PERSONAL JURISDICTION AND STATE REGULATORY OVERREACH: SOME POST-*FULD* OBSERVATIONS

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Even as personal jurisdiction in the United States has long since been unmoored from the strict view of territoriality that once animated it, the doctrine has remained persistently, puzzlingly intertwined with the question of the proper territorial scope of state power. And although the Supreme Court has occasionally appeared to disavow this connection, its most recent pronouncement on personal jurisdiction standards, Fuld v. Palestine Liberation Organization *reasserts it with unexpected force. In* Fuld*, the Court attempted to disentangle any state-specific restrictions incorporated into the Fourteenth Amendment's Due Process Clause from the (apparently more modest) limits on federal power under the Fifth Amendment's. That process led the Court to the surprising conclusion that minimum contacts analysis under the Fourteenth Amendment is, not incidentally but* centrally*, about maintaining the territorial balance of state power. In the wake of* Fuld*'s strong reaffirmation of personal jurisdiction's territoriality-policing component, this Article asks several questions: How did minimum contacts doctrine, created as a forceful rejection of the traditional territorial-formalist universe, come to encompass territorial concerns in the first place? What accounts for the persistent concern with the interstate balance of power that shows up so frequently in Supreme Court opinions, and how is this concern related, if at all, to personal jurisdiction's practical (but generally unacknowledged) effect of ensuring that courts do not apply forum law too broadly? And finally, given the decades' worth of suggestions by the Supreme Court that personal jurisdiction doctrine serves some anti-extraterritoriality function, how well does it fulfill that role? Ultimately, the Article argues that the extraterritoriality-restraining aspect of personal jurisdiction is a response to the lack of clear standards (or any animating theory) for when state courts should be permitted to use the application of forum law in litigation to influence out-of-state conduct. It concludes that, for the doctrine to better fulfill this purpose, it should acknowledge this function more directly and explicitly.*

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I.
INTRODUCTION

What does the question whether a court can exercise personal jurisdiction over a given defendant have to do with the extent to which the forum state can apply its legal rules to events outside its borders? At first glance, one might expect that the answer would be "nothing." Under prevailing international norms, judicial jurisdiction (a court's power over the defendant and subject matter in particular disputes) is generally considered to be an entirely separate category from prescriptive jurisdiction (a state's power to prescribe standards governing day-to-day conduct).[1] In the U.S. context in particular, the linkage of personal jurisdiction standards to the Due Process Clause presents obvious problems for viewing the doctrine as having anything to do with the federalism concerns of overlapping state regulation as opposed to the individual fairness the Clause is supposed to secure,[2] a fact that has not been lost on judges[3] and commentators.[4]

Nonetheless, even as personal jurisdiction in the in the United States has long since been unmoored from the strict view of territoriality

1. Restatement (Fourth) of Foreign Rels. L. of the U.S. § 401(a)–(b) (A.L.I. 2018) (defining and distinguishing between the two).

2. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) ("That [Due Process] Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.").

3. S*ee* Mallory v. Norfolk S. Ry.Co., 600 U.S. 122, 156 (2023) (Alito, J., concurring in part) (commenting on the incongruity of using the Due Process Clause as a mechanism to address federalism concerns given that "[t]he Due Process Clause confers a right on person[s], not States." (internal citation and quotation marks omitted)).

4. *See, e.g.*, Todd David Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 Wash. & Lee L. Rev. 655, 686 (2019) (describing widespread scholarly criticism of injecting federalism considerations into personal jurisdiction doctrine "on the ground that a matter of interstate federalism could not be an individual right under the Fourteenth Amendment that could be waived by defendants"); Patrick J. Borchers, *The Muddy-Booted, Disingenuous Revolution in Personal Jurisdiction*, 70 Fla. L. Rev. F. 21, 26 (2018) ("If one examines the Due Process Clause in operation in other contexts, it becomes clear just how estranged this sovereignty-infused, defendant-focused doctrine of jurisdictional due process is from its doctrinal family members."); Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 Case W. Rsrv. L. Rev. 769, 777 (2016) (noting, although critiquing, widespread scholarly views that "sovereignty should not be seen as an animating principle behind [personal jurisdiction] doctrine" and that the doctrine should instead rest on considerations such as "convenience, consent, or fair play"); Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 Iowa L. Rev. 1163, 1177 (2013) ("The peculiarity of using the 'due process clause as an instrument of interstate federalism' to protect *state* interests has not escaped scholarly note.").

that once animated it,[5] the doctrine has remained persistently, puzzlingly intertwined with the question of the proper territorial scope of state power.[6] And although the Supreme Court has at times appeared to disavow this connection,[7] its most recent pronouncement on personal jurisdiction standards, *Fuld v. Palestine Liberation Organization*,[8] reasserts it with unexpected force. *Fuld*'s nominal subject, to be sure, was *federal* authority to create a basis for personal jurisdiction over foreign defendants in U.S. courts in one rather specific context:[9] the breadth of Congress's power to subject two quasi-governmental entities to U.S. jurisdiction based on certain enumerated acts.[10] But in considering this issue, the Court necessarily had to disentangle any state-specific restrictions incorporated into the Fourteenth Amendment's Due Process Clause from the (apparently more modest) limits on federal power under the Fifth Amendment's.[11] That process led the

5. *See* Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 641 (2017) (noting that modern personal jurisdiction doctrine "has moved away from notions of territorial, sovereign limits and toward notions of fairness and litigant rights . . . .").

