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OF McINTYRE AND GOODYEAR DUNLOP TIRES*

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## The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v. Brown and J. McIntyre Machinery v. Nicastro

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**THE (THEORETICAL) FUTURE OF PERSONAL JURISDICTION: ISSUES LEFT  
OPEN BY *GOODYEAR DUNLOP TIRES V. BROWN* AND  
*J. MCINTYRE MACHINERY V. NICASTRO***

Lea Brilmayer\* and Matthew Smith\*\*

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The Supreme Court has given the jurisdiction-junkies among us two new precedents to mull over: *Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>1</sup> and *J. McIntyre Machinery, Ltd. v. Nicastro*.<sup>2</sup> *Goodyear* and *McIntyre* address some of the classic foundational questions in personal jurisdiction, but fail to answer others and possibly even raise some new ones.

Among the classics, the Supreme Court revisited the familiar question whether state lines form the boundaries of different sovereignties in some important way, or whether they are simply proxies for physical distance and therefore indicative of party inconvenience. On this matter, the position that the Court took—boundaries are important as a matter of principle<sup>3</sup>—does not come as a surprise. Despite previous suggestions that distance and inconvenience are relevant in determining personal jurisdiction,<sup>4</sup> the Court emphasized that boundaries have no inherent relationship with convenience.<sup>5</sup> This is as it should be: anyone who has driven across Rhode Island would be hard-pressed to think of states per se as proxies for either distance or convenience.

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1. 131 S. Ct. 2846 (2011).

2. 131 S. Ct. 2780 (2011).

3. See *id.* at 2789 (plurality opinion) (holding that “jurisdiction is in the first instance a question of authority rather than fairness” and thus that “personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis”).

4. See, e.g., *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (“An ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business is relevant . . .” (quoting *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930))).

5. See *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion) (rejecting fairness as the criterion for determining the propriety of personal jurisdiction).

The strongest message from *Goodyear* and *McIntyre* is a reaffirmation that state sovereignty is central to the Court's philosophy of what it means to have a federal system;<sup>6</sup> the states created the federal government much more than the federal government created the states. But although the Court's conviction that states are sovereign entities for jurisdictional purposes is nothing new, it does pose some new, or at least unanswered, questions. As we will argue, it is difficult to see sovereignty as the analytic lynchpin of personal jurisdiction because nothing in the concept of sovereignty itself explains what is at stake for individual liberty. Or to put the point another way, in some cases a state's exercise of jurisdiction offends individual due process rights and in some cases it does not, but an appeal to sovereign authority does nothing to distinguish one case from the other since the entire question is whether the state has that authority.

The limited analytic leverage that sovereignty provides explains why *McIntyre* resorts to consideration of "whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign."<sup>7</sup> But this consideration only kicks the can down the road: why does the state have authority over an out-of-state defendant whose course of conduct is in some way "directed," but not over one whose course of conduct merely affected the society or economy existing within the jurisdiction of the sovereign—as in *McIntyre*? The answer must be given in terms that explain what is at stake for the defendant, not the sovereign, since limits on personal jurisdiction subsist in due process.<sup>8</sup> Or, as an alternative formulation of the point, what *McIntyre* and *Goodyear* lack is an explanation of the connection between the individual defendant's interests and the sovereign's.

That the latest personal jurisdiction cases do not fully explain the connection between the individual and the sovereign also does not come as a surprise. Exertions of jurisdiction are acts of governmental coercion, and thus implicate theories of political legitimacy and justification.<sup>9</sup> To the extent, then, that theories of personal jurisdiction supervene on political theory, the absence of a clear answer to these questions is both more and less startling. It is less startling because the propriety of coercive power is an overwhelmingly complex and contested subject. Personal jurisdiction, as a relatively small subfield in civil

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6. See *Goodyear*, 131 S. Ct. at 2853 ("[A] State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice'" (alteration in original) (quoting *Int'l Shoe*, 326 U.S. at 316)); *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion) ("And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.").

7. *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion).

8. See *id.* (citing *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).

9. See *id.* at 2785 ("Due process protects the defendant's right not to be coerced except by lawful judicial power.").

procedure and constitutional law, should not be expected to make conclusive contributions to political theory. It is more startling because theories of political justification are so intellectually rich.<sup>10</sup>

If there is a key contribution that could be made to courts' understanding of personal jurisdiction, it is a fully articulated theoretical justification that delineates the circumstances under which extraterritorial defendants may be subject to the jurisdiction of a state. The intuitions underlying limits on personal jurisdiction are strong. For example, the *Goodyear* decision was entirely unanimous: a foreign corporation that conducted no business in North Carolina and otherwise had only the most tangential connections to the state should not be subject to the jurisdiction of North Carolina.<sup>11</sup> But the analytic mechanisms for deciding hard cases remain underdeveloped.

