 B.U. INT'L L.J. 163, 169 (2001) (over time, "the State Department's policy of making formal suggestions of immunity transformed the foreign sovereign immunity determination from a predominantly 'legal' determination into a predominantly 'political' determination wherein the Executive determined the rights of plaintiffs and foreign states alike on a case-by-case basis").

and legal realities of the twentieth century, restrictive immunity proved unwieldy.⁴³

The difficulties in administering and adjudicating restrictive immunity culminated in the FSIA. Like the history of personal jurisdiction, the FSIA has been the subject of exhaustive scholarly consideration.⁴⁴ In brief, the aim of the FSIA was to shift the process of determining foreign sovereign immunity to the federal courts,⁴⁵ thus depoliticizing such decision-making,⁴⁶ but codifying “for the most part . . . the restrictive theory of sovereign immunity.”⁴⁷ The FSIA codified the main exceptions to foreign sovereign immunity: express and implied waiver,⁴⁸ substantial commercial activity that is either conducted in or causes a direct effect in the United States,⁴⁹ and an assortment of other exceptions including noncommercial torts, unlawful expropriation, and arbitration agreements.⁵⁰

Since its passage in 1976, the FSIA has been amended and interpreted in a way that, in effect, narrows immunity and broadens the scope of claims for which foreign states (and their agencies and instrumentalities) are subject to suit.⁵¹ This narrowing of foreign sovereign immunity coincides with the late-twentieth-century era of personal jurisdiction in which the Supreme Court has, for the most part, developed an increasingly narrow approach to the scope of minimum contacts. This leads to the potentially troubling result that Professor Wuerth identifies in her Article: at the time when foreign states are the least protected by foreign sovereign immunity, they are left in a personal jurisdiction lurch because of the series of cases in which the Supreme Court and lower courts have held that foreign states are not persons within the meaning of the due process clauses for purposes of personal jurisdiction.⁵² This is not to suggest that the default norm should be that of protecting foreign sovereigns from suit. It does, however, raise troubling

43. See Andreas F. Lowenfeld, *Claims Against Foreign States—a Proposal for Reform of United States Law*, 44 N.Y.U. L. Rev. 901, 909–12 (1969).

44. See generally Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT'L L. 369 (2001); William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257 (1997); Karen Halverson, *Is a Foreign State a “Person”?* *Does it Matter?: Personal Jurisdiction, Due Process, and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 115, 119–29 (2001); Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978).

45. The FSIA also has a subject matter jurisdiction component, codified at 28 U.S.C. § 1330.

46. See *Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981) (“The principal purpose of the FSIA was to codify contemporary concepts concerning the scope of sovereign immunity and withdraw from the President the authority to make binding determinations of the sovereign immunity to be accorded foreign states.”).

47. *Verlinden*, 461 U.S. at 488.

48. 28 U.S.C. § 1605(a)(1) (2019).

49. *Id.* § 1605(a)(2).

50. *Id.* § 1605(a)(5), (6).

51. Wuerth, *supra* note 6, at 640.

52. Wuerth, *supra* note 6, at 648–49.

questions when foreign states, as a category, seem excluded from the baseline protections enjoyed by domestic and non-state foreign defendants alike.

III. FOREIGN SOVEREIGN IMMUNITY IN THE LARGER CONTEXT OF PERSONAL JURISDICTION REDUNDANCY

Professor Wuerth identifies the primary contemporary reason for the exclusion of foreign states from the due process protections of personal jurisdiction, namely, that courts have refused to define foreign states as persons within the meaning of the Fifth and Fourteenth Amendments to the U.S. Constitution. The FSIA itself has a complicated relationship to both personal jurisdiction and subject matter jurisdiction.⁵³ Although it governs when a foreign state is amenable to suit, personal jurisdiction must be established separately. The FSIA cannot create personal jurisdiction where it does not exist constitutionally. Her historical and doctrinal arguments that this conclusion is erroneous are thorough and provocative, particularly her argument that the structure and early understanding of the scope of judicial power under Article III of the Constitution extends to in personam jurisdictional power over foreign sovereigns. In this Essay, however, I want to highlight the role that personal jurisdiction redundancy plays in this story.