6. *See, e.g.*, World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980) ("[I]t acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.").

7. *See* Ins. Corp. of Ir., 456 U.S. at 702 ("[The personal jurisdiction requirement] represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."); Omni Cap. Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987) (quoting *Ins. Corp. of Ir.*, 456 U.S. at 702).

8. 606 U.S. 1, 25 (2025).

9. *Id.* at 9 (citing Fuld's lawsuit "invok[ing] the PSJVTA as the basis for personal jurisdiction").

10. *See id.* at 6. In 2019, Congress had passed a statute, the Promoting Security and Justice for Victims of Terrorism Act (the PSJVTA), that purported to subject alleged perpetrators of terrorism to personal jurisdiction in U.S. courts by construing certain statutorily enumerated activities as consent to jurisdiction in U.S. courts. One of these activities was making payments to people convicted of terrorist acts against U.S. nationals, another was maintaining an office or headquarters in the United States under certain circumstances. *See id.* at 8–9 (citing 18 U.S.C. § 2334(e)(1)). The question before the Court was whether a U.S. court's jurisdiction over defendants who had satisfied these jurisdictional prerequisites comported with limits on personal jurisdiction imposed by the Fifth Amendment Due Process Clause. *See id.* at 9. To do so, the Court necessarily had to consider the extent to which Fourteenth Amendment Due Process Clause constraints on personal jurisdiction in the state context did or did not apply to Congressional use of the commerce power to reach foreign defendants. As the Court ultimately reasoned, many such constraints in fact were relevant only to states because they dealt with considerations of interstate federalism. Thus, in delineating the scope of Fifth Amendment limits on congressional power, the Court ended up also providing an account of the federalist purposes served by Fourteenth Amendment curbs on states. *See id.* at 14–16.

11. *See id.* at 13 ("We have long recognized, however, that '[w]hile the language of [the two] amendments is the same,' . . . 'questions may arise in which different constructions and applications of their provisions may be proper.'").

Court to the conclusion that minimum contacts analysis under the Fourteenth Amendment is, not incidentally but *centrally*, about maintaining the territorial balance of state power.[12] The Court implies, that is, that the core goal of minimum contacts is to ensure that states do not extend their regulatory power too far, and that the defendant's due process rights are merely derivative of this aim—that is, that the measure of a due process violation under the minimum contacts doctrine is whether the defendant has been subjected inappropriately to state regulatory power. Given the Court's various prior disavowals of this purpose as well as the fundamental improbability of locating such an aim in due process restrictions, this unequivocal endorsement—albeit an indirect one[13]—of minimum contacts as a federalism-policing device comes as a surprise.[14]

To be sure, linkage of a sort between personal jurisdiction and state territorial sovereignty is longstanding; it is a truism that, for much of U.S. history, personal jurisdiction limits were closely linked to territorial conceptions of state power. Throughout the nineteenth century and even beyond, a formalist view of territory played an important role in legitimating exercises of a state's physical power over people and property. Thus first-year law students encounter, sometimes on their first day of class, the Court's famous pronouncements in *Pennoyer v. Neff* that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" while at the same time, "no State can exercise direct jurisdiction and authority over persons or property without its territory."[15] *Pennoyer*-era jurisdictional beliefs denied that, in most situations, any assertion of state judicial authority outside state borders could be fair or legitimate; proper jurisdiction thus rested on in-state service or the presence of property within state borders.[16] Although the *Pennoyer*-era conception of "territory" was a formalist one that bears significant

12. *Id.* at 14 (proclaiming that state personal jurisdiction standards, "and in particular, the requirement that a defendant have minimum contacts with the forum State" are "a consequence of territorial limitations on the power of the respective States" and are rooted in the principle that "[s]tate sovereign authority is bounded by the States' respective borders" (internal citation and quotation marks omitted)).

13. The Court, that is, reached the issue only in the context of deciding the separate question of the reach of Congress's power to subject foreign actors to personal jurisdiction in the United States as a whole.

14. *See supra* note 10 (outlining how the *Fuld* Court engaged in an analysis of the federalist purposes served by the Fourteenth Amendment in the course of explaining why normal minimum contacts principles do not apply to the federal government's powers to assert personal jurisdiction).

15. 95 U.S. 714, 722 (1877).