In addition to the need for a fully articulated political justification for personal jurisdiction, *Goodyear* and *McIntyre* also raise a number of collateral issues about the meaning and consequences of state sovereignty. These issues are collateral because their resolution may be impacted by whatever political justification is ultimately successful but nonetheless constitute independent and substantive areas for further research and development. And, of course, some of these issues are as old as personal jurisdiction itself<sup>12</sup>—a testament to the need for further endeavor by scholars of jurisdiction. The three collateral issues we will consider in addition to the political justification for personal jurisdiction are:

- *Causality*: When a defendant is not present in a forum but is involved in a chain of events resulting in a loss or injury in the forum, under what conditions can the defendant be regarded as having caused the loss or injury such that the forum will have personal jurisdiction? There are many candidates—foreseeability,

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10. Although it is clearly impossible to list all the works in political theory that may bear on questions of jurisdiction, some are especially influential. See generally, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 88–146 (1974) (arguing for legitimacy from consent); A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 101–142 (1979) (arguing that fair-play arguments can be successful in such limited circumstances that they have little hope of legitimating extant governments); Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111 (2003) (discussing theories of legitimacy with respect to the U.S. Constitution and arguing for legitimacy based on substantive notions of rights); H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955) (elucidating the relationship between moral rights and a natural right to be free from certain forms of coercion); George Klosko, *Presumptive Benefit, Fairness, and Political Obligation*, 16 PHIL. & PUB. AFF. 241 (1987) (arguing that the provision of benefits can in certain circumstances legitimate coercive power); John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3 (Sidney Hook ed., 1964) (developing the rough sketches of a fair-play argument for legitimacy).

11. *Goodyear*, 131 S. Ct. at 2850–52 (explaining that the foreign defendants had no contact with North Carolina except to the extent that North Carolina residents had been injured by the defendants' allegedly defective tires in France and that other Goodyear affiliates had distributed a very small number of the defendants' tires—none of the type involved in the incident giving rise to litigation—in North Carolina).

12. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

probability, etc.—but which is correct, and on what criteria would one decide?

- *Symmetry*: Is the overriding focus on protecting the defendant really sound, given that the decision not to assert jurisdiction has the same effect on the plaintiff as the decision to assert jurisdiction has on the defendant?
- *International Due Process*: What difference does it (should it) make that the defendant hails from, and restricted its conduct to, another country, as opposed to another state?

The discussion below expands a bit on what these questions mean; explores briefly why we think that these problems matter; and, in some cases, briefly suggests tentative solutions or avenues for further work.

## I. OPEN QUESTIONS

### A. *Political Justification*

The fundamental problem in personal jurisdiction is explaining when states may assert jurisdiction over extraterritorial defendants and when they may not. Courts and commentators have developed various concepts for distinguishing these two sets, among them notions of causality, reciprocal contacts, and implied consent.<sup>13</sup> But the underlying theoretical justification for distinguishing them remains vexingly illusive. Why are there persons *not subject* to the jurisdiction of a state? If the jurisdiction of states were extended to everyone, what would be lost?

Three traditional justifications for limiting the power of states over extraterritorial defendants are consent, inconvenience, and expectations. Unfortunately, they all have fatal flaws. A recurring and more promising, but still problematic, justification depends on notions of federalism and sovereignty.<sup>14</sup> And the necessity of coercion in solving collective action problems, colloquially known as the provision of benefits, remains an

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13. See, e.g., *Calder v. Jones*, 465 U.S. 783, 789 (1984) (“California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the ‘effects’ of their Florida conduct in California.” (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 37 (1971))); *Ins. Corp. of Ir.*, 456 U.S. at 703 (“Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived. . . . A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court.”); Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1257 (2011) (“A forum without minimum contacts lacks the power to assert personal jurisdiction over a defendant, not solely because the defendant would find it inconvenient, but also because the forum state lacks sufficient interests to justify an assertion of adjudicative power.”).

14. The latest example of state sovereignty as political justification for limits on personal jurisdiction appears, of course, in *J. McIntyre*, 131 S. Ct. at 2786–87.

underdeveloped but promising justification.<sup>15</sup> The future of personal jurisdiction depends in large part on grappling with these political justifications and perhaps others.

### 1. *Traditional Justifications*

As with most political theory, consent is a starting place. The affinity between consent and the legitimation of coercive power stems from the undisputed fact that consent is sufficient to legitimate coercive power: a basic assumption across the law, and particularly in contracts, is that genuine consent to an arrangement justifies enforcing that arrangement, or some approximation thereof.<sup>16</sup> Given that consent is a sufficient condition for coercive power, it has been natural to assume that it is also a necessary condition. This reasoning is embodied in an early line of cases,<sup>17</sup> but was famously banished by the Court in *International Shoe Co. v. Washington*.<sup>18</sup>

The problem with using consent to justify the use of coercive power is that the semantic content of “consent” is too limited to justify coercive power in the vast majority of situations. Any conventional definition of consent, e.g., deliberate manifestation of agreement,<sup>19</sup> will leave out the vast majority of corporations and individuals because the vast majority of corporations and individuals never deliberately manifest agreement to coercive power and have no reason to. Corporations enter new states to earn profit and expand their business, just as individuals travel to, or interact with, new states because it is personally, socially, or professionally advantageous. People have motives that need not (and generally do not) involve deliberate manifestations of assent to the states’ coercive power.

Moves to implied consent do not fare any better because they are strangely circular. If some actions impliedly manifest consent to jurisdiction and others do not, how do we tell them apart? And more particularly, how do we tell them apart when the defendant can perpetually deny that his actions manifested consent? Any litigant can maintain, probably truthfully, that she took the actions

15. Indeed, the idea that the provision of benefits has a role in justifying exertions of jurisdiction has been around as long as the doctrine of personal jurisdiction:

[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

*Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

16. See, e.g., *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17–18 (1972) (using contractual consent to justify choice of jurisdiction).

17. See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 356–57 (1927) (upholding a state statute which implied consent to service of process for all out of state motorists driving on its highways).

