JURISDICTION AS DIALOGUE

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Courts treat assertions of jurisdiction that carry into effect very different policies and powers alike. The attempt to exert power over the terrorist is treated the same as power over the non-resident motorist. However, all assertions of jurisdiction are not treated alike. Rather, they are treated very differently depending on how a legislature labels their doctrinal category. Courts will rigorously scrutinize assertions of in personam jurisdiction for compliance with the Constitution. If a legislature characterizes an assertion of jurisdiction as in rem, however, courts will give it a constitutional pass. For generations, the same was true of jurisdiction by consent. In the landmark decision Shaffer v. Heitner, *the U.S. Supreme Court shifted the category of quasi-in-rem jurisdiction from the no-scrutiny box to the full-scrutiny box.*

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This peculiar way of calibrating constitutional scrutiny leads to creative drafting by legislatures, particularly in the wake of the U.S. Supreme Court's constriction of personal jurisdiction in Daimler v. Bauman*,* Walden v. Fiore*, and other cases limiting in personam jurisdiction. In 2018, the President signed into law the Anti-Terrorism Clarification Act, which purports to restore jurisdiction to hear claims under the Anti-Terrorism Act, but under the heading of consent, rather than personal, jurisdiction.*

This repackaging of jurisdictional power is not costless, but neither is it entirely wasteful. In fact, it illustrates that the jurisdictional power of U.S. courts is built on inter-branch dialogue. This dialogue is couched in formalist distinctions between doctrinal categories of jurisdiction, and these formalisms can push the judicial analysis further from underlying values that should inform the debate. Nevertheless, this jurisdictional dialogue has value. This dialogue leads elected officials to tailor assertions of jurisdiction, to communicate necessary information to courts, and to assist courts in distinguishing among the legislature's constitutional powers.

I. INTRODUCTION

A state that attempts to assert jurisdiction over an out-of-state vacationer in a civil dispute faces the same hurdles as a state seeking to adjudicate claims of torture and terrorism against a foreign war criminal temporarily in the forum. The United States faces the same barriers when it attempts to assert jurisdiction to comply with a valid international treaty as it would if that treaty did not exist. The same protections bar opening up the courthouse purely for the benefit of domestic plaintiffs as they would bar opening up the courthouse for the benefit of all plaintiffs.

U.S. courts do not focus on the powers and policies behind these assertions of jurisdiction. Rather, they determine their level of constitutional scrutiny based on formal doctrinal categories. Four decades ago, the U.S. Supreme Court did away with the formal doctrinal distinction between quasi-in-rem jurisdiction and personal jurisdiction in *Shaffer v. Heitner*.[1] And yet, other doctrinal distinctions still dominate the consti-

1. Shaffer v. Heitner, 433 U.S. 186, 212 (1977) ("The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to

tutional analysis of jurisdiction. An assertion of *in personam* jurisdiction receives the full scrutiny of the Fifth or Fourteenth Amendment to the Constitution. Until recently, an assertion of consent jurisdiction received little such scrutiny. And an assertion of in rem jurisdiction receives practically none. These formal categories are not without relevance, but their borders are porous.

This article makes three novel contributions. First, it examines statutory assertions of jurisdiction that fall into each of the major doctrinal categories, and shows that measuring the level of constitutional scrutiny based on these formal categories makes little sense as these categories do not map cleanly onto either the amount or the type of power exercised by the state. Second, this article shows how legislatures use these formal distinctions to scramble jurisdictional categories and to reassert the powers that courts reign in by re-characterizing them into a different doctrinal box. Third, this article critically examines this phenomenon of jurisdictional dialogue—the packaging and repackaging of jurisdictional powers in response to constitutional interventions by courts.

Jurisdictional power as inter-branch dialogue is becoming more important now because the United States is entering an era of jurisdictional experimentation. The U.S. Supreme Court itself sparked this experimental phase with its decision in *Daimler v. Bauman*.[2] The *Daimler* decision swept away the old standard for general, all-purpose jurisdiction. For about sixty years, U.S. courts had been able to adjudicate all claims against any defendant with "continuous and systematic" contacts with the forum.[3] In practice, this standard was easily met—for example, by a corporate multinational that maintained a small, leased sales office in the forum with a handful of temporary employees. In the commercial context, this was referred to as "doing business" jurisdiction.[4] In *Daimler*, the Court eliminated *doing business* jurisdiction, holding that courts could only exert

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allow state-court jurisdiction that is fundamentally unfair to the defendant.").

2. Daimler AG v. Bauman, 571 U.S. 117, 120 (2014) ("This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.").

3. *Id.* at 126.

4. *Id.* at 138 n.18.

general jurisdiction over defendants who were "essentially at home" in the forum; for corporations, this meant their principal place of business or the state of their organization.[5]

The U.S. Congress, however, had been legislating against the backdrop of broad general jurisdiction for generations. Whole regulatory regimes had grown up around the trunk of *doing business* jurisdiction. This was particularly true in the transnational sphere. The sudden expiration of broad general jurisdiction warped or nullified these regulatory systems. In previous work, I identified and explored this tension, illustrating how *Daimler* had undermined the regulatory systems governing recognition and enforcement of arbitral awards, the market entry of generic pharmaceuticals, and civil remedies against international terrorism.[6] I predicted that Congress would strike back soon, asserting (or re-asserting) jurisdiction in new and creative ways, likely beginning with the deterrence of terrorism.[7]

That happened quickly. Several civil suits under the Anti-Terrorism Act (ATA)[8] were pending against the Palestinian Liberation Organization (PLO) and Palestinian Authority (PA) when *Daimler* was decided. Jurisdiction over the PLO and PA had been sustained under the pre-*Daimler* standard of *doing business* jurisdiction. All of these suits were dismissed for lack of personal jurisdiction after *Daimler*.[9] On October 3, 2018, the

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5. *Id.* at 138–39 ("Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State.") (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

6. *See* Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325, 327–28 (2018) ("The Court has made the United States one of the most jurisdictionally stingy countries in the world. This leaves Congressional statutes vulnerable to evisceration by restrictive Court-crafted jurisdictional rules.").

7. *Id.* at 379.

8. 18 U.S.C. § 2333(a) (2012) ("Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.").

9. *See, e.g.*, Waldman v. Palestine Liberation Org., 835 F.3d 317, 333 (2d Cir. 2016) ("These contacts with the United States do not render the PA and

President signed into law the Anti-Terrorism Clarification Act (ATCA).[10]

But Congress did not—and under the conventional understanding, could not—simply reauthorize jurisdiction. Instead, Congress used the vehicle of consent jurisdiction to reassert the very same jurisdictional power that U.S. courts had formerly asserted under the heading of personal jurisdiction. This is the plainest example yet of the scrambling of jurisdictional categories, though not the only one. The narrowing of specific jurisdiction in *Asahi Metal v. Superior Court of California*[11] prompted Congress to draft the Foreign Manufacturers Legal Accountability Act (FMLAA), which would institute consent jurisdiction over foreign manufacturers (if it enters into law).[12] After *Daimler*, the New York legislature entertained and ultimately rejected a bill to make explicit that the New York corporate registration statute imposed general jurisdiction of foreign corporations doing business in New York.[13]

The substitution of consent for personal jurisdiction represents a specific attempt to take advantage of the Court's formal, categorical approach to jurisdiction in the wake of constitutional narrowing of personal jurisdiction. It is not the only example. Congress has also used in rem jurisdiction to achieve what it could not under the heading of personal jurisdiction. In the late 1990s, Congress became concerned about cybersquatting—the act of registering, trafficking in, or using a domain name that is "confusingly similar" to a domain name with

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the PLO 'essentially at home' in the United States.") (citing *Daimler*, 571 U.S. at 127).

10. Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-253, 132 Stat. 3183. Section 4 of the ATCA added subsection (e) to 18 U.S.C. § 2334, which "specifies activities by which certain parties shall be deemed to have consented to personal jurisdiction." Waldman v. Palestine Liberation Org., 925 F.3d 570, 573 (2d Cir. 2019) (citing Anti-Terrorism Clarification Act § 4 (to be codified at 18 U.S.C. § 2334)).

11. Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102 (1987).

12. Foreign Manufacturers Legal Accountability Act of 2011, S. 1946, 112th Cong. § 2 (2011).

13. *See* N.Y.C. BAR, REPORT ON LEGISLATION 1 (2016), http://www2.nycbar.org/pdf/report/uploads/20072900-OppositiontoBilltoConsenttoJurisdictionbyForeignBusinessOrganizationsAuthorizedtodoBusinessinNewYork.pdf (expressing Constitutional concerns over the proposed bill).

"bad faith intent to profit" from the confusion.[14] The Anticybersquatting Consumer Protection Act (ACPA) was designed to combat this problem by, in part, opening up multiple possible forums in which prospective plaintiffs could pursue return or inactivation of the bad faith domains.[15] The ACPA could not do this simply by authorizing personal jurisdiction, say, at the home of the plaintiff or anywhere the bad faith domain was viewed. Instead, the ACPA deemed in rem jurisdiction to exist over the bad faith domain in multiple places, such as the place of the registry or of the registrar.[16] Even outside the cybersquatting context, courts interpreted the ACPA as a strong indication that rights in a domain name could be decided at the locations specified in the statute.[17]

Of course, the "location" of a domain name is a pure legal fiction.[18] The ACPA is another example of Congress flexing its legislative muscle to assert jurisdiction for specific policy reasons. In the ACPA, Congress achieved a particular policy goal—civil relief available in multiple forums for a subclass of aggrieved trademark holders—through the vehicle of asset jurisdiction because it could not act under the heading of personal jurisdiction. The success of the ACPA, along with the rising importance of intangible assets in the Internet economy, opens up a clear model for aggressive assertions of jurisdiction, freed of the burdens of constitutional scrutiny that attend assertions of personal jurisdiction.

The deliberate scrambling of doctrinal categories is not new, though its pace is likely to increase. Courts also have a history of responding to this blurring of formal jurisdictional categories. The most famous example is the U.S. Supreme

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14. Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) (2012).

15. *Id.*

16. *Id.*

17. *E.g.*, Office Depot, Inc. v. Zuccarini, 596 F.3d 696, 702 (9th Cir. 2010) ("Although the current proceeding is not an action under the ACPA, the statute is authority for the proposition that domain names are personal property located wherever the registry or the registrar are located.").

18. *See* Aaron D. Simowitz, *Siting Intangibles*, 48 N.Y.U. J. INT'L L. & POL. 259, 259 (2015) ("Debts, shares of stock, intellectual property, wire transfers, LLC interests, and all other intangible assets have no physical location. The current law of jurisdiction imposes the legal fiction that intangible assets have a particular location or 'situs.'").

Court's landmark decision in *Shaffer v. Heitner*.[19] In *Shaffer*, the Court did away with so-called quasi-in-rem jurisdiction, subtype two—power to hear all claims against a party based on the presence of the party's unrelated property in the forum, up to the value of the property.[20] The assertion of jurisdictional power in *Shaffer* is worth noting: Delaware attempted to bring an enormous swath of disputes into its courts through its "sequestration" statute, which stated that all shares of all Delaware corporations (of which there were, and are, many) would be deemed located in Delaware.[21] The Court held that, to the extent that the sequestration statute supported quasi-in-rem jurisdiction, it was unconstitutional.[22] In essence, Delaware had attempted to assert asset jurisdiction to do what it could not through personal jurisdiction, and was rebuked by the Supreme Court. However, Delaware reasserted the power under the heading of consent.[23] Courts acquiesced.[24]

In the post-*Daimler* era, courts have begun to push back on attempts to use consent jurisdiction to reassert the jurisdictional reach denied by *Daimler*, invoking the principles of *Shaffer*. In the only federal appellate case on point thus far, the U.S. Court of Appeals for the Second Circuit narrowly construed the Connecticut corporate registration statute not to assert general jurisdiction over foreign corporations registered in the state.[25] The court was merely engaging in constitutional avoidance. State legislatures have not responded with aggres-

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

20. *See id.* at 207 ("The case for applying to jurisdiction in rem the same test of 'fair play and substantial justice' as governs assertions of jurisdiction in personam is simple and straightforward.").

21. *Id.* at 214 ("Delaware law bases jurisdiction, not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the State. Although the sequestration procedure used here may be most frequently used in derivative suits against officers and directors, the authorizing statute evinces no specific concern with such actions." (internal citations omitted)).

22. *Id.* at 219.

23. *See infra* Section II.A.

24. *See infra* Section II.A.

25. Brown v. Lockheed Martin Corp., 814 F.3d 619, 637 (2d Cir. 2016) ("The inclusion of this phrase ('permitted by law') and the omission of any specific reference to 'general jurisdiction,' to our reading, differentiates Connecticut's registration statute from others that have been definitively construed to convey a foreign corporation's consent to general jurisdiction.").

sive explicit assertions of general jurisdiction by consent. The New York legislature declined to do so after some debate.[26] In the ATCA, the federal legislature took the first shot.

The courts have not rejected all aggressive assertions of personal jurisdiction. The Foreign Sovereign Immunities Act (FSIA) authorizes statutory jurisdiction over foreign states as well as their organs and instrumentalities.[27] Congress may have assumed that these statutory personal jurisdiction provisions would be narrower than the limits of constitutional jurisdiction, which they were clearly designed to ape. In some instances, however, these assertions of jurisdiction have gone beyond constitutional limits. In an FSIA case, the United States Court of Appeals for the District of Columbia withdrew all due process jurisdictional protections from foreign states,[28] likely motivated by the seeming conflict with the regulatory goal of the FSIA and the assertions of jurisdiction under the FSIA. The United States Court of Appeals for the Second Circuit followed this reasoning in a similar case involving recognition and enforcement of a foreign arbitral award under the Federal Arbitration Act (FAA).[29]

Courts' reliance on formal doctrinal categories as the key to constitutional scrutiny is troubling. The ATCA illustrates the problem.[30] The only reason that Congress framed this assertion of jurisdictional power as sounding in consent was that it

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26. Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1831–32 (2018).

27. Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§ 1330, 1602–1611 (2012).

28. Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 98 (D.C. Cir. 2002) ("[T]he constitutional law of personal jurisdiction secures interests quite different from those at stake when a sovereign nation such as Libya seeks to defend itself against the prerogatives of a rival government.").

29. Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic, 582 F.3d 393, 399 (2d Cir. 2009) (overturning the lower court's holding that "foreign states and their instrumentalities are entitled to the jurisdictional protections of the Due Process Clause").

30. The consent regime that Congress imposed was immediately criticized as fictional or coerced consent, and as recapitulating the *Daimler* regime. *See* Harry Graver & Scott R. Anderson, *Shedding Light on the Anti-Terrorism Clarification Act of 2018*, LAWFARE (Oct. 25, 2018), https://www.lawfare blog.com/shedding-light-anti-terrorism-clarification-act-2018 ("ATCA does nothing to strengthen these ties but, instead, seeks to compel certain defendants to implicitly consent to personal jurisdiction by making it a condition for receiving U.S. foreign assistance. But is such consent an adequate

was constrained from doing so under the heading of personal jurisdiction. Perhaps it should not matter whether Congress frames the identical exercise of power under the formal category of consent or of personal jurisdiction. A less formalistic analysis would look to the power exercised and for what regulatory purpose.

And yet, this dialogue between the branches—couched in formalist doctrinal terms—serves important purposes. First, jurisdictional dialogue has the capacity to lead to tailoring of jurisdictional assertions. Before *Shaffer*, quasi-in-rem jurisdiction had the potential to affect many different types of suits. After *Shaffer*, the Delaware legislature reauthorized an assertion of jurisdiction specifically targeting foreign directors of Delaware corporations.[31] Delaware tailored its statutory assertion of jurisdiction to a narrowed class of disputes that spoke to its central policy concern. The courts' subsequent acquiescence might seem peculiar given Delaware's blatant repackaging of similar jurisdictional powers, but it reflects a receptivity to the Delaware legislature's communication of its core policy concerns by narrowing the reach of its jurisdictional statutes.

Relatedly, jurisdictional dialogue may also inject necessary information into courts' decision making process. By passing the ATCA, Congress clearly signaled its legislative priority to punish and deter international terrorism that harms national security and the security of U.S. nationals. Congress also effectively communicated its conclusion that, under international law, the United States clearly has a reasonable basis to prescribe law to govern this conduct, either under the protective or the passive personality principle.[32] In effect, the ATCA communicated Congress's conclusions about factual necessity, legislative priorities, and international law. That regulatory clarity should factor into whether U.S. courts have the power to adjudicate claims necessary to vindicate this regulatory power.

Finally, jurisdictional dialogue helps courts to distinguish among different Article I constitutional powers. An enumer-

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remedy to the constitutional due process concerns that *Daimler* raises? The House report argues that it is but musters little support for this conclusion.")

31. Eric A. Chiappinelli, *The Myth of Director Consent: After* Shaffer*, Beyond* Nicastro, 37 DEL. J. CORP. L. 783, 792 (2013).

32. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmts. h–i (AM. LAW INST. 2018) (describing jurisdiction to prescribe based on the passive personality and protective principles).

ated power cannot overrule a later enacted amendment,[33] but it is certainly relevant to assessing the ambit of a constitutional right or doctrine. In some instances, Congress promulgates jurisdictional rules in furtherance of an explicit constitutional power. For example, Congress acts pursuant to the Bankruptcy Clause of the Constitution when it enacts broad in rem jurisdiction to support the functioning of the bankruptcy system.[34] In these instances, Congress is likely to interpret these clauses, and its interpretation should play a factor in a court's constitutional analysis. Jurisdictional dialogue promotes the communication of Congress's view of the content of and differences among its constitutional powers.

II. Jurisdictional Packaging

The legislature has an incentive to scramble jurisdictional categories precisely because those categories matter. The mere packaging of an exercise of jurisdiction as, for example, in rem rather than in personam has profound consequences for how closely courts will apply constitutional scrutiny. Assertions of in personam jurisdiction will receive the full weight of constitutional scrutiny, while asset, status, and consent jurisdiction all, to a greater or lesser extent, get a constitutional pass.

A. *Personal Jurisdiction*

There is a simple historical reason that the doctrine of jurisdiction is principally one of limitation, and not of assertion. At the time of the Framing, a sovereign's assertions of jurisdiction within its borders were unlimited.[35] Sovereigns sometimes acted beyond the limits of international law. If so, the remedy was for other states to refuse to recognize the judg-

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33. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996) ("Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.").

34. *See* Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. Chi. L. Rev. 1155, 1204–05 (2015) (discussing the power that the Bankruptcy Clause grants Congress).

35. *See* Austen L. Parrish, Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants, 41 Wake Forest L. Rev. 1, 33 (2006) ("[T]he Framers never intended the . . . Due Process Clause to limit territorial assertions of power . . . .").

ment. But within its borders, the sovereign's power to assert jurisdiction was without limit.

The Full Faith and Credit Clause of the U.S. Constitution[36] changed that, though not immediately. Interpreting the Full and Faith and Credit Clause, the Supreme Court held that sister states were obligated to recognize each other's judgments, but that this obligation was still subject to certain limitations.[37] Chief among these limitations was jurisdiction. If a state acted beyond the limits of international law—for example, by issuing a judgment against an absent defendant without service of process—other states could deny that judgment recognition.[38] But jurisdictional defenses were limited to this collateral context.

The Supreme Court changed that in two cases: first in *Galpin v. Page*,[39] and then, famously, in *Pennoyer v. Neff*.[40] In *Galpin*, the Court held that that a California court had lacked jurisdiction over an absent defendant. Justice Field wrote for the Court, noting that, although a sovereign's exercise of jurisdiction was unlimited within its borders, those exercises of jurisdiction would be strictly construed for compliance with the relevant statutes when those assertions deviated from generally accepted principles of international law.[41] The Court held in *Galpin* that the California service by publication statute must be narrowly construed and, as such, had not been followed; the judgment was therefore void.[42]

Pennoyer essentially converted *Galpin*'s limiting canon of construction into a limitation of constitutional stature. Oregon had exercised jurisdiction over an absent defendant under its service by publication statute.[43] Following *Galpin*, the lower courts strictly construed the statute and found that it not been

36. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of evxery 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.").

37. Parrish, supra note 36, at 9.

38. D'Arcy v. Ketchum, 52 U.S. 165, 176 (1851).

39. Galpin v. Page, 85 U.S. 350 (1874).

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

41. *Galpin*, 85 U.S. at 367–69.

42. *Id.* at 375.

43. *Pennoyer*, 95 U.S. at 719–20.

followed.[44] Justice Field wrote again for the Court.[45] In order for Field to reach any constitutional holding, he had to dispense with the lower courts' statutory construction—which he briskly did, holding that the narrow reading of the statute had been incorrect.[46] Instead of following *Galpin*'s approach, the Court held that Oregon's exercise of jurisdiction was restrained by the Due Process Clause of the Fourteenth Amendment to the Constitution (notwithstanding that the amendment had not been ratified at the time of the relevant events).[47]

If the first reason for the structure of U.S. jurisdictional doctrine is its history, the second is its roots in the Fifth and Fourteenth Amendments of the Constitution. The Amendments by their nature are defendant-focused. In *Pennoyer*, the Court reoriented the focus of jurisdiction away from international law and away from interpreting jurisdictional statutes, and towards constitutional guarantees made to persons.

By contrast, jurisdiction in civil law systems never had a constitutional *Pennoyer* moment. The focus of jurisdictional doctrine therefore remained on the nature of the claim, not on the protections owed to the defendant. As demonstrated by the Brussels Recast system, this has allowed for greater flexibility.[48] Jurisdictional rules can vary based on the nature of the claim, the plaintiff, or the particular constellation of parties in the suit. Under the U.S. system, the defendant is the lynchpin of constitutional analysis.

The constitutional system ushered in by *Pennoyer* has taken several iterations. Initially, *Pennoyer* was interpreted to require that a defendant had at least one opportunity to contest the assertion of jurisdiction over him, but not to define "the content of jurisdictional rules."[49] Around the turn of the last

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44. *Id.* at 721.

45. *Id.* at 719.

46. *Id.* at 743–44.

47. *Id.* at 741, 743.

48. Regulation 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L 351) 1, 4.

49. Simowitz, *supra* note 6, at 335 (citing 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, 40 (1990) ("The limited view of *Pen-*

century, the Court began to regulate the precise contours of those jurisdictional rules, eventually settling on the notion of a defendant's "implied consent" as the determinant of whether she was subject to jurisdiction in a state.[50]

To begin the third and current iteration, the Court decided *International Shoe v. Washington*.[51] In *International Shoe*, the Court "did away with the cumbersome fiction of implied consent," in favor of "another more workable fiction, 'corporate presence.'"[52] The Court defined corporate presence as consisting of "certain minimum contacts" with the forum, such that the exercise of jurisdiction over the foreign entity did not offend "traditional notions of fair play and substantial justice."[53]

The Court divided personal jurisdiction into two categories: general, all-purpose jurisdiction and claim-specific jurisdiction. A state's courts could exercise their power to decide any and all claims against a person if that person had contacts with the forum that were "continuous and systematic."[54] There would then be no unfairness in the forum's courts hearing "suits unrelated" to the person's actions in the forum.[55] In addition, a state's court could exercise claim-specific jurisdiction to hear suits against a foreign person with contacts in the forum that "arise out of or are connected" with the claim.[56]

Over the decades that followed, the Court applied these limitations rigorously to limit assertions of jurisdiction under

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noyer is that Field intended for the due process clause to provide an avenue for challenging a state's exercise of personal jurisdiction in all cases, whether or not recognition of the judgment was sought interstate or intrastate, but did not intend to have the due process clause dictate the contents of those rules of jurisdiction.")).

50. *See* Hess v. Pawloski, 274 U.S. 352, 356–57 (1927) ("The difference between the formal and implied appointment is not substantial, so far as concerns the application of the due process clause of the Fourteenth Amendment."); Kane v. New Jersey, 242 U.S. 160, 164 (1916) (upholding a statutory scheme whereby a nonresident driver would "appoint the Secretary of State his attorney upon whom process may be served 'in any action or legal proceeding caused by the operation of his registered motor vehicle, within this State'").

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

52. Simowitz, *supra* note 6, at 336.

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

54. *Id.* at 317.

55. *Id.* at 318.

56. *Id.* at 319.

state statutes authorizing jurisdiction over nonresidents, so-called long-arm statutes. For example, the Court sustained jurisdiction over a nonresident motorist passing through the state because he had purposely availed himself of the state roads.[57] On the other hand, a nonresident could not be subjected to the jurisdiction in the state if their contacts with the forum were "fortuitous" or merely "adventitious."[58] A foreign publisher could be subjected to jurisdiction in the forum only if they had targeted or "directed" their activity at the forum.[59] The Court sustained an exercise of general jurisdiction only once, when a corporation had relocated all of its operations from the Philippines to Ohio.[60]

The courts did not purport to vary their constitutional scrutiny based on the nature of the assertion of personal jurisdiction (as opposed to the category, which continued to matter a great deal). Nevertheless, in some areas, courts seemed oddly inclined to let the legislature have its way. This was particularly true of the relationship between courts and the federal legislature.

Rule 4(k) is commonly known as the "federal long-arm statute".[61] It authorizes the exercise of personal jurisdiction by the federal district courts.[62] Its predecessor, Rule 4(e), sparked controversy because it seemed to authorize federal courts to exercise jurisdiction where it would be forbidden to state courts.[63] For example, Rule 4 authorized courts to command appearance of a person where they resided, regularly transacted business, or with 100 miles of those places.[64] The

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

58. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295, 304 (1980).

59. Calder v. Jones, 465 U.S. 783, 790 (1984).

60. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447–49 (1952).

61. J. Christopher Gooch, *The Internet, Personal Jurisdiction, and the Federal Long-Arm Statute: Rethinking the Concept of Jurisdiction*, 15 ARIZ. J. INT'L & COMP. L. 635, 637 (1998).

62. *Id.* at 652.

63. *See id.* at 653 (discussing a Supreme Court decision that invited Congress to amend the 4(e) formulation of the rule, which it did through the current 4(k) formulation).

64. FED. R. CIV. P. 4(k)(1) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . (B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the

so-called "bulge" could cross state boundaries.[65] Under the Fourteenth Amendment, this was clearly impermissible. Thus, the bulge provision raised two questions—first, were exercises of jurisdiction by federal courts applying federal law governed by the Fifth or Fourteenth Amendment, and second, if the Fifth Amendment applied, would it permit more flexibility than the Fourth Amendment.[66] The Supreme Court resolved the question in the favor of federal power on both questions.[67] The Court also suggested that the federal legislature could authorize aggregation of national contacts, rather than forcing federal courts to rely on contacts in the state where they sit.[68] The subsequent edition of Rule 4—Rule 4(k)—reflected and codified this power.[69]

Courts have also stepped aside when Congress has sought to authorize personal jurisdiction over foreign sovereigns and their organs or instrumentalities. The FSIA muddles the normal approach to immunity, subject matter jurisdiction, and personal jurisdiction. The FSIA authorizes personal jurisdiction over foreign sovereigns and their instrumentalities if certain conditions are met. If personal jurisdiction is authorized, the subject matter jurisdiction is available, and no sovereign immunity applies.[70]

The FSIA's authorizations of jurisdiction were designed to ape the then prevailing standard for personal jurisdiction. Nevertheless, cases did arise in which the assertions of jurisdiction under the FSIA exceeded the limits imposed by the Con-

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United States and not more than 100 miles from where the summons was issued . . . .").

65. Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413, 441 (2017).

66. *See generally* Herbert Hovenkamp, *Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts: A Policy Analysis*, 67 IOWA L. REV. 485 (1982) (analyzing, five years prior to the *Omni Capital* decision, the potential roles of the Fifth and Fourteenth Amendments in the determination of personal jurisdiction).

67. *See* Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 103–04 (1987) (implicating the answer to these questions with findings on personal jurisdiction).

68. *Omni Capital Int'l*, 484 U.S. at 111.

69. *Id.*

70. Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§ 1330, 1605 (2012).

stitution. In these cases, two circuit courts did something rather extraordinary—they held that the jurisdictional protections of the Fifth and Fourteenth Amendments simply did not apply to foreign sovereigns. In *Price v. Socialist People's Libyan Arab Jamahiriya*, the U.S. Court of Appeals for the District of Columbia was faced with a claim under the FSIA against Libya.[71] The FSIA provides that it is the sole means of obtaining jurisdiction over a foreign sovereign and would have authorized jurisdiction over Libya.[72] The appellate court held that the Constitution was no bar at all.[73] The panel had two reasons: first, that it would not inconvenience a foreign sovereign to obtain counsel and litigate in a U.S. forum, and second, that the quasi-sovereign states of the United States did not receive jurisdictional protections in U.S. court.[74] The first explanation could be applied to any sophisticated multinational; the second relies on a questionable analogy between the quasi-sovereign states and foreign sovereigns.

In *Frontera v. State Oil Company of Azerbaijan*, the U.S. Court of Appeals for the Second Circuit extended the holding in *Price* in several ways. The claim in *Frontera* was for recognition and enforcement of an arbitral award, and the debtor was not a state, but a state instrumentality.[75] The court held that *Price* could be extended here because the instrumentality was the alter ego of the foreign sovereign itself.[76]

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71. Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 85 (D.C. Cir. 2002).

72. *Id.* at 87.

73. *Id.* at 99–100.

74. *See id.* at 96, 100 (concluding that "it would be highly incongruous to afford greater Fifth Amendment rights to foreign nations . . . than are afforded to the states," and that foreign states would not be "helpless" if sued in a U.S. forum).

75. Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic, 582 F.3d 393, 394, 400 (2d Cir. 2009).

76. *See id.* at 400 ("[I]f the Azerbaijani government 'exerted sufficient control over' SOCAR 'to make it an agent of the State, then there is no reason to extend to [SOCAR] a constitutional right that is denied to the sovereign itself.'") (quoting TMR Energy Ltd. v. State Prop. Fund of Ukr., 411 F.3d 296, 301 (D.C. Cir. 2005)). This author has argued elsewhere that the *Price* and *Frontera* decisions took this extraordinary step because it was the only means available to them under current jurisdictional law to resolve the tension between an important federal statutory scheme—the ATA, the FSIA, or the FAA, implementing the New York Convention—and the restric-

Price and *Frontera* would seem to deal with the problem of constitutional jurisdictional protections and foreign sovereigns. But the problem of foreign non-state entities remains. Congress has tried to scramble jurisdictional categories to evade constitutional restrictions. Congress may also mount a more direct assault on constitutional restrictions. The recent Justice Against Sponsors of Terrorism Act (JASTA)[77] contained a little-noticed statement in the legislative findings. In the JASTA legislative findings, Congress stated that "entities . . . that knowingly . . . contribute material support or resources," to U.S.-designated Foreign Terrorist Organizations "necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities."[78] Litigants were quick to cite this statement, arguing that "due process challenge like the one presented here requires deference to legislative findings."[79]

Rule 4 and actions against foreign sovereigns both present examples of courts stepping aside when Congress seeks to assert jurisdiction. A final example bears noting. The Supreme Court famously preserved so-called tag jurisdiction—assertion of jurisdiction based solely on in-state service on a natural person—against scrutiny under the "minimum contacts" framework.[80] Justice Scalia's opinion expressly linked the continued vitality of tag jurisdiction to both tradition and its widespread adoption in state long-arm statutes.[81]

In summary, legislative assertions of personal jurisdiction will feel the full weight of constitutional scrutiny applied by the courts. Courts have seemed to carve out exceptions where the elected branches are dealing with foreign sovereigns,

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tions imposed by the courts in the name of constitutional due process jurisdiction. Simowitz, *supra* note 6, at 371–73, 376.

77. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 852 (2016) (codified as amended in scattered sections of the U.S. Code).

78. *Id.* § 2(a).

79. Notice of Supplemental Authority Pursuant to Federal Rule of Appellate Procedure 28(j)—Justice Against Sponsors of Terrorism Act, Public Law No. 114-222 ("JASTA") at 2, Waldman v. Palestinian Liberation Org., 835 F.3d 317 (2d Cir. 2016) (Nos. 15-3135 & 15-3151).

80. Burnham v. Superior Court of Cal., 495 U.S. 604, 618–19 (1990).

81. *Id.* at 615.

where Congress seeks to erase boundaries imposed on the state by horizontal federalism, and where a broad consensus of state legislative enactments supports such an assertion.

B. *Asset Jurisdiction*

In contrast to personal jurisdiction, asset jurisdiction has typically received little constitutional scrutiny. (The grand exception is the Court's decision in *Shaffer v. Heitner*.[82]) Asset jurisdiction is the power of courts to decide a claim based on the presence of property in the forum. It includes several headings of jurisdiction: (i) in rem jurisdiction, the power to decide all rights in an asset; (ii) type one quasi-in-rem jurisdiction, the power to decide competing claims in an asset between particular parties; and (iii) type two quasi-in-rem jurisdiction, the power to decide a claim against a foreign defendant based on the presence of the defendant's unrelated property in the forum.[83]

The largely uncontroversial nature of asset jurisdiction conceals profound exercises of legislative power. This is particularly true where the asset—the res—is not a physical, tangible object at all, but rather an intangible interest. The act of siting that res, declaring in effect which court can decide all claims regarding that asset, is a true flexing of legislative muscle. But the doctrinal label of asset jurisdiction conceals that exercise of power and shields it from constitutional scrutiny. Two particularly striking examples are the jurisdictional provisions of the U.S. Bankruptcy Code and of the ACPA.

The U.S. Bankruptcy Code contains one of the most aggressive assertions of jurisdiction in U.S. law. The Code provides that "the automatic stay" slams into place the moment a

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82. Shaffer v. Heitner, 433 U.S. 186, 199 (1977).

83. Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 414 (1981). Personal jurisdiction is not always clearly delineated from asset jurisdiction. For example, the stew of contacts that can add up to minimum contacts for personal jurisdiction can sometimes include the presence of property in the forum, particularly property related to the underlying claim. And type two quasi-in-rem jurisdiction could be referred to as personal jurisdiction because it allows the plaintiff to pursue a claim against a foreign person, rather than as in rem jurisdiction, which indulges in the fiction that the claim is against the property. The latter is illustrated in case names such as *United States v. One Solid Gold Object in Form of a Rooster*, 191 F. Supp. 198 (D. Nev. 1961).

voluntary bankruptcy petition is filed.[84] A creditor violates the automatic stay injunction and can be subjected to damages, including punitive damages, when it takes any action to enforce a debt, anywhere in the world, whether or not it had notice of the injunction.[85] This profound jurisdictional reach would never pass muster under the heading of personal jurisdiction. It is possible only because the Code characterizes this assertion of power as protective of its in rem jurisdiction over the assets of the estate. The Code creates the legal fiction that all assets of the estate are, in effect, located on the courthouse steps.

The jurisdictional provisions of the Code include 28 U.S.C. § 1334(e), which gives district courts exclusive jurisdiction over "all the property, wherever located, of the debtor as of the commencement of [the] case, and of the property of the estate."[86] Section 1334 applies to both property of the debtor and of the estate, covering "property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings."[87] The breadth of this provision has never been seriously challenged on constitutional grounds.

C. *Status Jurisdiction*

The exceptionalism of so-called status jurisdiction goes back to the beginning of constitutional jurisdiction itself. *Pennoyer v. Neff* announced a "status" exception for ex parte divorce, even as it sought to ground jurisdiction in the Fifth and Fourteenth Amendments to the Constitution.[88] Beale defined

84. 11 U.S.C. § 362(a) (2012).

85. *Id.* § 362(k)(1) ("[A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.").

86. 28 U.S.C. § 1334(e) (2012).

87. Begier v. IRS, 496 U.S. 53, 58 (1990); *see also* Edward R. Morrison, *Extraterritorial Avoidance Actions: Lessons from Madoff*, 9 BROOK. J. CORP. FIN. & COM. L. 168, 173 (2014) (discussing the extraterritorial implications of Section 1334).

88. Pennoyer v. Neff, 95 U.S. 714, 734–35 (1878) ("The jurisdiction which every State possesses to determine the civil *status* and capacities of all its inhabitants involve authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions

"status" in this context as "a personal quality or relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned."[89] In *Shaffer*, the U.S. Supreme Court expanded the "minimum contacts" rule to essentially eliminate type two quasi-in-rem jurisdiction, but expressly carved out certain jurisdictional rules, "such as the particularized rules governing adjudication of status," as not "inconsistent with the standard of fairness."[90]

Courts have struggled, however, with whether, when, and how to expand the "status exception" to related disputes.[91] Some states have required personal jurisdiction, but have "struggled in exerting 'purposeful availment' and 'minimum contacts' tests in order to assert jurisdiction over non-resident parents."[92] Some states have labeled custody and termination disputes as "status" proceedings to sweep them into the exception.[93] "Still other states have turned to quasi in rem jurisdiction over children as 'objects' in the state."[94]

Both state and federal legislatures have waded into this confusion. In the 1990s, state legislatures adopted the Uniform Child Custody Jurisdiction Act (UCCJA),[95] which eventu-

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upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.").

89. 2 JOSEPH HENRY BEALE, A TREATISE ON THE CONFLICT OF LAWS § 119.1, at 649 (1935); *see also* Christopher L. Blakesley, *Comparativist Ruminations from the Bayou on Child Custody Jurisdiction: The UCCJA, the PKPA, and the Hague Convention on Child Abduction*, 58 LA. L. REV. 449, 462 (1998) (clarifying that Beale's definition is used in the Pennoyer context).

90. Shaffer v. Heitner, 433 U.S. 186, 208 n.30 (1977).

91. Christina M. Giordano, Case Comment, In re R.W., *39 A.3d 682 (Vt. 2011)*, 36 SUFFOLK TRANSNAT'L L. REV. 223, 226 (2013) ("Case law has been notably inconclusive and vague regarding how the term 'jurisdiction' is used in custody issues.").

92. *Id.*

93. *Id.* at 226–27; *see also* S.B. v. Alaska, 61 P.3d 6, 14–15 (Alaska 2002) ("The majority of courts that have addressed the issue have held that child custody proceedings conducted under the jurisdictional rules of the UCCJA fit within *Shaffer*'s 'status' exception, meaning that personal jurisdiction over non-consenting parties is not required. Likewise, numerous courts that have considered whether termination proceedings fit within the 'status' exception have held that they do. The reasoning of both sets of cases is persuasive, and both apply here.").

94. Giordano, *supra* note 92, at 227.

95. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 pt. 1 U.L.A. 116 (1988).

ally became "virtually universal state law."[96] Congress enacted the Parental Kidnapping Prevention Act[97] and the enabling legislation for the Hague Abduction Convention,[98] the International Child Abduction Remedies Act.[99] These statutes sought to reign in and systemize U.S. courts that "were usually aggressive in an atmosphere of virtually no jurisdictional limitations to assert initial and modification child custody jurisdiction."[100]

D. *Consent Jurisdiction*

Consent jurisdiction has existed as a separate category for as long as in rem and status jurisdiction. And yet, courts and commentators are showing a recent and sudden willingness to subject some forms of consent jurisdiction to constitutional scrutiny. The inciting incident, once again, was the Supreme Court's watershed decision in *Daimler v. Bauman*.

Every state has passed some form of corporate registration statute.[101] These statutes require foreign corporations doing business in the state to, among other things, appoint an agent for service of process within the state.[102] The typical penalty for failure to register is to close the courts of the state to the noncompliant corporation.[103]

Many of these statutes either explicitly require that the foreign corporation submit to jurisdiction in the state, or have been interpreted to do so.[104] Only one state statute explicitly requires foreign corporations to submit to general jurisdic-

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96. Blakesley, *supra* note 90, at 465. The federal legislature has enacted legislation to implement The Hague Abduction Convention. *Id.* at 533.

97. 28 U.S.C. § 1738A (2012).

98. The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670 (entered into force July 1, 1988).

99. 22 U.S.C. §§ 9001–9011 (Supp. II 2014).

100. Blakesley, *supra* note 90, at 449.

101. Kevin D. Benish, Note, Pennoyer*'s Ghost: Consent, Registration Statutes, and General Jurisdiction After* Daimler AG v. Bauman, 90 N.Y.U. L. Rev. 1609, 1611 n.11 (2015).

102. *Id.* at 1625.