The ways in which personal jurisdiction and foreign sovereign immunity are redundant of one another should, by now, be obvious. Each doctrine implicates, at some level, due process (or the lack thereof) and separation of powers.⁵⁴ Each doctrine addresses, at least in part, restrictions on the amenability of a party to the jurisdiction of a territorial sovereign. Each doctrine has a historical tradition of allowing the party to consent. And, in each doctrine, courts and legislators have struggled to accommodate the competing considerations of modern commercial realities with limits of state territorial power. In fact, as one commentator has noted, the FSIA “nexus requirement usually ensures that assertions of personal jurisdiction under the FSIA satisfy due process requirements.”⁵⁵

But, over the past four decades, consideration of each doctrine has been relatively siloed. The legislative and judicial expansion of the FSIA exceptions unfolded, for the most part, without explicit regard to the “foreign state” gap in personal jurisdiction into which many of these defendants would fall. Similarly, one would expect the judicial personal jurisdiction discourse, which has become so solicitous of the supposed horrors of territorial

53. See 15A Martin H. Redish, *Moore’s Federal Practice* § 104.06 (2019) (“The FSIA conflates the usually distinct questions of sovereign immunity, subject matter jurisdiction, and personal jurisdiction . . .”).

54. Wuerth, *supra* note 6, at 680 (discussing “[t]he redundancy between separation of powers and due process” in the constitutional protection of foreign states).

55. Victoria A. Carter, *God Save the King: Unconstitutional Assertions of Personal Jurisdiction Over Foreign States in U.S. Courts*, 82 VA. L. REV. 357, 363 (1996).

overreach, to be especially sensitive to the interests of foreign nations.⁵⁶ But, as we have seen, the opposite has been true.

I believe that this is due to implicit assumptions that arise from personal jurisdiction redundancy. There might be an unexamined or unstated belief that the question of the amenability of foreign states (as well as their agencies and instrumentalities) is not “really” a personal jurisdiction question at all, but solely a question of foreign sovereign immunity. This intuition is what gets clumsily translated into the argument that foreign states are not persons within the meaning of due process. And, of course, my argument here flies in the face of the several cases which hold that personal jurisdiction over foreign state defendants is a separate question to be answered after the determination that the defendant is not immune from suit under the FSIA. In other words, how could courts and commentators have an intuition that foreign sovereign immunity is the “real” limit on the amenability of foreign states to be sued in federal court when they simultaneously make explicit demands that the requirements of constitutional personal jurisdiction must also be fulfilled?

There is not a satisfactory doctrinal or theoretical answer to this question (at least as of now) because the conundrum is born of a lack of clarity in the relationship between personal jurisdiction and any number of other doctrines including foreign sovereign immunity. The current gap that Professor Wuerth addresses in her Article is yet another example of the “ping pong” effect that I described earlier in which efforts to dilute, circumscribe, or eradicate one procedural doctrine are justified, at least in part, by reference to a different doctrine that should “really” be doing the work of the first. It is easy to cut foreign states out of personal jurisdiction with the vague notion that foreign sovereign immunity places appropriate limits on the amenability of foreign states to suit. And it is similarly easy to broaden the exceptions to the FSIA when there is solid precedent reminding courts and commentators that constitutional personal jurisdiction is a separate requirement.

Aside from serving as an example of some of the problems that arise from redundancy in personal jurisdiction doctrine, there are a few other lessons about personal jurisdiction and foreign sovereign immunity that can be drawn from highlighting the parallel histories. First, both stories originate as old and accepted doctrines that predate the Constitution and have a common ancestor in international law principles of comity. But despite their ancient provenance, both doctrines have developed as reactions to actual and perceived changes in economic and political realities. In both doctrines, courts have struggled to articulate generally applicable principles that allow for the necessary exercise of jurisdictional authority over commercial and

56. *Cf.* Simowitz, *supra* note 13, at 362 (arguing that Congress should have the “power to interpret Due Process jurisdiction as it pertains to foreign persons” and that it “should be even greater . . . where foreign sovereigns and their instrumentalities are concerned”).

other activities that have some connection to the forum state⁵⁷ without rendering the idea of territorial jurisdiction itself obsolete. The parallel histories show the importance of relative baselines. By the 1980s, many jurists viewed the limits on constitutional personal jurisdiction as too lax and laid the doctrinal foundations for the restrictive doctrines that have emerged in the post-2011 cases. But during the same time period, lawmakers and judges viewed the FSIA as too restrictive, and sought to relax the restrictions on suing foreign states and, especially, their agencies and instrumentalities. The background condition of personal jurisdiction redundancy allowed both of these doctrinal paths to continue without a real dialogue about their mutual effects.