18. See *Int’l Shoe*, 326 U.S. at 318–19.

19. See BLACK’S LAW DICTIONARY 346 (9th ed. 2009).

at issue with no reference whatsoever to the authority of a state. So what actions create implied consent? Ultimately, consent is too strong a concept to be useful in legitimating coercive power generally and extraterritorial assertions of jurisdiction in particular.

The failure of consent brings us to inconvenience, or the idea that defendants should not be forced to litigate in a distant or obscure forum. The personal jurisdiction cases are riddled with language suggesting that inconvenience is a correct understanding of defendants' interests.<sup>20</sup> But, as other commentators have pointed out, defending in a different state just is not that inconvenient.<sup>21</sup> And more importantly, an emphasis on inconvenience would be anomalous in constitutional doctrine. "[T]here is simply no historical concern over convenience as an additional component of due process . . . ."<sup>22</sup>

For example, there are absolutely no *constitutional* limits on the diversity jurisdiction of the federal courts: "There is . . . nothing in the Constitution which forbids Congress to enact that . . . a circuit court . . . shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision."<sup>23</sup> While there are geographic limits on the diversity jurisdiction of the federal courts, they are provided for statutorily and could thus be repealed at any time by Congress.<sup>24</sup>

The requirements of the Due Process Clause cannot be applied so selectively. To maintain consistency, one must either rework entire areas of constitutional law by incorporating protections against inconvenience, or jettison

20. See, e.g., *Int'l Shoe*, 326 U.S. at 317 ("An 'estimate of the conveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant . . . ." (quoting *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (1930))).

21. See 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, 95 (1990) ("Depositions and other discovery devices take place anywhere the parties designate, and are not tied to the forum. The only events tied to the forum are those requiring judicial supervision, such as pretrial motions. Motions require the presence of counsel, but a party is free to hire a lawyer close to the courthouse. The only time a party is likely to travel is in the improbable event that the case goes to trial." (footnote omitted)).

22. A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 630 (2006).

23. *United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 604 (1878); *accord* *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 442 (1946) ("Congress could provide for service of process anywhere in the United States." (citing *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925); *Union Pac. R.R. Co.*, 98 U.S. at 604; *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838))); *Robertson*, 268 U.S. at 622 ("Congress has power, likewise, to provide that the process of every district court shall run into every part of the United States." (citing *Toland*, 37 U.S. (12. Pet.) at 328; *Union Pac. R.R. Co.*, 98 U.S. at 604)).

24. 28 U.S.C. § 1391(a) (2006) (providing that a suit in diversity may only be filed in a district in which the defendants reside, a substantial part of the events or omissions giving rise to the case occurred, or a defendant is subject to personal jurisdiction at the time the action commenced), amended by Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202(1)(b)(1)–(3), 125 Stat. 758, 763 (2011).

the idea that inconvenience can animate due process restrictions on personal jurisdiction. The latter route is preferable.

Moving on to other rationales, the Court has at various times suggested that the expectations of defendants can serve as a limit on the jurisdiction of state courts. *World-Wide Volkswagen Corp. v. Woodson* contains perhaps the best statement of the Court's integration of expectations in personal jurisdiction cases:

[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. The Due Process Clause, by ensuring the "orderly administration of the laws," gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.<sup>25</sup>

Despite such language and its application in a range of cases,<sup>26</sup> the Court has never made expectations the cornerstone of its Due Process analysis—and with good reason.

If the problem with consent was that its semantic content was too strong and attempts to weaken that content resulted in circularity, the problem with expectations is that it has too little semantic content and uniformly results in circularity. People expect the world to work in the way the world works. "Any expectation that a defendant has of avoiding an out-of-state court is a function of the jurisdictional rules themselves. Thus . . . [expectations] cannot justify the contents of jurisdictional rules, it simply describes a consequence of having such rules."<sup>27</sup> As a justification for limits on state court jurisdiction, it is almost impossible to take the expectations of defendants seriously.

## 2. Federalism and Sovereign Authority

As an historical matter, federalism and state sovereignty (federalism) have been present in the personal jurisdiction cases from the beginning. In *Pennoyer*

25. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (citations omitted) (quoting *Int'l Shoe*, 326 U.S. at 319).

26. See, e.g., *Kulko v. Superior Court*, 436 U.S. 84, 97–98 (1978) ("We therefore see no basis on which it can be said that appellant could reasonably have anticipated being 'haled before a [California] court.'" (alteration in original) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977))); *Shaffer*, 433 U.S. at 216 ("[A]ppellants had no reason to expect to be haled before a Delaware court.").

27. Borchers, *supra* note 21, at 94; cf. *World-Wide Volkswagen Corp.*, 444 U.S. at 310 n.16 (Brennan, J., dissenting) ("Such a standard need be no more uncertain than the Court's test 'in which few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable.'" (internal citation omitted) (quoting *Kulko*, 436 U.S. at 92)).