103. *See id.* app. at 1647–61 (finding that the penalties of forty-nine states include a "door-closing statute").

104. *See id.* (surveying statutes in all fifty states and the District of Columbia).

tion.[105] Some state statutes—notably New York's—are not explicit impositions of general jurisdiction, but have been interpreted by state courts to require foreign corporations to submit to general jurisdiction.[106] A plurality of states requires foreign corporations to submit to specific jurisdiction.[107] Some states require only that service can be made within the state.[108]

Over a century ago, the Supreme Court seemed to approve these statutes.[109] However, the Supreme Court's recent *Daimler* decision had made them newly controversial. Some commentators pointed to the registration statutes as a way to maintain the long-standing existence of *doing business* jurisdiction.[110] Others were critical.[111] The New York legislature took

105. 42 PA. CONS. STAT. § 5301 (2014). A federal district court recently held that the Pennsylvania statutory scheme "allows Pennsylvania to impermissibly extract consent at a cost of the surrender of a constitutional right . . . . and is unconstitutional." In re Asbestos Prods. Liab. Litig., 384 F. Supp. 3d 532, 543 (E.D. Pa. 2019) ("Absent voluntary consent, *Daimler* teaches that a corporation is only subject to general jurisdiction where it is 'at home.' The Pa. Statutory Scheme impermissibly re-opens the door to nation-wide general jurisdiction that *Daimler* firmly closed.").

106. *See, e.g.*, Bailen v. Air & Liquid Sys. Corp., No. 190318/2012, 2014 WL 3885949, at *4–5 (N.Y. Sup. Ct. Aug. 5, 2014) ("Although *Daimler* clearly narrows the reach of New York courts in terms of its exercise of general jurisdiction over foreign entities, it does not change the law with respect to personal jurisdiction based on consent.").

107. *See* Benish, *supra* note 102, app. at 1647 ("Most states are *unclear* and have not yet clarified the jurisdictional consequences of their registration statutes (thirty-two states have no definite interpretation). However, eleven states and the District of Columbia have made clear that their corporate registration statues affect *service only*, while six states have made it clear that registration to do business results in 'consent' to *general jurisdiction*.").

108. *Id.*

109. Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95 (1917) ("The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service.").

110. *See, e.g.*, Oscar G. Chase, *Consent to Judicial Jurisdiction: The Foundation of "Registration" Statutes*, 73 N.Y.U. ANN. SURV. AM. L. 159, 200 (2018) ("The justifications for registration jurisdiction include the state's intention to keep a level playing field between domestic and foreign competitors that enjoy doing business in it.").

111. *See, e.g.*, Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1346 (2015) ("Registration to do business as a basis for general jurisdiction . . . rests on dubious constitutional footing."); Cassandra Burke Robertson & Charles W. "Rocky"

up a bill to amend the state registration statute to explicitly require that foreign corporations submit to general jurisdiction.[112] The bill failed under criticism, including a report for the New York City Bar, that the proposal was both bad policy and possibly unconstitutional.[113] In effect, the legislature hesitated to do what the Delaware legislature had done four decades before—attempt to escape constitutional scrutiny by shifting assertions of jurisdiction into the consent category.

This concern has been partly borne out. In the only appellate decision to date on the issue, the U.S. Court of Appeals for the Second Circuit declined to read the Connecticut registration statute to impose general jurisdiction in foreign corporations. In *Brown v. Lockheed Martin*, the appellate court expressed concern that interpreting the Connecticut statute to impose general jurisdiction would recapitulate the system criticized in *Daimler*, in which a multinational corporation would be unable to ascertain with confidence which forums could subject it to general, all-purpose jurisdiction.[114] On the other hand, a judge on the U.S. Court of Appeals for the Federal Circuit concurred separately only to express the strongly held opinion that general jurisdiction under corporate registration statutes was constitutionally acceptable.[115]

Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transnational Litigation, and the Problem of Nonparties*, 19 LEWIS & CLARK L. REV. 643, 664 (2015) ("[S]tates may overreach by attempting to subject the corporation to dispute-blind general jurisdiction for any and all causes of action, regardless of whether the claims have any relationship to the state."); Benish, *supra* note 102, at 1613 ("[I]t is unconstitutional to assert general jurisdiction over foreign corporations based on a consent-by-registration theory.").

112. Assemb. 6714, 2015-2016 Leg., Reg. Sess. (N.Y. 2015), http://assembly.state.ny.us/leg/?term=2015&bn=A06714.

113. N.Y.C. BAR, *supra* note 14, at 3.

114. Brown v. Lockheed Martin Corp., 814 F.3d 619, 637 (2d Cir. 2016) ("[T]he analysis that now governs general jurisdiction over foreign corporations . . . suggests that federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate 'consent'—perhaps unwitting—to the exercise of general jurisdiction by state courts . . . .").

115. Acorda Therapeutics, Inc. v. Mylan Pharm., Inc., 817 F.3d 755, 767–68 (Fed. Cir. 2016) (O'Malley, J., concurring) ("*International Shoe* and *Daimler* did not overrule this historic and oft-affirmed line of binding precedent [with regard to *Pennsylvania Fire*]."), *cert. denied sub nom.* Mylan Pharms. v. Acorda Therapeutics, 137 S. Ct. 625 (2017).

The notion of consent exceptionalism has its modern roots in *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*, in which the Court laid out its strongest case for personal jurisdiction as based on an individual liberty interest.[116] Of crucial importance in that case, this meant that personal jurisdiction could be waived. In support of this holding, the Court noted that a "variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court."[117] The Court then gave several examples, all of which described either consent by contract or by submission.[118]

Proponents of corporate registration statutes and of the draft FMLAA point to the reasoning of *Insurance of Ireland* and the long history of corporate registration statutes[119] (and have debated why consent-by-registration did not make the list in *Insurance of Ireland*). Criticisms of consent exceptionalism come in several flavors. Tanya Monestier has argued that consent by registration is meaningfully different from consent by contract or by submission.[120] Monestier argues that the key differences are specificity, privity, and "contractual policing."[121] First, a party that consents to jurisdiction by contract or by submission does so with regard to specific disputes, either those arising out of or related to the contract, or related to the specific dispute for which submission is made.[122] Second, a party

116. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

117. *Id.* at 703.

118. *See* Monestier, *supra* note 112, at 1382 ("Notably absent from this seemingly exhaustive list is any mention of registration to do business as a basis for jurisdiction.").

119. *See, e.g.*, Eric Porterfield, *A Domestic Proposal to Revive the Hague Judgments Convention: How to Stop Worrying About Streams, Trickles, Asymmetry, and a Lack of Reciprocity*, 25 DUKE J. COMP. & INT'L L. 81, 117–18 (2014) ("The Supreme Court has long recognized that registration statutes like the FMLAA, where a company is required to establish an agent who consents to personal jurisdiction as a condition of doing business in the forum state, are constitutional. . . . At least as applied to the FMLAA, which would require express consent to jurisdiction for claims involving the manufacturer's product in return for the privilege of having the manufacturer's product sold in the United States, this form of consent has a long history of approval from the Supreme Court and is likely constitutional.").

120. Monestier, *supra* note 112, at 1384.

121. *Id.*

122. *Id.* at 1383.

consents to jurisdiction by contract or submission with regard to a certain party or parties—potential plaintiffs or defendants are known at the time of the consent to jurisdiction.[123] Third, a contractual consent to jurisdiction is subject to a limited subset of contract defenses that might void that consent.[124] Monestier concedes that "claims that a forum selection clause is unreasonable are not often successful," but that "the rule nonetheless provides an important escape hatch for a party resisting enforcement of a forum selection clause."[125] All of these limitations stand in contrast to consent to general jurisdiction by registration, where the claims and parties are unknown at the time of consent.

Kevin Benish levels related but different critiques. His examination of every state's registration statute demonstrates that very few actually subject foreign corporations to general jurisdiction.[126] His analysis suggests that general jurisdiction by consent is not as deeply rooted as might have been thought. And before *Daimler*, statutes subjecting corporations to "doing business" jurisdiction in the forum would have been duplicative with most state long-arm statutes.[127] Benish and Monestier both express concern that imposition of general jurisdiction could offend the dormant commerce clause by burdening interstate commerce, or could impose unconstitutional conditions on foreign corporations.[128]

In contract and in arbitration cases, the Supreme Court has reinforced consent as a separate basis of jurisdiction. In a trilogy of cases over forty years, the Court has consistently strengthened forum selection clauses that function, in part, as a consent to personal jurisdiction in the chosen forum.[129] In a long series of arbitration cases, the Court strengthened arbitra-

123. *Id.*

124. *Id.* at 1985.

125. *Id.*

126. Benish, *supra* note 102, at 1631 ("[C]onsent-by-registration to general jurisdiction carries neither the history nor the tradition required to establish it as a touchstone of jurisdiction.").

127. *See id.* at 1626 (referring to both registration statutes and long-arm statutes generally as "jurisdiction-rendering statutes").

128. *Id.* at 1626, 1645 & n.220.

129. Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex., 571 U.S. 49, 66 (2013); Carnival Cruise Lines v. Shute, 499 U.S. 585, 596 (1991); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 19–20 (1972).

tion clauses that function, in part, as a consent to jurisdiction at the place of the arbitral seat.[130] Particularly in its consumer arbitration cases, the Court has seemed to move further away from a conception of actual consent, and toward a notion of presumptive or formal consent grounded more in policy than in an actual foreseeability. Meanwhile, Justice Ginsburg emphasized in her dissent in *J. McIntyre Machinery, Ltd v. Nicastro* that personal jurisdiction is not about consent, but rather about individual liberty, seeming to emphasize further that minimum contacts personal jurisdiction and jurisdiction by consent operate on separate tracks.[131]

The ATCA will likely be the battleground on which the vitality of consent exceptionalism will be fought. The courts may simply cling to the old doctrine that consent is simply different and insulated from meaningful constitutional scrutiny. The courts may also consider whether the ATCA has more in common with contractual consent or with the corporate registration statutes that are now coming under scrutiny. However, the debate over the ATCA is highly likely to be shaped by the fact that it seeks to regulate, deter, and compensate for acts of terrorism. Courts' current approach to questions of the statute's constitutional validity leaves little room for this concern.

III. JURISDICTIONAL REPACKAGING

Legislatures have a long history of scrambling jurisdictional categories after courts impose limits on judicial jurisdiction. This back-and-forth did not begin with the Court's watershed decision in *Daimler v. Bauman*, though *Daimler* may prove to be the most profound example to date. Courts pull back on jurisdictional powers exercised under one heading—typically, personal jurisdiction—and the legislature repackages and authorizes practically that same assertion of jurisdiction by merely changing the doctrinal label—typically, to asset, status, or consent jurisdiction. This phenomenon has occurred across

130. *See* Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1150–51 (2019) (describing the progression of Supreme Court arbitration cases).

131. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 899 (2011) (Ginsburg, J., dissenting) ("[T]he constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty.").

multiple areas of substantive law, including shareholder derivative litigation, product liability, terror regulation, and cybersquatting—though this is surely a non-exhaustive account of the scrambling of jurisdictional categories.

A. *Shareholder Derivative Litigation*

In the 1920s, Delaware became the favored state of incorporation and, consequently, the favored state for shareholder derivative litigation.[132] In Delaware, personal jurisdiction over the corporation was "assured" in an era when corporate jurisdiction was "uncertain."[133] But jurisdiction over directors, necessary and indispensable parties to derivative litigation, was much less certain, as they tended to live elsewhere and might not be easily served.[134]

The Delaware General Assembly addressed the issue in 1927 by enacting the "sequestration" statute, Section 366.[135] For the next fifty years, "Section 366 was the primary method of obtaining personal jurisdiction over fiduciaries of Delaware corporations."[136] Section 366 deemed all shares of Delaware corporations to be located in Delaware.[137] Therefore, a plaintiff could seize the defendant's stock in the forum of Delaware and use it to adjudicate any unrelated claim under the old jurisdictional heading of quasi-in-rem, subtype two jurisdiction.

The U.S. Supreme Court's 1977 decision in *Shaffer v. Heitner* marked the "end of an era."[138] The Court held that the "minimum contacts" analysis of *International Shoe* must apply to all assertions of personal jurisdiction.[139] The Court held that

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132. Chiappinelli, supra note 32, at 793 ("Delaware became the preeminent state of incorporation for foreign corporations by the end of World War I. By the 1920s, the modern form of shareholder derivative litigation was the primary means of controlling director power.").

133. *Id.*

134. *Id.*

135. An Act to Amend Chapter 117 of the Revised Code of the State of Delaware Relating to the Court of Chancery, ch. 217, 35 Del. Laws 217 (1927) (codified as amended at DEL. CODE ANN. tit. 10, § 366 (2012)).

136. Chiappinelli, *supra* note 32, at 794.

137. 35 Del. Laws at 217.

138. Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 101 (1978).

139. Shaffer v. Heitner, 433 U.S. 186, 212 (1977) ("We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny.").

the mere presence of unrelated property in the forum did not constitute purposeful availment of the forum state.[140] This effectively rendered Section 366 a constitutional nullity, unless personal jurisdiction would exist over an absent debtor based on other contacts.