Second, this juxtaposition is further evidence of the poor fit between personal jurisdiction and due process. If, as Professor Wuerth suggests, Congress should take a greater role in defining the due process content of the constitutional rights of foreign states,⁵⁸ then it seems like foreign sovereign immunity, as codified in the FSIA, would be a natural place to start. It is, in fact, a comprehensive statute in which Congress has specified when foreign states should or should not be amenable to suit in the United States. A call to merge foreign sovereign immunity with constitutional personal jurisdiction is consistent with recent scholarship suggesting that the United States (rather than the individual states) is the relevant sovereign for cases brought in federal courts and that the Fifth Amendment is the relevant due process clause.⁵⁹ As Professor Simowitz has observed, there is a relationship between the stubborn commitment to trans-substantivity in civil procedure and weak congressional involvement in regulating the scope of personal jurisdiction at the federal level, but he also suggests that “Congress has both the accountability and the expertise to craft substance specific rules,”⁶⁰ and this would include rules for suing foreign sovereigns.

Foreign sovereign immunity and the FSIA are emphatically *not* constitutional doctrines.⁶¹ If anything, courts typically mention due process in the FSIA context only to point out that it is a requirement that must be

57. Even if that connection is mostly the result of the plaintiff’s residence, see *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) (finding that New Jersey state court lacked personal jurisdiction over claim brought by New Jersey resident for a workplace injury that took place in New Jersey), or unilateral conduct, see *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (“[t]he unilateral activity of those who claim some relationship with a nonresident defendant”); *Walden v. Fiore*, 571 U.S. 277 (2014) (affirming and broadening *Hanson*’s unilateral activity standard).

58. Wuerth, *supra* note 6, at 685; see also Simowitz, *supra* note 13, at 370.

59. See Jonathan Remy Nash, *National Personal Jurisdiction*, 68 EMORY L.J. 509, 522–23 (2019) (developing a theory of Fifth Amendment due process protections for personal jurisdiction).

60. Simowitz, *supra* note 13, at 380.

61. Cf. Lori Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 522–23 (1987) (arguing that “foreign states are outsiders to the constitutional compact” and that “their relationship to the United States polity is quite different from that of aliens” who “can be compelled to comply with United States law”).

separately satisfied⁶² and that the current weight of Supreme Court authority demands the conclusion that foreign states are not protected by due process.⁶³ One possible answer is to stress, as do Professor Wuerth and others, that Congress has the power to regulate personal jurisdiction both as a statutory matter and as a matter of defining the due process scope of the doctrine.

Another possible answer to this conundrum is to suggest that courts have been misguided in their assertions or assumptions that foreign sovereign immunity, if properly codified or applied, is *itself* not a satisfaction of due process. While it is already true that “the FSIA . . . does not relieve courts of the obligation of protecting the due process rights of foreign state defendants,”⁶⁴ the decisions that Congress makes about the amenability of foreign states to suit could be viewed as a single answer to multiple questions, namely, (1) how has Congress chosen to codify foreign sovereign immunity?; (2) how has Congress chosen to affirmatively extend the personal jurisdiction authority of the United States as sovereign to foreign states?; and (3) how has Congress chosen to interpret the due process limits of personal jurisdiction over foreign states? To the extent that a unitary law addressing the amenability of foreign states to suit addresses all three questions, then due process is coextensive with foreign sovereign immunity, and it may even be possibly to *imply* this unification in a statute like the FSIA without Congress making the explicit connection.⁶⁵

Professor Wuerth does not explicitly argue that congressionally codified foreign sovereign immunity is or could be coextensive with due process. However, her analysis does point in this direction. While I find this an intriguing possibility, I would retreat to the safer territory of asserting that this problem simply adds to the numerous arguments for why personal jurisdiction should probably be decoupled from due process.

CONCLUSION

Personal jurisdiction redundancy is the result of the significant doctrinal overlap that I have documented in this brief Essay. Underlying this overlap are serious disagreements about the theories behind personal jurisdiction: sovereignty, liberty, territorial control, convenience, and fairness and reasonableness to the defendant, plaintiff, or both—not to say anything of the role that due process plays and the question of what due process even means. The Supreme Court does not appear poised to resolve these debates any time

62. See, e.g., *Tex. Trading & Mill. Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981) (*overruled by* *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Rep.*, 582 F.3d 393 (2d Cir. 2009)).

63. See *Frontera Res.*, 582 F.3d at 395 (“the Due Process Clause’s protections should not apply to foreign states or their instrumentalities.”).

64. Carter, *supra* note 55, at 360.

65. However, the FSIA as currently drafted probably defies such implications. Although it does muddle jurisdiction and sovereign immunity, those doctrines are still distinct within the statute.

soon. It might be possible, in the meantime, to patch a few holes where we can, and the gap between non-resident alien defendants, domestic defendants, and foreign state defendants might be one such place. Taking advantage of personal jurisdiction redundancy with foreign sovereign immunity might be a partial (or temporary) solution, in which a more robust understanding of what doctrines count as due process (perhaps a statute like the FSIA) and who is entitled to make such a constitutional interpretation (Congress) would fill the void of constitutional protection.