*v. Neff*,<sup>28</sup> the Court held “that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory” and thus that “no State can exercise direct jurisdiction and authority over persons or property without its territory.”<sup>29</sup> Similarly, in *International Shoe*, the Court referred to limits on the jurisdiction of states within “the context of our federal system of government.”<sup>30</sup> Later cases took up the banner in slightly more detail, arguing, for example, that the Framers intended the states to retain “the sovereign power to try causes in their courts,” and that “[t]he sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.”<sup>31</sup> *McIntyre* is but the latest case to adopt some form of this line of thinking.<sup>32</sup>

The idea here is that a state could use the operation of the Full Faith and Credit Clause to efface the borders of its sister states and threaten their authority.<sup>33</sup> By way of illustration, Full Faith and Credit requires that any final judgment rendered in New York be given the same effect in Connecticut.<sup>34</sup> Thus, were New York able to declare its courts open to the claims arising from any auto accident in Connecticut between Connecticut residents, New York could effectively undermine Connecticut’s ability and right to determine causes of action within its borders. Limits on the personal jurisdiction of one state may thus be seen as protecting other states from encroachment. Or to put the point more sharply, personal jurisdiction is the constitutional equivalent of Las Vegas’s trademark advertising campaign:<sup>35</sup> what happens in state x, stays in state x.

Federalism is one of the stronger rationales offered for limits on the personal jurisdiction of state courts. However, a problem with conceptualizing federalism as a limit on state court jurisdiction is that it neglects to provide any account of the individual interests at stake. There is nothing in the concept of states or sovereignty that can tell you why it is inappropriate or appropriate to exercise coercive powers *on individuals* themselves. Because it neglects this important aspect, federalism is difficult to reconcile with the personal jurisdiction doctrine

28. 95 U.S. 714 (1878).

29. *Id.* at 722 (citing JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19–20 (2d ed. 1841); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 110–11 (George Grafton Wilson ed., William S. Hein & Co. photo. reprint 1995) (Richard Henry Dana, Jr. ed., 1866)).

30. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

31. *World-Wide Volkswagen*, 444 U.S. at 293.

32. *See J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (plurality opinion).

33. *See* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 567–68 (2008).

34. *See* U.S. CONST. art. IV, § 1.

35. *See* VISIT LAS VEGAS, <http://www.visitlasvegas.com> (last visited Feb. 15, 2012) (“What happens in Vegas, stays in Vegas.”).

as it exists in the case law,<sup>36</sup> as it is located in the Constitution,<sup>37</sup> and as it is interpreted procedurally.<sup>38</sup>

Federalism can explain limits on states' extraterritorial assertions of jurisdiction in certain paradigmatic cases. As in the example above, it is clear that the courts of New York should not be allowed to unilaterally substitute for the courts of Connecticut. However, federalism cannot explain other limits. In *World-Wide Volkswagen*, the defendant car dealership and regional-distributor sold an Audi to a family in New York, the gas tank of which exploded while they were traveling through Oklahoma.<sup>39</sup> The injured family members filed suit in Oklahoma state court.<sup>40</sup> But because the defendants had no other connection with Oklahoma (they did business solely in New York's tri-state area), the Court held that the Due Process Clause prevented Oklahoma's assertion of jurisdiction<sup>41</sup>—a result that cannot be attributed to concerns about federalism and interstate sovereignty. It is difficult to argue that Oklahoma was transgressing the interests of New York by adjudicating a products liability claim resulting from an explosion on its highways. Worries about sovereignty are similarly difficult to reconcile with the reasoning in cases involving sovereign governments.<sup>42</sup>

If notions of federalism and state sovereignty are to play a critical role in the future of personal jurisdiction, they will either have to be tied to individual interests, or the doctrine will have to undergo substantial change.

### 3. *Benefaction and Fair Play*

One promising but underdeveloped idea revolves around the benefits that are enabled by coercive state action. Often known as “fair play,” the suggestion that the election of benefits to a defendant can legitimate jurisdiction over that defendant has made appearances in most personal jurisdiction cases. For example, in *McIntyre*, the Court repeatedly emphasized that “the exercise of

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36. See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (discussing limits on personal jurisdiction as limited solely by the individual rights conferred in the Due Process Clause of the U.S. Constitution).

37. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (“Personal jurisdiction, of course, restricts ‘judicial power not as a matter of sovereignty, but as a matter of individual liberty,’ for due process protects the individual’s right to be subject only to lawful power.” (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982))).

38. Individuals can waive objections to personal jurisdiction. See FED. R. CIV. P. 12(h)(1).

39. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980).

40. *Id.*

41. *Id.* at 298–99 (quoting *Int'l Shoe*, 326 U.S. at 319).

42. If concerns about sovereignty truly motivated limits on personal jurisdiction, one might expect it to be an especially acute issue when defendants in foreign countries are involved. Yet the interests of foreign governments are barely mentioned. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114–16 (1987) (noting the international interests at play but providing minimal discussion and analysis); *infra* Part I.D.

judicial power is not lawful unless the defendant ‘purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’”<sup>43</sup> Why does seeking the benefits and protection of the laws legitimate jurisdiction? Answering this question may be pivotal to the future of personal jurisdiction.

States provide certain affirmative goods and benefits, most of which redound to the benefit of those who are territorially located in the state.<sup>44</sup> For example, the creation of traffic rules and the enforcement of those rules is a benefit to those who travel within the state or conduct commerce within the state. And to the extent that the coercive enforcement of traffic laws is necessary to the provision of those benefits, those who do benefit can have no in-principle objection to the enforcement of those laws. After all, benefaction is a relative concept and to even call something a benefit is to admit that, on the whole, it is better than not. Otherwise it would not be a benefit! It follows that the necessary conditions for a benefit, in our case some level of enforcement, must also be on the whole beneficial since, *ex hypothesi*, they enable something that is altogether beneficial.