Within two weeks, the Delaware General Assembly enacted Section 3114 to bring corporate directors back into Delaware courts (expanded in 2003 to include corporate officers):

> Every nonresident . . . who . . . accepts election or appointment as a director . . . of a corporation organized under the laws of this State or who . . . serves in such capacity . . . shall, by such acceptance or by such service, be deemed thereby to have consented to the appointment of the registered agent of such corporation . . . as an agent upon whom service of process may be made in all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation, in which such director . . . is a necessary or proper party, or in any action or proceeding against such director . . . for violation of a duty in such capacity . . . . Such acceptance or service as such director . . . shall be a signification of the consent of such director . . . that any process when so served shall be of the same legal force and validity as if served upon such director . . . within this State and such appointment of the registered agent . . . shall be irrevocable.[141]

Delaware maintained its power over nonresident directors, merely substituting the label of consent jurisdiction for quasi-in-rem jurisdiction. Section 3114 was immediately challenged on constitutional grounds.[142] The Delaware Court of Chancery upheld Section 3114 against constitutional challenge, avoiding the question of whether *Shaffer* barred the repackaged mode of asserting jurisdiction over out-of-state directors.[143] The court simply stated that the prior statute had based jurisdiction on the presence of property while Section 3114 based it on

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140. *Id.*

141. DEL. CODE ANN. tit. 10, § 3114 (2009).

142. Armstrong v. Pomerance, 423 A.2d 174, 176 (Del. 1980) ("We disagree with the defendants' . . . characterization of the holding in *Shaffer*.").

143. *Id.*

service as a director.[144] (In fairness, Justice Marshall's opinion in *Shaffer* had practically invited such a substitution.[145]) Over the years, the Court of Chancery imposed some limitations on Section 3114, but its reach remains "quite broad."[146] In the words of one critic: "Thus the seeds were sown for decades of misapplication of due process principles."[147]

B. *Products Liability*

In 1987, the Court limited transnational jurisdiction over foreign manufacturers in *Asahi Metal v. Superior Court of California*.[148] The plaintiff and his wife were riding his motorcycle in California when a tire blew out, injuring the plaintiff and killing his wife.[149] The plaintiff sued the Taiwanese tire manufacturer in California court, which in turn sued the Japanese component maker, Asahi, for indemnification.[150] The plaintiff settled, leaving the foreign manufacturer and component maker to fight it out in California court.[151] The Court did not deliver a majority opinion, though eight justices concluded that jurisdiction was "unreasonable."[152] *Asahi* was interpreted as requiring something in addition to "minimum contacts" to support jurisdiction where injuries arose from products placed in the so-called "stream of commerce."[153] This had the effect

144. *Id.* at 179–80.

145. *Shaffer*, 433 U.S. at 214 ("This argument is undercut by the failure of the Delaware Legislature to assert the state interest appellee finds so compelling. Delaware law bases jurisdiction, not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the State. Although the sequestration procedure used here may be most frequently used in derivative suits against officers and directors, the authorizing statute evinces no specific concern with such actions." (internal citation omitted)).

146. Chiappinelli, *supra* note 32, at 802.

147. *Id.* at 800.

148. Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102 (1987).

149. *Id.* at 105–06.

150. *Id.* at 106.

151. *Id.*

152. *Id.* at 114, 116 ("A consideration of these factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce."); *id.* at 116 (Brennan, J., concurring) (explaining that *Asahi* was a "rare case[ ]" wherein jurisdiction is unreasonable even though the defendant had purposefully availed itself of the jurisdiction).

153. *See* Nathan A. Olin, *The A-B-Cs of Targeting: A Formula for Resolving Personal Jurisdiction-Internet Issues Within the District of Massachusetts*, 23 W. NEW

of forbidding point of injury jurisdiction (in comparative terms, an anomalous result).

Congressional response was swift but ultimately inconclusive. Later that year, a proposal was introduced in the Senate to authorize federal court jurisdiction over foreign manufacturers who injured U.S. claimants in the United States if the foreign manufacturer "knew or reasonably should have known that the product would be imported for sale or use in the United States."[154] This foreseeability standard "might not satisfy the Court's present due process test."[155] Therefore, "a more appropriate standard might look to whether the foreign defendant directed its sales to the United States as a whole and derived substantial revenue from the United States."[156] The 1987 proposal did not make it into law, but later events reignited Congressional concern and provoked a reworked proposal invoking consent jurisdiction.

The mid-2000s "building boom coupled with post-Hurricane Katrina reconstruction led to a nationwide drywall shortage in the United States in 2005 and 2006, forcing builders to turn to imports."[157] From 2006 on, the United States imported over 550 million pounds of Chinese-made drywall because it was "abundant and cheap."[158] The Chinese-made drywall was defective: "The drywall emits hydrogen sulfide gas, which produces a rotten-egg odor, corrodes metal, and destroys electronic equipment. In addition, American consumers have reported various physical ailments, such as breathing difficulties, persistent coughs, bloody noses, recurrent headaches, and asthma attacks."[159]

ENG. L. REV. 237, 254 (2002) ("Other courts that have also attempted to limn the 'something more' that might be required under *Asahi*, however, have met with varying results.").

154. S. 1996, 100th Cong. § 1 (1987).

155. Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 683 n.49 (2015).

156. *Id.*

157. Stephanie Glynn, *Toxic Toys and Dangerous Drywall: Holding Foreign Manufacturers Liable for Defective Products—The Fund Concept*, 26 EMORY INT'L L. REV. 317, 317 (2012).

158. *Id.* (quoting Brian Skoloff, *Cheap Chinese Drywall Causing Another Round of Nightmares*, WASH. POST, Oct. 17, 2009, at F2).

159. *Id.* at 317.

U.S. consumers found that they could not sue the Chinese manufacturers in U.S. courts. Lack of personal jurisdiction was the principal obstacle, though service and eventual judgment enforcement also posed problems. Although "importers, distributors, and sellers of the defective drywall," were amenable to suit, many of them were "out of business, bankrupt, or possess[ed] insufficient assets to satisfy a judgment."[160] According to Virginia Senator Mark Warner, the foreign manufacturers "can avoid liability and there's almost nothing we can do about it right now."[161]

"In the wake of the outcry over allegedly defective products manufactured overseas and the inability of U.S. consumers to obtain jurisdiction over the manufacturers for potential liability, the U.S. Senate introduced bipartisan legislation in the 111th Congress aimed at securing jurisdiction over foreign manufacturers."[162] A year later, similar legislation was introduced in the House of Representatives.[163] The proposed legislation, the FMLAA, would require foreign manufacturers "to appoint a registered agent in the United States to accept service of process on behalf of the manufacturer," and by "accepting service of process, the manufacturer would thereby consent to personal jurisdiction in the state in which the appointed agent is located."[164] Consent "would not extend to actions foreign plaintiffs filed for injuries suffered outside the United States," and a "manufacturer failing to appoint the required statutory agent would be barred from importing its

160. *Id.* at 318.

161. Aaron Kessler & Joaquin Sapien, *Special Report: Federal Failure on Chinese Drywall*, SARASOTA HERALD-TRIB. (Sarasota) (Dec. 14, 2010), https://www.heraldtribune.com/article/LK/20101214/News/605228232/SH.

162. Edward T. Hayes, *International Law*, 57 LA. B.J. 268, 269 (2010). The legislation introduced was the Foreign Manufacturers Legal Accountability Act of 2009, S. 1606, 111th Cong. (2009).

163. Foreign Manufacturers Legal Accountability Act of 2010, H.R. 4678, 111th Cong. (2010); *see also* James J. Ferrelli et al., *Is U.S. Supreme Court Review Inevitable? New Jersey High Court Extends Long-Arm Jurisdiction*, FOR DEF., no. 9, 2010, at 44, 48 ("Both bills are gathering support from members of Congress with varied political philosophies. Foreign manufacturers should consult their legal counsel to determine the potential effect of these developments on their international business operations and vulnerability to suit in U.S. federal and state courts, and counsel for foreign manufacturers should become familiar with these legislative initiatives.").

164. Glynn, *supra* note 158, at 320.

products into the United States."[165] Commentators largely lauded the proposed legislation as welcome and constitutionally sound,[166] although imperfect.

In the midst of these Congressional responses, the U.S. Supreme Court further limited jurisdiction in two products liability cases, *Goodyear Dunlop Tires Operations, S.A. v. Brown*[167] and *J. McIntyre Machinery, Ltd. v. Nicastro*.[168] *Goodyear* was not a difficult case, doctrinally. The North Carolina plaintiffs were

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165. Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 435 (2012); *see also* Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551, 1587–88 (2012) ("While this provision would ensure that foreign manufacturers are subject to suit somewhere in the United States, it would not prevent such manufacturers from selecting agents in the most pro-defendant state. A better statute would require consent to suit in any state where the product is sold.").

166. *See H.R. 4678, Foreign Manufacturers Legal Accountability Act, and H.R. 5156, Clean Energy Technology Manufacturing and Export Assistance Act: Hearing on H.R. 4678 and H.R. 5156 Before the Subcomm. on Com., Trade, & Consumer Prot. of the H. Comm. on Energy & Com.*, 111th Cong. 41 (2010) (statement of Andrew F. Popper, Professor of Law, American University, Washington College of Law) (testifying that the proposed legislation was "a strong bill that is constitutionally sound," though not addressing its flaws); *see also* Andrew F. Popper, *In Personam and Beyond the Grasp: In Search of Jurisdiction and Accountability for Foreign Defendants*, 63 CATH. U. L. REV. 155, 192 (2013) (arguing this legislation was necessary for the "protection of basic property rights"); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1325–26 (2014) ("The Foreign Manufacturers Legal Accountability Act would require foreign manufacturers of certain products to appoint an agent for service of process, as well as to consent to some state's jurisdiction over cases involving the covered product and either U.S. residents or U.S. events. First introduced in 2009, the bill is broadly supported by the plaintiffs' bar. . . . In important ways, though, the bill doesn't go far enough."); Borchers, *supra* note 66, at 446 ("[I]n 2009, the Foreign Manufacturers Legal Accountability Act (FMLAA) was introduced in the House with multiple versions submitted in subsequent Congresses. . . . [G]roups supportive of tort plaintiffs endorsed the bill, which had sponsors from both parties, but it still proved controversial.").

167. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011). It has been noted in the context of FMLAA that "Congress could . . . render the *Goodyear* decision essentially moot." Collyn A. Peddie, *Mi Casa Es Su Casa: Enterprise Theory and General Jurisdiction over Foreign Corporations After* Goodyear Dunlop Tires Operations, S.A. v. Brown, 63 S.C. L. REV. 697, 725 n.169 (2012).

168. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 886–87 (2011) ("[T]he stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause

killed in a bus accident in France, allegedly caused by a defective tire manufactured by a foreign subsidiary of Goodyear USA.[169] Plaintiffs sued in North Carolina, where the North Carolina Court of Appeals held that mere sale of products into North Carolina established general jurisdiction there.[170] This holding was plainly at odds with Supreme Court precedent. The most notable element of Justice Ginsburg's opinion for the Court was that it noted that the "paradigmatic" forums for exercise of general jurisdiction were a corporation's place of incorporation and principal place of business.[171]

The *Nicastro* decision was far more perplexing, eliciting criticism from legislators, commentators, and justices. In *Nicastro*, a New Jersey plaintiff was injured by a metal-shearing machine in New Jersey.[172] The machine was manufactured in England, where the defendant was incorporated, and marketed and sold in the United States by an independent distributor based in Ohio.[173] The Court failed to deliver a majority opinion. For the plurality, Justice Kennedy authored a paean to horizontal federalism and state sovereignty, holding that specific jurisdiction could not exist in New Jersey because the manufacturer had contracted only with an independent distributor, and therefore targeted the United States as a whole, rather any individual state.[174] Justice Ginsburg excoriated the decision, noting the touchstone of the Court's jurisdiction jurisprudence was individual liberty, not sovereignty, and that the plurality had laid out a roadmap for foreign manufacturers to avoid jurisdiction in any U.S. state by simply using a U.S. distributor.[175] In short, it made no sense in a transnational case to hold that a foreign manufacturer could target the United States without targeting any individual state.

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ensures. . . . [T]he Constitution commands restraint before discarding liberty in the name of expediency.").

169. *Goodyear*, 564 U.S. at 918.

170. *Id.* at 919–20 ("Were the foreign subsidiaries nonetheless amenable to general jurisdiction in North Carolina courts? Confusing or blending general and specific jurisdictional inquiries, the North Carolina courts answered yes.")

171. *Id.* at 924.

172. *Nicastro*, 564 U.S. at 878.

173. *Id.* at 878, 896–97.

174. *Id.* at 884–85.

175. *Id.* at 893–94.

The 2011 version of FMLAA was introduced during the pendency of *Goodyear* and *Nicastro*. Despite bipartisan support, the FMLAA met (and continues to meet) well-organized resistance.[176] Commentators have largely defended it both as a matter of products liability policy and as a valid exercise of jurisdiction under the Constitution.[177] Although the FMLAA remains just a bill, it has also been cited in support of other forms of consent-based assertions of jurisdiction.[178]

C. *Terrorism*

It turned out that *Goodyear* and *Nicastro* were mere prologues for a jurisdictional retrenchment to come. In *Daimler v. Bauman* and *Walden v. Fiore*, the Court returned to general jurisdiction and specific jurisdiction, respectively, and cut back on both.[179]

In *Daimler*, "the Court 'confirmed what it had only hinted at previously'—that general jurisdiction would be sharply limited to only those states where the corporation was 'at home.'"[180] Before *Daimler*, a court could exert general jurisdiction over a corporation or natural person where it had continuous and systematic contacts with the forum. This test had been interpreted liberally, leading to a low standard for so-

176. *See* Amanda Iler, *Bridging the Stream of Commerce: Recommendations for Living in the Post-*Nicastro *Era*, 45 McGeorge L. Rev. 407, 430 (2013) ("Because the Foreign Manufacturers Legal Accountability Act continues to fail—despite being a clear, straightforward solution—other legislative options should be considered.").