Critically, even persons located extraterritorially may benefit from the laws of a state. An extraterritorial merchant who sends goods into the state as part of the conduct of his business also benefits from the conditions the state has enabled. To the extent, then, that the enforcement of some law (including against the merchant) is necessary in the enablement of those benefits (e.g., the social conditions enabled by product liability torts), the merchant can have no objection to coercion since, *ex hypothesi*, he benefits.

The above sketch is a rough but promising direction for the political justification of personal jurisdiction. It is, of course, subject to counterarguments and examples. Consider, for example, Randy Barnett’s strongest counterexample:

To better appreciate why the nonconsensual receipt of benefits cannot be the source of a duty of obedience, imagine a very generous master who provides all essentials and even a degree of choice or freedom to his vassals—or house slaves—which they nevertheless are unable to refuse. Are the slaves of sufficiently bounteous masters morally obligated to obey them? What is the problem with this entire

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43. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2785 (2011) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); *see also Asahi*, 480 U.S. at 109 (“Minimum contacts must have a basis in ‘some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’” (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985))).

44. Because such goods redound as a merely contingent matter (i.e., they are not by definition territorial), fair play avoids problems with circularity. *See generally* Lea Brilmayer, *The William B. Lockhart Lecture, Consent, Contract, and Territory*, 74 MINN. L. REV. 1 (1989) (arguing that territoriality and not consent explain exercises of jurisdiction).

line of argument? The obvious answer is that what is lacking is the consent of the slave.<sup>45</sup>

An even more obvious answer is that slavery bears absolutely no necessary relationship to the provision of benefits. In stipulating that having a generous master is a benefit to slaves, presumably Barnett's presupposed counterfactual is one where the slaves have an abject and avaricious master. But in either situation, the slaves are slaves, so the benefits Barnett mentions could not possibly be thought to justify slavery.

Another counterargument seizes on causality. What does it mean to say that a merchant benefits? Or, in other words, what causal connection must obtain between a merchant and events in the forum state such that jurisdiction is proper? Because notions of causality are an issue implicated under every theory of political justification, they represent a further frontier for personal jurisdiction.

### B. Causality

In some cases, it is clearly possible to say that the defendant's actions had the requisite causal connection with events in the forum state. For example, a Massachusetts domiciliary who drives into Texas and recklessly causes a traffic accident in Dallas took actions (causing the traffic accident) that are sufficiently connected to Texas to give Texas jurisdiction.<sup>46</sup> Or more generally, challenges are rare in cases where the defendant enters the forum state and engages in legally culpable conduct there, causing injury.

In other cases, it is clear that the defendant's actions do not have the requisite causal connection. In *Goodyear*, the foreign defendants had no connection with North Carolina except to the extent that a North Carolina resident was allegedly killed by one of their defective tires in France, and to the extent that a very small number of their tires, none of the type involved in the accident, were distributed by other Goodyear affiliates in North Carolina.<sup>47</sup> *Goodyear* thus represents one end of the spectrum: the defendants' actions clearly did not have the requisite causal connection with North Carolina.<sup>48</sup>

That *Goodyear* was even litigated, however, is instructive. Personal jurisdiction cases where the defendant remains outside the state but takes actions having an impact in the state are legion. The most common fact pattern involves a business that manufactures or sells an allegedly defective product outside the

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45. Barnett, *supra* note 10, at 135.

46. See *Calder v. Jones*, 465 U.S. 783, 789 (1984) (citing *World-Wide Volkswagen*, 444 U.S. at 297–98; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971)) (holding that jurisdiction is proper in the state that “is the focal point both of the story and of the harm suffered” based on the effects of the defendant’s conduct in that state).

47. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851–52 (2011).

48. See *id.* at 2857.

forum, which somehow finds its way into the forum where it causes loss or injury.<sup>49</sup> This is the familiar “stream of commerce” problem.<sup>50</sup>

In such stream of commerce cases, how is causality to be assessed? Every legal subject deserves some sort of realist treatment, and in personal jurisdiction cases there is no stronger candidate than the issue of causality. All of which is to say that there is no formal answer to hard questions of causality. Rather, the decision as to whether a defendant caused an injury in stream of commerce cases may be mediated in part by aims of personal jurisdiction.

For example, in every stream of commerce case, the defendant will have caused the accident in a but-for sense: but for the manufacture, distribution, or sale of the product that caused the injury, the injury would not have occurred. But stream of commerce cases are tricky precisely because there are strong intuitions that but-for causality, in and of itself, is insufficient for jurisdiction. Justice Kennedy picked up on the general form of this intuition in rejecting foreseeability as a causal criterion in *McIntyre*:

The owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country. . . . [As a result of which,] the farmer could be sued in Alaska or any number of other States’ courts without ever leaving town.<sup>51</sup>

Focusing the jurisdictional inquiry on causality in the strict, but-for sense would likely have the undesirable consequence of opening up manufacturers and distributors of products to the jurisdiction of any state in which their goods ultimately end up, however random.<sup>52</sup>

Nor do other formulations of causality prove particularly salutary. Foreseeability, depending on how it is defined, would simply reproduce the results of but-for causality since it is foreseeable that almost anything that enters the stream of commerce could start in Florida and end up in Alaska.<sup>53</sup> Or, to reference another famous personal jurisdiction case, it is not hard to foresee that

49. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105–06 (1987) (describing such a factual scenario).

50. See, e.g., *id.* at 112 (discussing stream of commerce). Stream of commerce cases have been the bread and butter of personal jurisdiction scholarship for years. See, e.g., Diane S. Kaplan, *Paddling up the Wrong Stream: Why the Stream of Commerce Theory Is Not Part of the Minimum Contacts Doctrine*, 55 BAYLOR L. REV. 503 (2003).

51. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011) (plurality opinion).

52. The undesirability of this outcome is, of course, contestable. The point is that many, including the Court in *J. McIntyre*, and the present authors, hold strong intuitions suggesting its undesirability. See *id.* Also note that manufacturers and distributors could pursue counterfactual, causality defenses: e.g., “even if I hadn’t distributed the product, another would have.” But the possibility of litigation over such defenses only reinforces our point: the specter of the attorneys’ fees that would arise from such attempts to predict past futures is undesirable indeed.

53. See *J. McIntyre*, 131 S. Ct. at 2790 (plurality opinion).

a car sold in New York may be driven through another state, like Oklahoma.<sup>54</sup> The harsh results foreseeability might have for defendants could be lessened by a move to probability or predictability, but that presents an equally intractable inquiry: what level of probability is the right one? Ninety percent? Eighty percent? And more importantly, what criteria would one use to decide the correct probability?

The point is that there are different formulations of causality available and the choice among them must be guided by functional, rather than formal, considerations. Even a formal category that could in theory be made precise,<sup>55</sup> likely probability, requires functional considerations to decide where to draw the line.<sup>56</sup> Thus, the connection between political justification and causality becomes apparent: deciding when defendants who sell goods into the stream of commerce in Florida should be subject to the jurisdiction of Alaska would be substantially easier if we knew what liberty interests were at stake more generally.

But critically, the question of political justification need not be resolved in order to make some progress on issues of causality. A clearer understanding of some basic policy considerations would be felicitous.

To foreshadow one possible policy contribution: an overly abstemious understanding of causality, one that limited the inquiry only to the literal actions of the defendant, would allow the complexities of modern economies to shield defendants, and perhaps intentionally so. For example, if all that matters are the literal actions of a defendant that performs all of its actions in state *x* (e.g., is headquartered in state *x*, designs in state *x*, manufactures in state *x*, and sells its products to distributors in state *x*), then such a defendant could be immune from suit in state *y* even if all of its products were sold (by distributors) to end users in state *y*. Corporations could prevent liability in states where their products are most popular, and to the extent that corporate formalities were intact, corporate veil piercing would offer no solution.

In contrast, an overly broad notion of causality could subject defendants to suit in a state to which they had only a tangential connection, as would have happened in *Goodyear*. A clearer understanding of these policy considerations would appeal to both courts and commentators. But our point is merely that clearer functional considerations need to be articulated in order to generate a more comprehensive grasp of the issues surrounding causality in personal jurisdiction cases.

54. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 297 (1980).

55. We say “in theory” because, given sparse data, the statistical feats involved in determining that a car sold in New York will end up in Oklahoma are formidable.

56. Similarly, using a category like knowledge would be problematic: if an actual showing of knowledge were the required casual connection, then defendants might shield themselves from liability through studied ignorance of the destination of their products. If some other form of knowledge is required (e.g., constructive knowledge), then functional considerations would be needed to articulate its contours.

### C. Symmetry

This set of questions starts with the observation that the query “which party should get his/her choice of forum?” is roughly symmetric. If the forum exercises jurisdiction, then the defendant must travel to the forum to litigate; if the forum does not exercise jurisdiction, then it is the plaintiff that must travel.

This simple symmetry has sometimes been overlooked. Judges or academics who are “plaintiff oriented”—that is, they view limitations on personal jurisdiction as an irrational nuisance—tend to see the deprivation of a forum as a serious burden: whatever values can be realized by the lawsuit are best enabled by giving plaintiffs their choice of forum and are significantly hindered by limiting that choice.<sup>57</sup> Thus, holding that plaintiffs should not be able to sue in their chosen forum is tantamount to saying that they should not be able to sue anywhere at all. This plaintiff-oriented view is often conjoined with the observation that litigating in a distant forum is, under modern travel conditions, not such a great imposition on defendants.<sup>58</sup> Proponents of this point of view tend not to address the fact that modern travel conditions are as helpful to plaintiffs as to defendants, and that defendants are just as inconvenienced by an adverse jurisdictional ruling as plaintiffs are.<sup>59</sup>

But, the voices on the other side sometimes make the same mistake. Defendant-oriented judges and scholars treat defendants as entitled to view state lines as serious limitations of principle.<sup>60</sup> This is an important argument, but one that applies as well to plaintiffs. If plaintiffs cannot sue in their preferred state, it will be necessary for them to travel. Just as with defendants, this is not a question of convenience only; it is also a question of principle because plaintiffs must submit themselves to the authority of a sovereign with which they have not

57. See, e.g., *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (“California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable.”); Borchers, *supra* note 21, at 99 (“Perhaps there are some cases in which a defendant is put to the test of defending or defaulting, and it is economically rational for the defendant to make a motion to dismiss for lack of personal jurisdiction. This much, however, should be clear: if there are such cases, they are few and far between. Such a motion should require a defendant to show a practical inability to defend. Beyond that, a defendant must show the availability of some other forum in which the plaintiff can meaningfully pursue the claim.” (footnote omitted)).

58. *McGee*, 355 U.S. at 223.

59. In some respects, of course, defendants are worse off than plaintiffs; for example, plaintiffs are more likely to have access to lawyers on contingent fees, and they also have the first pick in a case where there is more than one forum that meets due process requirements.

60. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion) (“[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.”); Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385, 433 (1998) (taking the argument one step further by suggesting that to truly protect defendants from litigating in an inconvenient forum the analysis should “be concerned with factors such as a defendant’s wealth and the distance between the court and the defendant’s home”).

voluntarily aligned themselves. Whether one sees the question in terms of sovereignty or convenience, the basic question is symmetric.

It is no response to say that due process protects defendants and not plaintiffs. The language of the Due Process Clause seems at first to support this distinction; what is prohibited is deprivation of property, as opposed to the state failing to provide a forum.<sup>61</sup> But plaintiffs have property rights in their causes of action, and these are protected by due process to almost as great a degree as the property rights of defendants. *Phillips Petroleum Co. v. Shutts*<sup>62</sup> makes this conclusion explicit: “a chose in action is a constitutionally recognized property interest possessed by . . . plaintiffs.”<sup>63</sup> And while *Phillips Petroleum* suggests that *class action* plaintiffs have less at stake than *class action* defendants by virtue of the mechanics of class action litigation,<sup>64</sup> the scope of that reasoning *a fortiori* supports the idea that *individual* plaintiffs and *individual* defendants are symmetrically situated.<sup>65</sup>

The essential symmetry of the problem leads to what might be called the problem of “reciprocal contacts.” In the absence of compelling, principled reasons to privilege the jurisdictional choices of defendants over plaintiffs, or vice versa, it makes sense to ask not only whether the defendant has contacts with the forum, but reciprocally whether the plaintiff has connections with the alternative forum. From this point of view, the stay-at-home plaintiff has better chances to prevail in his or her home state than the plaintiff who interacted with the defendant in another state and then went to the forum. Again, another famous personal jurisdiction case, *World-Wide Volkswagen*, exemplifies the concept.<sup>66</sup>

Lack of appreciation for the problem of reciprocal contacts shows no signs of abating. For example, in *McIntyre*, the worry that local Florida farmers may

61. See U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

62. 472 U.S. 797 (1985).

63. *Id.* at 807 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

64. See *id.* at 808.

65. Every point made with regard to class action defendants applies to individual (but not class action) plaintiffs. “An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it.” *Id.* But similarly, jurisdictional considerations may force an out-of-state individual plaintiff to litigate in a distant forum, and he or she may be faced with the full powers of the forum State to render judgment against him or her. “The defendant must generally hire counsel and travel to the forum to defend itself from the plaintiff’s claim, or suffer a default judgment.” *Id.* But similarly, an out-of-state individual plaintiff must hire counsel and travel to the forum to prosecute his or her claim or suffer the inability to realize on that claim. The point is that every argument applied to defendants applies equally to *individual* plaintiffs.

66. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288–89 (1980). The Robinsons had substantial contact with New York, where they purchased their car, and Oklahoma, where the accident precipitating the suit occurred, while the defendants had no identifiable contact with Oklahoma other than selling the car to the Robinsons. *Id.* A reciprocal contacts analysis would thus identify New York as the appropriate forum. See discussion *infra*.



be subject to suit in Alaska<sup>67</sup> should evince a reciprocal concern about local, Alaska-locked consumers who have to sue in Florida to vindicate their property rights. But it does not.<sup>68</sup> The problem of reciprocal contacts suggests three possible futures. First, courts or scholars could develop principled reasons to focus on defendants over plaintiffs; second, courts or scholars could develop principled reasons to prefer plaintiffs over defendants; or third, courts and scholars could begin to work reciprocal contacts analyses into problems of personal jurisdiction.<sup>69</sup> In the absence of a fully articulated political justification for personal jurisdiction (i.e., what liberty interest is really at stake in asserting jurisdiction),<sup>70</sup> the first two possible futures are likely to reproduce the rigidity that arises from existing arguments as to the proper balance the law should strike between plaintiffs and defendants. We are, therefore, most sanguine about the third possible future.

Where the defendant meets the “minimum contacts” threshold, it should not be necessary to ask, in addition, whether the plaintiff has contacts with the alternative forum. The question of reciprocal contacts may be influential, however, when the defendant has few contacts or they are of dubious significance. For example, in *World-Wide Volkswagen*, it probably mattered that the plaintiffs had connections with the place that the car was bought; the plaintiffs bought the car in New York, were en route to the southwest, and had their accident on the way.<sup>71</sup> Although the defendant would have had to travel if the case was brought in Oklahoma, the plaintiff would have had to travel if the case was held in New York. Equipoise between the interests of the plaintiffs and the defendants would thus require the plaintiffs to cross state lines and sue in New York. Depending on the proper treatment of foreign defendants for constitutional purposes,<sup>72</sup> a similar analysis could obtain a similar result in *Goodyear* where the (estates of the) decedents, represented by the plaintiffs, arguably had far more contact with France than the defendants did with North Carolina.<sup>73</sup>

#### D. *International Due Process*

We do not have a clear answer to the question of whether interstate cases and international cases should be treated the same for constitutional purposes. There are many cases that seem to apply international and interstate precedents interchangeably. *Goodyear*, for example, noted simply that the defendants

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67. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011) (plurality opinion).