177. *See supra* note 166.

178. *See, e.g.*, Gwynne L. Skinner, *Expanding General Personal Jurisdiction over Transnational Corporations for Federal Causes of Action*, 121 Penn St. L. Rev. 617, 677 (2017) ("Such expansive personal jurisdiction is not unprecedented. Congress has pending legislation, the Foreign Manufacturers Legal Accountability Act (FMLAA), which attempts to do something similar to what is being recommended here: requiring foreign manufacturers that do business in the United States to register to do business, appoint an agent, and consent to the personal jurisdiction of U.S. courts.").

179. Daimler AG v. Bauman, 571 U.S. 117, 138 (2014) ("[T]he exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business . . . .' is unacceptably grasping.") (internal citation omitted); Walden v. Fiore, 571 U.S. 277, 285 (2014) ("[T]he plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State . . . .").

180. Simowitz, *supra* note 6, at 340.

called *doing business* jurisdiction. The *Daimler* decision demolished this standard, holding that a corporate entity would, absent "exceptional circumstances," be subject to general jurisdiction only where it was "at home," its place of incorporation or its principal place of business.[181] The Court had "reduced the number of forums in which a large multinational corporation would be subject to general jurisdiction from scores to just two."[182]

The Court also narrowed claim-specific jurisdiction. In *Walden v. Fiore*,[183] the Court held that "intentional torts" committed against residents of another state, with knowledge that effects would be felt in that state, could not, without additional actions directed to that forum, ground jurisdiction.[184] A defendant's "suit-related conduct" must have a "substantial connection" with the forum, not simply with persons from that forum.[185] The Court reiterated the importance of targeting the forum itself in *Bristol-Myers Squibb v. Superior Court of California*, where it observed that "[w]hat is needed—and what is missing here—is a connection between the forum and the specific claims at issue."[186]

None of these cases involved terrorism, but they had a profound effect on the principal statute that confers a private right of action against terrorist organizations. After *Daimler* and *Walden*, "every pending ATA case against the Palestinian Authority (PA) or the Palestine Liberation Organization (PLO) was dismissed on jurisdictional grounds, except for one."[187] That one case, *Sokolow v. PLO*, survived in the district court, but was dismissed on appeal.[188] The Supreme Court de-

181. *Id.*

182. *Id.*

183. *Walden*, 571 U.S. at 285 (holding that the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there").

184. *Id.* at 291.

185. *Id.* at 284.

186. Bristol-Meyers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1781 (2017).

187. Aaron D. Simowitz, *Defining* Daimler's *Domain*, 56 WILLAMETTE U. L. REV. 578 (forthcoming 2020).

188. Sokolow v. Palestinian Liberation Org., No. 04-CIV-00397, 2015 WL 10852003 (S.D.N.Y. Oct. 1, 2015), *vacated sub nom.* Waldman v. Palestinian Liberation Org., 835 F.3d 317 (2d Cir. 2016), *cert. denied*, 2018 WL 1568032 (2018).

clined to grant certiorari.[189] In direct response, Congress enacted the Anti-Terrorism Clarification Act (ATCA). The ATCA states any defendant "shall be deemed to have consented to personal jurisdiction" if, within 120 days of the enactment of the ATCA, it either receives certain types of economic assistance from the United States or operates a facility within the United States while benefitting from a waiver or suspension of the statutory bar to "the PLO or any of its constituent groups" operating such a facility within the United States.[190]

Once again, Congress acted to essentially repackage one form of jurisdiction, personal jurisdiction, as another: consent jurisdiction.

D. *Cybersquatting*

In the 1990s, there was a "gold rush" in domain names, or uniform resource locators (URLs).[191] Some people registered URLs that copied or nearly copied famous trademarks: "This was done with the intent either of holding them hostage to the rightful owners of the trademark, or misusing them to deceive consumers."[192] The registrants gobbled up this valuable virtual real estate with the intent to misuse the URLs to deceive consumers or to demand payment from the trademark holder to relinquish the domain. This practice is referred to as cybersquatting.[193] Some trademark holders fought, but many simply decided to pay off the cybersquatters in light of the many obstacles to successful litigation.

These difficulties included limitations on personal jurisdiction. Personal jurisdiction might be available if the cyber-

189. *Id.*

190. Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-253, § 4, 132 Stat. 3183, 3184 (to be codified at 18 U.S.C. § 2334). The Anti-Terrorism Act of 1987 represents a statutory bar to "the Palestine Liberation Organization or any of its constituent groups" operating such a facility within the United States. 22 U.S.C. § 5202 (2012).

191. Edward T. Colbert & Lida Rodriguez-Taseff, *Anti-Cybersquatting Consumer Protection Act*, 2 ATLA ANN. CONVENTION REFERENCE MATERIALS 1899, 1899 (2001).

192. *Id.*

193. John Brogan, Note, *Much Ado About Squatting: The Constitutionally Precarious Application of the Anticybersquatting Consumer Protection Act*, 88 IOWA L. REV. 163, 168 (2002).

squatter took some additional action targeting the forum,[194] such as a call or an e-mail to a person in the forum offering to sell the domain name. A registrant did not subject itself to personal jurisdiction at the location of the registrar merely by registering the domain name.[195]

President Clinton signed the ACPA into law on November 29, 1999, "to protect consumers and American businesses, to promote the growth of online commerce, and to provide clarity in the law for trademark owners by prohibiting the bad-faith and abusive registration of distinctive marks as Internet domain names with the intent to profit from the goodwill associated with such marks."[196] The ACPA required the claimant to show that the defendant "registered, trafficked in, or used a domain name that was distinctive or famous at the time of registration," and that the defendant had "bad faith intent to profit" from the mark.[197]

Congress labeled the exercise of power over bad faith registrants as in rem jurisdiction to circumvent the problems of personal jurisdiction. The ACPA provided that, if personal jurisdiction could not be obtained over the registrant, in rem jurisdiction would be deemed to exist in the "judicial district in which . . . the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located."[198]

The ACPA's assertion of jurisdiction is narrower than the Bankruptcy Code's, covering only a single type of property, but is more striking in one sense: It specifies that the domain name res shall be located in multiple forums. Here the metaphor to physical, tangible property truly breaks down. In the ACPA, Congress made the policy decision that holders of famous or distinctive marks with claims against cybersquatters should be able to pursue those claims in multiple forums. Congress simply used the heading of in rem jurisdiction to accomplish that legislative goal. Congress could have provided for "claims against the individual who registered the disputed do-

194. McRae's, Inc. v. Hussain, 105 F. Supp. 2d 594, 598 (S.D. Miss. 2000).

195. *E.g.*, Am. Online, Inc. v. Huang, 106 F. Supp. 2d 848, 856 (E.D. Va. 2000).

196. S. REP. NO. 106-140, at 4 (1999).

197. Brogan, *supra* note 193, at 173.

198. Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d)(2)(C) (2012).

main name."[199] But that would not have enabled Congress to evade the constitutional jurisdictional restrictions that had already evolved around suing cybersquatters.

To open up more forums, Congress authorized claims "against" the domain name itself.[200] In theory, due process protections should be at their height where forfeiture of an asset, such as a domain name, is the remedy sought. In the words of the U.S. Court of Appeal for the Fourth Circuit: "Due process protections ought to be diligently enforced, and by no means relaxed, where a party seeks the traditionally-disfavored remedy of forfeiture."[201] Nevertheless, courts have blessed this exercise of legislative power, relying on the in rem nature of the statutory grant.

If the mark holder cannot locate the registrant, the ACPA authorizes jurisdiction at the location of the registrar or registry. Many cybersquatters now use foreign registrars. However, the regional Internet registry for North America (the American Registry for Internet Numbers) is located in the Eastern District of Virginia.[202] This both ensures that ACPA cases can be heard in that district, and gives that court outsize power. That court swiftly rejected challenges to Congress's exercise of in rem jurisdiction.

Judge Bryan of the U.S. District Court of the Eastern District of Virginia decided the first significant constitutional challenge to the jurisdictional provisions of the ACPA.[203] In *Caesars World v. Caesars-Palace.com*, Judge Bryan rejected the argument that "that a domain name registration is not a proper kind of thing to serve as a res."[204] Judge Bryan held: "There is no prohibition on a legislative body making something property. Even if a domain name is no more than data, Congress can make data property and assign its place of registration as

199. *See* Brogan, *supra* note 193, at 174 (noting that Congress did not choose to provide for such claims in the ACPA).

200. *Id.*

201. United States v. Borromeo, 945 F.2d 750, 752 (4th Cir. 1991).

202. Press Release, Am. Registry for Internet Nos., ARIN Wins Important Legal Case and Precedent Against Fraud (May 13, 2019), https://www.arin.net/vault/about_us/media/releases/20190513.html.

203. Caesars World, Inc. v. Caesars-Palace.com, 112 F. Supp. 2d 502, 502 (E.D. Va. 2000).

204. *Id.* at 504.

its situs."[205] Judge Bryan rejected the argument that *Shaffer* required minimum contacts to sustain in rem jurisdiction and, in the alternative, held that registration of the domain name supplied the needed minimum contacts where the only relief sought was forfeiture of the domain name.[206] Indeed, Judge Bryan observed that "the enactment of the Anticybersquatting Consumer Protection Act [is] a classic case of the distinction between *in rem* jurisdiction and *in personam* jurisdiction and a proper and constitutional use of *in rem* jurisdiction."[207]

Judge Bryan's decision is particularly striking in that, only the year before, the same court had come to the opposite conclusion about whether it had in rem jurisdiction over domain names. Prior to the enactment of the ACPA, Judge Cacheris had held in *Porsche Cars v. Porsch.com* that "to construe the Trademark Dilution Act so as to permit *in rem* actions against allegedly diluting marks would needlessly call the constitutionality of the statute into doubt," because in rem proceedings "necessarily affect the interests of persons," though they "purport to affect nothing more than the disposition of property."[208] Judge Cacheris was particularly troubled that the Trademark Dilution Act, "[r]ather than authorizing an injunction against a diluting mark itself, . . . only provides a remedy against another 'person's' commercial use of that mark."[209]

One year later, Judge Bryan noted that the court "does not construe this decision as inconsistent with the decision in [*Porsche Cars*]," because "[t]hat case pre-dated the enactment of the Anticybersquatting Consumer Protection Act, and its enactment itself, in this court's view, provides the omission that Judge Cacheris found cast doubt on *in rem* jurisdiction in that case."[210] On appeal from *Porsche Cars*, the United State Court of Appeals for the Fourth Circuit endorsed Judge Bryan's reasoning: "Congress plainly treated domain names as property in the ACPA, however. . . . Congress may treat a do-

205. *Id.*
206. *Id.*
207. *Id.*
208. Porsche Cars N. Am., Inc. v. Porsch.com, 51 F. Supp. 2d 707, 712 (E.D. Va. 1999), *vacated sub nom.* Porsche Cars N. Am., Inc. v. Allporsche.com., 215 F.3d 1320 (4th Cir. 2000), *and aff'd in part, vacated in part sub nom.* Porsche Cars N. Am., Inc. v. Porsche.net, 302 F.3d 248 (4th Cir. 2002).
209. *Id.*
210. *Caesars World, Inc.*, 112 F. Supp. 2d at 504 n.5.

main name registration as property subject to in rem jurisdiction if it chooses, without violating the Constitution."[211] Congress's labeling of this exercise power as in rem in nature made all the difference.[212]

The jurisdictional impact of the ACPA swept beyond cybersquatting actions. In *Office Depot v. Zuccarini*, the question was not whether an anti-cybersquatting action could be brought in the forum where the registry was located. Rather, the question was where a garden-variety judgment creditor could go to collect against assets of the debtor—in this case, domain names.[213] The ACPA was not directly applicable. Nonetheless, the court looked to the ACPA as indicative of where it ought to deem a domain be located—where it ought to assert jurisdiction over the asset, in other words.

IV. Jurisdictional Dialogue

The current approach to constitutional due process jurisdiction emphasizes the importance of doctrinal categories over the actual source or nature of power being exercised. This results in a predictable push and pull between the courts and the legislature. As the courts tighten the screws on one category of jurisdiction, legislatures try to reframe their exercise of power as something else. Straightforward exercises of personal jurisdiction become somewhat peculiar constructions of consent jurisdiction.

At first blush, this repackaging of jurisdiction seems wasteful at best and perhaps even harmful. Legislatures seem to ex-

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211. *Porsche Cars*, 302 F.3d at 260 ("The domain names suggest that Congress lacked power to do so, but support this proposition only by analogizing to slavery's constitutionality before passage of the Thirteenth Amendment. Even if this ill-considered attempt to analogize from people to domain names constituted an argument, we would see no merit in it.").

212. Relatedly, a line of cases from outside Virginia established that in rem jurisdiction over domain names could not be established in any forum that Congress had not specified—even if all the documents necessary to transfer control of the domain were located in the forum. *See* Mattel, Inc. v. Barbie-Club.com, 310 F.3d 293, 305 (2d Cir. 2002) ("It follows that, in the present case, Mattel's unauthorized arrangement to have registrar's certificates for captainbarbie.com and the other Domain Names transferred from Maryland, Virginia, and California for deposit with the Southern District of New York was an inappropriate and ineffectual method of establishing *in rem* jurisdiction under the ACPA.").

213. Office Depot, Inc. v. Zuccarini, 596 F.3d 696, 703 (9th Cir. 2010).

pend time and resources to reassert the authority that courts have just proscribed. And typically, the powers become couched in a doctrinal framework that emphasizes formalist debates that are even further removed from any value that we might care about in designing a civil adjudication system. It is worthwhile to consider, however, whether this formalist back-and-forth adds anything. At a minimum, the repackaging of jurisdictional powers leads to a sort of dialogue between the branches about jurisdictional powers. This dialogue may have value.

First, the repackaging of jurisdictional powers rarely leads to the reassertion of precisely the same power. Rather, there is some tailoring. To take the Delaware example: the old pre-*Shaffer* quasi-in-rem jurisdiction authorized many assertions of power that did not speak to the heart of Delaware's concern—jurisdiction over corporate directors for shareholder derivative suits. The repackaged jurisdictional power, premised on director consent, captured only this core concern.

Second, this jurisdictional dialogue injects information into the judicial decision making process. Legislatures have institutional advantages over courts in some forms of information gathering. Elected officials certainly have a better grasp on their own policy priorities and the wants and needs of their constituents. The give-and-take between courts and legislatures over jurisdictional powers offers an opportunity for the elected branches to inject this information into the courts' decision-making process in a manner that may be more credible and forceful than, say, amicus briefs. Looking again to Delaware: The *Shaffer* decision forced the Delaware legislature to articulate its interest in jurisdiction over corporate directors and to signal, via rapid new legislation, the importance of this jurisdictional power to the Delaware version of corporate governance and economic welfare. You might say that they gave the courts the opportunity to take a hint.

Third, jurisdictional dialogue allows the legislature to impart important constitutional principles into the judicial decision-making process. Legislatures and executives engage in their own constitutional interpretation—courts do not have a monopoly on that process, even if they do enjoy the last word. And yet, it is difficult for the elected branches to signal their constitutional priorities in a way that courts are likely to respect. Signing statements, legislative findings, committee re-

ports, and statements from the floor or from a bill's sponsors have received varying degrees of skepticism from courts. Nothing signals the importance of a particular constitutional provision like the passing of legislation.

The ongoing packaging and repackaging of jurisdictional powers may not be a first-best approach. As the current debate around the ATCA illustrates, it has the danger of focusing the debate on formalisms that are disconnected from any values that courts or elected officials might actually care about—whether those sound in sovereignty, liberty, convenience, or something else. But jurisdictional dialogue does serve important and useful ends.

A. *Tailoring Assertions of Jurisdiction*

Each of the four examples discussed above involve a legislature reasserting jurisdictional power that a court had proscribed. But in each instance, the legislature did not attempt to reassert precisely the same power. Rather, the dialogue between legislature and court resulted in a tailoring and narrowing, typically focusing on a particular area of substantive law.

The Delaware director consent statute did not reconstitute the exact same power as the sequestration statute. In *Shaffer*, Justice Marshall essentially invited the Delaware legislature to enact a more carefully tailored statute. The *Shaffer* majority observed that "Delaware law bases jurisdiction, not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the State."[214] Although this power was "most frequently used in derivative suits against officers and directors, the authorizing statute evinces no specific concern with such actions," and had been used in other suits against nonresidents, including garden-variety breach of contract actions.[215] Justice Marshall observed that the sequestration statute was therefore over-inclusive and under-inclusive, as Delaware law did not require corporate directors to own stock.[216] Indeed, Heitner himself had been unable to obtain jurisdiction over seven defendants as they did not own Grey-

214. Shaffer v. Heitner, 433 U.S. 186, 214 (1977).

215. *Id.* (internal citation omitted).

216. *Id.* ("[T]here is no necessary relationship between holding a position as a corporate fiduciary and owning stock or other interests in the corporation.").

hound stock.[217] The director consent statute narrowed the state's jurisdictional power, excluding nonresidents other than corporate directors, and expanded it to ensure that corporate directors were covered.

The ACPA displays similar narrow tailoring. The in rem provisions of the statute apply only if a court finds that the mark owner is not able to locate or obtain personal jurisdiction over the person who falsely used the protected mark.[218] The ACPA also limits the remedies available in an in rem action to "the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark."[219]

This process of tailoring and narrowing reflects a surprising source of flexibility in the law of jurisdiction. U.S. courts' rulings on constitutional law typically speak in trans-substantive terms. Legislatures typically pass legislation to address substance specific areas of policy concern. Formal jurisdictional doctrine does little to take into account different policies or areas of law—the law of jurisdiction does not vary on its face, whether one is concerned about defamation or wrongful death. Doctrinal repackaging gives legislatures a tool to reassert jurisdictional power in a certain substantive area of law—corporate directorships, products liability, terrorism, or cybersquatting—in a way that courts seem to respect.

B. *Informing Courts of Legislative Priorities*

The process of jurisdictional dialogue also gives legislatures an opportunity to communicate the facts and regulatory priorities that drive their decision making. Once again, the Delaware example is instructive.

In effect, the director statute and its predecessor, the sequestration statute, made it easier to bring derivative actions involving Delaware corporations. One might think that the managers who control incorporation decisions would find this unappealing. But Delaware asserted a particular interest in the post-*Shaffer* litigation over the consent statute. (It had failed to do so in *Shaffer*.) Delaware asserted a domestic interest in controlling the development of Delaware corporate law. Share-

217. *Id.* at 192–94.

218. Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d)(2)(A)(ii) (2012).

219. *Id.* § 1125 d)(2)(D)(i).

holder derivative litigation is likely to intersect with the organic Delaware corporate law under which Delaware corporations are organized. Delaware asserted that it would be unable to adequately develop Delaware corporate law if actions had to be brought in other courts, which could only guess at what a Delaware court would do, without precedential effect.[220]

The doctrine of jurisdiction does a poor job of recognizing the regulatory priorities of the elected branches. But there is good reason to think that their regulatory priorities should inform the underlying structure of jurisdiction. Personal jurisdiction is a doctrine in search of a theory. Justice Field declined to supply one in *Pennoyer v. Neff* when the Court constitutionalized jurisdiction.[221] Since then, successive Supreme Courts have ping-ponged between "liberty" and "sovereignty" as the purported underpinnings of constitutional due process jurisdiction.[222]

Some scholars have attempted to supply a theoretical foundation that answers some of the riddles of jurisdiction. Leah Brilmayer and Stephen Sachs have tried to reorient jurisdiction toward theories of political accountability.[223] In their accounts, jurisdiction is not a matter of sparing litigants inconvenience or of preventing forum shopping, to take two common justifications. Jurisdictional restrictions are a function of the political legitimacy of courts and of coercive state action.[224] In short, courts exercise profound power over people.

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220. *See* Chiappinelli, supra note 32, at 828 ("A related interest, which Delaware has long claimed, is in 'defining, regulating and enforcing the fiduciary obligations which directors of Delaware corporations owe . . . .').

221. Simowitz, *supra* note 6, at 335 ("*Pennoyer* is the foundation of constitutional jurisdiction, but the Constitution plays no obvious role in *Pennoyer*.").

222. *Id.* at 341 ("The Court has also failed to clearly state what underlying constitutional values are protected by these jurisdictional rules. The Court has consistently held that 'sovereignty' and individual 'liberty' are the guideposts of the jurisdictional analysis, but the Court has been unable to articulate which factor predominates or how they relate.").

223. *See* Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 294 (1987) ("The link with political theory lies in the argument that such issues should be analyzed in terms of a state's right to exercise coercive power over the individual or dispute. Traditionally, political theory has treated as central the issue of the legitimacy of the state's exercise of coercive power."); Sachs, *supra* note 165, at 1314 (arguing that "[p]olitical authority concerns are inescapable" in the context of personal jurisdiction).

224. Brilmayer, *supra* note 223, at 296; Sachs, *supra* note 165, at 1309–11.

Jurisdiction is the doctrine that ensures this power is exercised legitimately.

In this account, the New Yorker can resist being hauled into court in Hoboken not because she has to cross the Hudson, but because she is being subjected to the power of a sovereign with which she may have little or no connection. Brilmayer posits that general jurisdiction is appropriate only for insiders—persons who are a part of the polity and therefore can exert political control over the courts charged with administering any and all claims against them.[225] (This approach does not account for political insiders who nevertheless do not have access to the political machinery of the state.) This account would therefore support the narrowing of general jurisdiction in *Daimler*.

Specific jurisdiction is triggered when the regulatory interests of the state are impacted. The doctrinal requirement of specific jurisdiction that claims must arise out of or relate to contacts in the forum serves the function of ensuring that the state is acting in furtherance of its own legitimate regulatory interests. In other words, if there are contacts in the state relevant to the claim, it is more likely that the conduct at issue genuinely concerns the state.

But the doctrinal tests associated with specific jurisdiction are simply proxies for the question of whether the state's regulatory interests are genuinely impacted. A state could find it necessary or even vital to exercise power over a foreign party to effect its valid regulatory policy, even if there were no related contacts in the forum. The state could have regulatory interests that are in no way connected to or limited by the territorial boundaries of the state.[226] In other words, if the goal of specific jurisdiction is to match the exercise of power by courts to the valid exercise of regulatory power by the state, then the test for specific jurisdiction could be under-inclusive.

Specific jurisdiction doctrine seems to recognize that it can be over-inclusive. The first step of the specific jurisdiction

225. Brilmayer, *supra* note 223, at 301–02.

226. For discussions of such extraterritorial state interests, *see generally* William Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3429336; Aaron D. Simowitz, *The Extraterritoriality Formalisms*, 51 CONN. L. REV. 375 (2019) (discussing extraterritorial state interests).

inquiry is to ask whether the foreign party has "minimum contacts" with the forum that "arise out of or relate to the claim."[227] But that it only the first step of the inquiry. In some contexts, courts will then inquire if the foreign party "purposeful[ly] avail[ed]" themselves of the benefits of presence in the forum or whether they targeted the forum.[228] A court will then inquire whether exercise of jurisdiction will be "unreasonable."[229] The constitutional doctrine of jurisdiction has highly (maybe overly) reticulated mechanisms for checking over-inclusive specific jurisdiction.

Jurisdiction seems to lack mechanisms to deal with under-inclusion. With the notable exception of admiralty law, U.S. courts have rejected the doctrine of "jurisdiction by necessity."[230] Jurisdiction has likely not developed a better means to deal with under-inclusion because of its root in inter-state disputes. In inter-state disputes, the stakes are: Which state courts will hear the dispute? In transnational disputes, the stakes are higher: Will a U.S. court hear the dispute? Frequently, the question is actually: Will the dispute be heard at all?[231]

As a consequence, disputes that are a valid exercise of regulatory power that fail the tests for specific jurisdiction are sometimes shoved into another jurisdictional category. Looked at in this light, the ATCA seems less like opportunism, or coerced consent, and more like Congress scrambling jurisdictional categories, but in service of a valid regulatory power.

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227. Marc Borden, *Decision of Interest: Baseball, Steroids, and Personal Jurisdiction*, L. PROFESSOR BLOGS NETWORK: CIV. PROC. & FED. CTS. BLOG (Sept. 5, 2010), https://lawprofessors.typepad.com/civpro/2010/08/decision-of-interest-baseball-steroids-and-personal-jurisdiction.html.

228. Linda J. Silberman & Nathan D. Yaffe, *The Transnational Case in Conflict of Laws: Two Suggestions for the New* Restatement Third of Conflict of Laws—*Judicial Jurisdiction over Foreign Defendants and Party Autonomy in International Contracts*, 27 DUKE J. COMP. & INT'L L. 405, 411 & n.18 (2017).

229. *Id.* at 408–09 (2017) ("Our sample suggests that courts in practice only dismiss on reasonableness grounds where the defendant is foreign, whereas they effectively never dismiss domestic defendants on grounds of reasonableness.").

230. John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court's Decisions in* Goodyear Dunlop Tires *and* Nicastro, 90 WASH. U. L. REV. 1707, 1716 n.42, 1749 n.181 (2013).

231. *See* Nicholas A. Fromherz, *A Call for Stricter Appellate Review of Decisions on Forum Non Conveniens*, 11 WASH. U. GLOBAL STUD. L. REV. 527, 535 (2012) ("Cases dismissed on [*forum non conveniens*] seem to just disappear.").

This plainly prompts the question of how one is to define valid regulatory power, if not through the tests already developed for specific jurisdiction. In this sense, the ATCA may be an easy case. No one contests that the regulation, deterrence, and punishment of terrorism is valid under U.S. domestic law. It is also a plainly valid exercise of regulatory power under international law.

The newly published Restatement (Fourth) of Foreign Relations Law lays out reasonable bases on which to regulate activity across sovereign borders—or, in the language of transnational law, to exercise prescriptive jurisdiction.[232] The Restatement identifies both the protective principle and the passive personality principle as bases on which a state can exercise reasonable prescriptive jurisdiction.[233] The protective principle provides that a state can act across borders to protect certain special interests of the state.[234] Deterring international terrorism is a classic example. The passive personality principle provides that a state may act across borders to regulate harms to its own nationals.[235] Either principle plainly supports the United States's exercise of power under the ATA and the ATCA. Terrorism may be an easy case—but it is the case now before the courts with the passage of the ATCA.

C. *Distinguishing Constitutional Powers*

The doctrine of jurisdiction does a poor job taking account of regulatory policies and priorities. Similarly, it does not on its face make distinctions based on which constitutional power the legislature is invoking when it passes an authorization of jurisdiction. The process of jurisdictional dialogue provides a route for courts to distinguish among different constitutional powers when policing assertions of jurisdiction that carry those powers into effect.

The U.S. Constitution authorizes Congress to establish "uniform Laws on the subject of Bankruptcies."[236] The impact of this power has been hotly debated, particularly as it relates

232. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (AM. LAW INST. 2018).