68. See *id.* at 2791.

69. Of course, a fourth possible future is continued disregard for the problem of reciprocal contacts.

70. See *supra* Part I.A.

71. See *World-Wide Volkswagen*, 444 U.S. at 288.

72. See *infra* Part I.D.

73. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851–52 (2011).

contesting jurisdiction were foreign (international) subsidiaries of a U.S. parent (which did not itself contest jurisdiction) and that “[a] state court’s assertion of jurisdiction exposes defendants to the State’s coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment’s Due Process Clause.”<sup>74</sup> In the general jurisdiction context, *Goodyear* even suggested the interchangeability of domestic and foreign out-of-state defendants by parenthetical explanation: “A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them . . . .”<sup>75</sup> For the sake of clarity, we will use the word *foreign* in this discussion to refer only to non-U.S. persons or entities.

This general equivalence between foreign and domestic defendants in the personal jurisdiction context is punctuated by the occasional suggestion that foreign defendants are qualitatively different. For example, in rejecting California’s assertion of personal jurisdiction over a Japanese tire valve manufacturer, the Court in *Asahi* emphasized the distance between Japan and California as well the challenges of mounting an international defense: “The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.”<sup>76</sup>

Yet, the idea that foreign nationals acting in foreign countries can claim U.S. constitutional rights is both highly controversial and contrary to other Supreme Court precedent. Indeed, there are cases that would appear to hold that defendants who are not citizens of the United States have no due process rights when on foreign soil. These arise in a rather different context: the war on drugs and the war on terror.<sup>77</sup> A prime example here is *United States v. Verdugo-Urquidez*, which held that a Mexican citizen acting and living on Mexican soil could not invoke the Fourth Amendment’s restrictions on search and seizure, even when the search was conducted (with the permission of the Mexican government) by agents of the U.S. Drug Enforcement Agency.<sup>78</sup> By analogy,

74. *Id.* at 2850 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

75. *Id.* at 2851.

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

77. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 783 (2008) (determining that foreign citizens detained as combatants by executive order are entitled to habeas proceedings that “need not resemble a criminal trial” but must be sufficient to “conduct a meaningful review of both the cause for detention and the Executive’s power to detain”). Note that a critical difference between the chain of reasoning pursued in this Article and recent war on terror cases (particularly involving Guantanamo) is that in those cases, the actions may or may not have taken place on foreign soil and here, we are assuming that the relevant actions take place, and the defendants abide, unambiguously on foreign soil.

78. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261–62, 274–75 (1990) (“We think that the text of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritorially require rejection of respondent’s claim. At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.”).

*Verdugo-Urquidez* suggests that foreign nationals on foreign soil should not have due process rights under the Fourteenth Amendment.<sup>79</sup>

The two sets of cases are puzzlingly alike. Both due process/personal jurisdiction and the war on terror/war on drugs cases involve defendants who ask simply to be left alone. But of all the outstanding issues in personal jurisdiction, this is perhaps the most tractable: the treatment of foreign nationals in foreign countries really is an open question, highlighted by the doctrinal dissonance we have just described.

We suspect that the equivalence between foreign and domestic defendants in personal jurisdiction cases is best understood as an example of adaptive reuse. For a whole host of reasons—including basic nationalistic impulses, separation of powers and federalism in the conduct of trade and foreign affairs, and the economic efficiencies enabled both by foreign trade and the outsourcing of product components (e.g., the tire valves manufactured in *Asahi*)—the federal courts are wary of giving state courts jurisdiction over certain sets of foreign defendants, particularly when the state courts would lack jurisdiction over the defendants if they were merely located in another state. The Due Process Clause and the doctrines that have developed around personal jurisdiction are a highly convenient way to remove jurisdiction from state courts, even if doing so means ascribing due process protection to foreigners acting in foreign countries and creating dissonance with other areas of constitutional law.

Given the foregoing, two further sets of questions dare answers. First, is our adaptive reuse theory correct? If so, exactly what are the motivating reasons for extending due process to foreign defendants acting in foreign countries? And if not, what is the motivation for so extending due process?<sup>80</sup> It could be that personal jurisdiction is just a special, *sui generis* sub-category of constitutional right, but why would that be? The second set would work out the constitutional implications of extending due process rights to foreigners acting in foreign countries. What are the implications for other constitutional rights foreigners might claim? And are there other constitutional avenues that could substitute for personal jurisdiction in preventing state jurisdiction over certain sets of foreign defendants?

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79. See *id.* at 269, 274–75. The Court based its reasoning in *Verdugo-Urquidez* in part on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which held that foreign nationals were not entitled to habeas corpus under the Fifth Amendment while in custody in Germany. See *Verdugo-Urquidez*, 494 U.S. at 269 (quoting *Johnson*, 339 U.S. at 784). “If such is true of the Fifth Amendment [i.e., it does not apply to foreign nationals on foreign soil even when they are under U.S. control], which speaks in the relatively universal term of ‘person,’ it would seem even more true with respect to the Fourth Amendment, which applies only to ‘the people.’” *Id.* The Fourteenth Amendment’s due process protections similarly apply to “person[s].” See U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any *person* of life, liberty, or property, without due process of law . . .” (emphasis added)).

80. Note that it is no answer to contend that out-of-state foreign and domestic defendants just are similarly situated, because the exact same response could be given to the denial of constitutional rights in *Verdugo-Urquidez*.

## II. CONCLUSION

Personal jurisdiction is a rewarding area of scholarship precisely because many of the problems appear intractable but, in spite of appearances, are subject to refinement and contribution. In this Paper, we have limned what we think are the lodestars of personal jurisdiction over the next few decades: the need for a fully articulated political justification, causality, symmetry, and international due process. Robust development of any one of these issues would constitute a strong future, both for the doctrine of personal jurisdiction and for those of us who are jurisdiction-junkies.

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