233. *Id.* at § 402 cmts. h–i.

234. *Id.* at § 402 cmt. i.

235. *Id.* at § 402 cmt. h.

236. U.S. CONST. art. I, § 8, cl. 4.

to state sovereign immunity.[237] And yet even in the realm of state sovereign immunity, the in rem nature of the judicial assertion has had a profound effect.

In *Seminole Tribe of Florida v. Florida*, the U.S. Supreme Court held that the fact Congress was exercising an Article I power (in that case, the Indian Commerce Clause) did not empower it to overcome a later-enacted amendment—specifically, the Eleventh Amendment's grant of sovereign immunity to the quasi-sovereign states.[238] A four-justice dissent warned that this new federalism would leave "persons harmed by state violations" of bankruptcy law with "no remedy" against the states.[239] The U.S. Court of Appeals for the Sixth Circuit distinguished *Seminole Tribe* and held that Congress had the authority to abrogate state sovereign immunity under Bankruptcy Code § 106.[240] The circuit court relied on the distinctiveness of the Bankruptcy Clause and the Hamiltonian conception of sovereign immunity as explicated in the Federalist Papers.[241]

In *Tennessee Student Assistance Corp. v. Hood*, the U.S. Supreme Court turned to the in rem nature of bankruptcy courts' power to sidestep the conflict of the Bankruptcy Clause and the Eleventh Amendment, affirming and remanding the decision below.[242] Hood sought a discharge of her student loans in a Chapter 7 bankruptcy proceeding.[243] Those student loans were guaranteed by the Tennessee Student Assistance

237. *See generally* Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129 (2003) (discussing the uniformity power in bankruptcy in relation to state sovereignty).

238. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47, 52 (1996).

239. *Id.* at 77 n.1 (Stevens, J., dissenting).

240. Hood v. Tenn. Student Assistance Corp. (*In re* Hood), 319 F.3d 755, 762 (6th Cir. 2003) (quoting 11 U.S.C. § 106(a) (2012) ("Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section . . . .")), *aff'd sub nom.* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004).

241. *Id.* at 764 ("As it was initially understood, the Bankruptcy Clause represented the states' total grant of their power to legislate on bankruptcy. In order for laws to be uniform, the laws must be the same everywhere. That uniformity would be unattainable if states could pass their own laws. Alexander Hamilton stated that the federal government had 'exclusive jurisdiction' where the Constitution granted Congress the power to make uniform laws.").

242. *Hood*, 541 U.S. at 454–55.

243. *Id.* at 444.

Corporation (TSAC), a state entity.[244] As required by the Federal Rules of Bankruptcy Procedure,[245] Hood served a complaint on TSAC.[246] The Bankruptcy Court, Bankruptcy Appellate Panel, and the U.S. Court of Appeals for the Sixth Circuit held that Hood could do so under the Code's abrogation of state sovereign immunity.[247] The appellate decision opened a circuit split with several other circuits that had held, following *Seminole Tribe*, that Congress could not do so.[248]

The U.S. Supreme Court dodged the question and, with it, the implication of its *Seminole Tribe* decision. The manner of its evasion is instructive. The Court relied on the in rem nature of the Bankruptcy Court's jurisdiction to declare that there was, in fact, no infringement on state sovereignty. The Court noted that federal courts' exercise of in rem jurisdiction in admiralty is not necessarily viewed as invading state sovereignty.[249] The Court reasoned that, similarly, the debtor's discharge proceeding is in rem in nature: "Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate."[250] That Court concluded that "when the bankruptcy court's jurisdiction over the res is unquestioned . . . the exercise of its *in rem* jurisdiction to discharge a debt does not infringe state sovereignty."[251] The Court was not particularly troubled that bankruptcy and admiralty are "specialized" areas of law.[252]

The power of the in rem characterization was so great that the Court was willing to overlook the relevant rules requiring service of a complaint on the state entity—"normally an indignity to the sovereignty of a State."[253] Indeed, the Court relied entirely on jurisdictional labels to distinguish the discharge proceeding from a fraudulent conveyance action, which typi-

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244. *Id.* at 443–44.
245. FED. R. BANKR. P. 7001(6), 7003, 7004.
246. *Hood*, 541 U.S. at 444–45.
247. *Id.* at 445.
248. *Id.* at 446.
249. *Id.* ("[T]he Eleventh Amendment does not bar federal jurisdiction over *in rem* admiralty actions when the State is not in possession of the property." (citing California v. Deep Sea Research, Inc., 523 U.S. 491, 507–08 (1998))).
250. *Id.* at 447.
251. *Id.* at 448 (internal citation omitted).
252. *Id.* at 451.
253. *Id.* at 453.

cally relied on in personam jurisdiction.[254] The fraudulent conveyance action to claw back property from the state might implicate state sovereignty, but the discharge proceeding, which effectively annihilates property of the state, does not.

The *Hood* saga is illuminating in that it includes both approaches to assertions of jurisdiction. The U.S. Court of Appeals for the Sixth Circuit looked at the nature of the power being exercised by the federal government—a grant of jurisdiction taken in direct and necessary support of an enumerated constitutional power to promote a "uniform" bankruptcy system.[255] The Supreme Court retreated to reliance on jurisdictional labels, ultimately to reach the same result. The former is justified on a close reading of a Hamiltonian conception of the federal system. The latter is justified on formalisms.

This latter approach failed to satisfy four justices. Justices Souter and Ginsburg concurred in the judgment to reject "any implicit approval of the holding in [*Seminole Tribe*]".[256] Justices Thomas and Scalia dissented, expressly taking the majority to task for its reliance on the in rem label. They noted that "the Court concludes that, because the bankruptcy court's jurisdiction is premised on the res, the issuance of process in this case, as opposed to all others, does not subject an unwilling State to a coercive judicial process."[257] And, "[m]ore importantly, although the adversary proceeding in this case does not require the State to 'defend itself' against petitioner in the ordinary sense, the effect is the same, whether done by adversary proceeding or by motion, and whether the proceeding is *in personam* or *in rem*."[258]

Only two years later, the Court abandoned *Hood*'s distinction between discharge and clawback actions. In *Central Virginia Community College v. Katz*,[259] the Court held, "contrary to its dicta in *Seminole Tribe*, that a State does not have Eleventh Amendment immunity from a suit in a bankruptcy court to void and recover a preferential transfer received by the

254. *Id.* at 453–55.
255. *Id.* at 443.
256. *Id.* at 455 (Souter, J., concurring).
257. *Id.* at 458 (Thomas, J., dissenting).
258. *Id.* at 459 (Thomas, J., dissenting).
259. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.")

State."[260] Once again, the in rem nature of the Code's assertion of jurisdiction was the key to the Court's new theory. In *Katz*, the action to claw back a preferential transfer was "ancillary" to the bankruptcy court's in rem jurisdiction; therefore, Eleventh Amendment state sovereign immunity was no bar to the action.[261] One commentator observed that this new theory was "broad enough to preclude the States from asserting immunity as a defense to any proceeding grounded on a provision of the Bankruptcy Code or which affects property of the debtor estate."[262]

The *Hood* dissenters argued that "[w]hatever the scope of the *in rem* exception in admiralty, the Court's cases reveal no clear principle to govern which, if any, bankruptcy suits are exempt from the Eleventh Amendment's bar."[263] This is, however, a plain connection between assertions of jurisdiction under the federal bankruptcy power and the federal admiralty power—both are the subjects of explicit grants of constitutional power other than the commerce power. The *Hood* saga shows the power of jurisdictional assertions made pursuant to an explicit constitutional grant of power. The continued vitality of quasi-in-rem jurisdiction under the federal admiralty power demonstrates a similar deference to assertions of jurisdiction when made to effectuate an enumerated constitutional power other than the commerce power.

Over a century ago, the Supreme Court recognized that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country,"[264] under article 3, section 2 of the Constitution (the judicial power of the U.S. shall extend "[t]o all cases of admiralty and maritime jurisdiction"),[265] and article 1, section 8 (Congress may "make all laws which may be necessary and proper for" carrying out granted powers).[266] Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure provides:

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260. Richard Lieb, *State Sovereign Immunity: Bankruptcy Is Special*, 14 AM. BANKR. INST. L. REV. 201, 202 (2006).

261. *Id.* at 203.

262. *Id.*

263. *Hood*, 541 U.S. at 461 (Thomas, J., dissenting).

264. S. Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917).

265. *Id.* at 214.

266. *Id.* at 214–15.

> If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process.[267]

In short, Rule B authorizes the very type two quasi-in-rem jurisdiction that *Shaffer* purported to reign in by subjecting it to constitutional scrutiny. Rule B has survived while other authorizations of quasi-in-rem jurisdiction have succumbed. The reason lies in its distinctive constitutional origins.

Rule B "has been upheld on three distinct theories."[268] Some courts have found that, in a particular case, the defendant had the necessary minimum contacts with the forum, obviating the need to rely on Rule B.[269] Some courts have held that *Shaffer* did not apply because the property seized was related to the action brought.[270] Some courts, however, have plainly held that the constitutional scrutiny applied in *Shaffer* simply does not apply to admiralty Rule B.[271] Many decisions have combined a mix of these reasons.[272]

In an influential opinion shortly after *Shaffer*, Judge Beeks of the U.S. District Court for the Western District of Washington noted that Rule B attachment "bears some similarity to *Shaffer*," in that the "purpose of the Delaware sequestration statute and Supplemental Rule B(1) is to compel the personal appearance of a nonresident defendant to answer and defend a suit brought against him through the seizure of any property which might be found in the geographical area over which the court has jurisdiction."[273] And as in *Shaffer*, the court was asked "to consider the constitutionality of an ancient form analogous

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267. FED. R. CIV. P. SUPP. RULE B(1)(a).

268. Joseph J. Kalo, *The Meaning of Contact and Minimum National Contacts: Reflections on Admiralty in Rem and Quasi in Rem Jurisdiction*, 59 TUL. L. REV. 24, 35–36 (1984).

269. *Id.* at 36 & n.71.

270. *Id.* at 36 & n.72.

271. *Id.* at 36 & n.70.

272. *Id.* at 36–37.

273. Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd., 450 F. Supp. 447, 452 (W.D. Wash. 1978).

to sequestration, the writ of 'maritime' foreign attachment."[274] Judge Beeks stated that, "[n]otwithstanding the similarities between this action and *Shaffer*, I am not persuaded that *Shaffer* alters the basis of admiralty jurisprudence"; rather, "it can be distinguished on both constitutional and analytical grounds."[275] Buttressed by an extensive history of the admiralty attachment power, Judge Beeks concluded that the "autonomy of admiralty from the common law is of constitutional magnitude," and that "constitutional grant of judicial power conferred jurisdiction over admiralty and maritime matters independent of jurisdiction over matters in law and equity."[276]

The U.S. Court of Appeals for the Second Circuit noted in *Amoco Overseas Oil* that the property was related to the claim, that Rule B was likely the only means to obtain jurisdiction in the United States, and that "Shaffer did not consider assertion of jurisdiction over property in the admiralty context."[277] The appellate court noted that "the constitutional power of the federal courts is separately derived in admiralty," and that "tradition suggests not only that jurisdiction by attachment of property should be accorded special deference in the admiralty context, but also that maritime actors must reasonably expect to be sued where their property may be found."[278] Citing both *Amoco* and *Grand Bahama*, Judge Sweet of the U.S. District Court for the Southern District of New York held that "the independent constitutional basis of admiralty jurisdiction" should be "distinguished from the *in personam* jurisdictional concepts formulated in law and equity."[279]

Within a couple years of these decisions, courts regarded it as "settled that *Shaffer* is not applicable to admiralty jurisdic-

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274. *Id.*

275. *Id.* at 452–53 ("It is now clear that 'contacts' outweigh 'sovereignty' when a state court seeks to compel a non-resident defendant to answer and defend a lawsuit. But in admiralty these interests have never been in substantial conflict; the action against property is the keystone of admiralty jurisprudence. Thus, the exercise of jurisdiction based on concepts of 'sovereignty,' that is, power over property, is central to the continued vitality of American admiralty jurisprudence.").

276. *Id.* at 453.

277. Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 655 (2d Cir. 1979).

278. *Id.*

279. Filia Compania Naviera, S.A. v. Petroship, S.A., No. 81-Civ.-7515-(RWS), 1982 WL 195514, at *5 (S.D.N.Y. Mar. 18, 1982).

tion."[280] The U.S. Court of Appeals for the Second Circuit rejected a different due process challenge to Rule B, noting that "[t]his jurisdiction is of ancient origin, preceding the independence of the United States and the founding of the Republic," and that "[a]dmiralty law is a species of international law, administered by the courts of maritime nations, including specifically the courts of the United States."[281]

V. CONCLUSION

This article makes three claims. First, assertions of personal jurisdiction tend to receive the full weight of constitutional scrutiny, while assertions of asset, status, or consent jurisdiction tend to escape such restrictions. Second, legislatures take advantage of this doctrinal categorization to scramble jurisdictional categories, shifting their exercises of power from, for example, personal jurisdiction to consent jurisdiction in a bid to escape constitutional limitations. Third, this dialogue between the branches serves valuable purposes.

280. Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion, 552 F. Supp. 771, 782 (S.D. Ga. 1982), *rev'd*, 732 F.2d 1543 (11th Cir. 1984).

281. Polar Shipping, Ltd. v. Oriental Shipping Corp., 680 F.2d 627, 636 (9th Cir. 1982) ("The process of maritime attachment, now provided for in Supplemental Rule B, is at least as old as the Republic.").