16. *See, e.g.*, Stephen E. Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249, 1289–91 (2017) (explaining *Pennoyer*'s doctrinal underpinnings).

differences from the way we think about territoriality today, it is nonetheless undeniable that nineteenth-century jurists saw territory and personal jurisdiction as being inextricably intertwined.[17]

It is equally a commonplace, however, that this era eventually came to an end. With the beginning of the modern personal jurisdiction regime in *International Shoe v. Washington*, the Court finally abandoned these formalist views and began assessing personal jurisdiction according to notions of fairness to the defendant,[18] a change sparked by the realization that "the strict territorialist framework for jurisdiction was no longer workable in . . . a century now dominated by both national corporate activity and expanded transportation and communication technologies."[19] *Shoe*'s minimum contacts framework has been met with praise,[20] heavy criticism (especially in recent years),[21] and debate over how it should be applied, but its split with *Pennoyer*'s territorial-formalist worldview has been rightfully seen as both sharp and definitive.[22]

At the same time, despite minimum contacts-based jurisdiction's apparent break with the territorialist past, the doctrine has recently been pressed into frequent service, if both sporadically and somewhat perplexingly, as a solution to a quite *different* territoriality-related question—the degree to which a state can, through litigation, apply its own regulatory rules to people and conduct outside its borders.[23]

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17. *See* Katherine Florey, *Resituating Territoriality*, 27 Geo. Mason L. Rev. 141, 160–64 (2019) (discussing *Pennoyer* as focusing on "the state's coercive power rather than its power to define policy through law," while modern conceptions of personal jurisdiction also view it as "a boundary on state regulatory authority").

18. 326 U.S. 310, 320 (1945) (suggesting that personal jurisdiction is proper when a defendant has "sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which [the defendant] has incurred there")

19. Paul Schiff Berman, *The Future of Jurisdiction*, 102 Wash. U. L. Rev. 1169, 1180 (2025).

20. *See* Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. Chi. L. Rev. 1589, 1594 (2018) (describing the "popular story" under which minimum contacts doctrine is the "hero" that "discarded the inconvenient formalist fictions of the territorial era").

21. *See, e.g.*, James P. George, *Running on Empty*: Ford v. Montana *and the Folly of Minimum Contacts*, 30 Geo. Mason L. Rev. 1, 5 (2022) (describing minimum contacts as an "unworkable maze of a test whose precedents are a repetitive patchwork of contradictions.").

22. *See id.* at 21 (noting that *International Shoe* introduced a "radical new test").

23. To be sure, the Court has never been precisely clear about the precise sort of territorial overreach it is worried about when it discusses personal jurisdiction as a mechanism for maintaining the federalist balance. As this Article will discuss, however, it seems fairly clear, by process of elimination if nothing else, that the Court's

The Court's discussion in *Fuld* falls squarely in this vein. Although some of the Court's language in *Fuld* sounds on the surface like a throwback to *Pennoyer*'s territorial formalism,[24] the Court's actual concern in *Fuld* was a far more modern one; the Court suggested that minimum contacts' real function is to prevent states from exercising authority over disputes in which they lack a "legitimate interest."[25] In other words, the Court's invocation of federalism and territoriality in cases like *Fuld* assumes (in contrast to the nineteenth-century territorial worldview) that states *do* have some legitimate authority over defendants and conduct outside their borders; the question they pose is, rather, just how broadly states can apply their decisional rules and the policy choices they embody before encroaching too far on the prerogatives of their neighbors.[26]

This concern with the extraterritorial projection of state *regulation* is a fairly recent one.[27] *Pennoyer*-era courts hardly troubled themselves with it, in part because, in a time when states drew primarily from shared common-law principles to resolve disputes, the modern idea of law as an expression of the particularized policy preferences of a single sovereign had not yet become a commonplace understanding.[28] By contrast, the question of how to balance the competing policy regimes of different states—which, in a mobile

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central concern is that states will adjudicate disputes and pronounce judgment on conduct that they have little legitimate interest in because it is unconnected or only loosely connected to the forum state. *See infra* Section III.C.

24. Fuld v. Palestine Liberation Org., 606 U.S. 1, 14 (2025) ("State sovereign authority is bounded by the States' respective borders.").

25. *Id.* at 18 (quoting Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty., 582 U. S. 255, 263) (noting that Court in both *World Wide Volkswagen Corp. v. Woodson* and *Bristol-Myers Squibb* stressed concerns over limiting State power).

26. *See* Florey, *supra* note 17, at 143–45 (explaining the differences between these two views of territoriality); Wendy Collins Perdue, *What's "Sovereignty" Got to Do With It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. Rev. 729, 730 (2012) [hereinafter *Sovereignty*] (noting that the elements of "sovereignty and due process" were "approached in *Pennoyer* quite differently than they are described in modern opinions").

27. The concern with excessive territorial projection of state legislation was seldom a concern until the early 20th century, both because there was less variation in law between states and because the prevailing understanding of choice of law was fundamentally different from the modern one. *See* Clyde Spillenger, *Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850–1940*, 62 UCLA L. Rev. 1240, 1259–60 (2015) (documenting changes in judicial concerns about the extraterritorial application of state law).

28. *See id.* at 1256–57 (enumerating several ways in which the current understanding of extraterritoriality differs from nineteenth-century ones, among them that law applied in U.S. courts is "positive law emanating from, and pertaining to, a particular sovereign state or nation[]" as opposed to a shared body of general law).

society, encompasses the question of how far beyond state borders those policy preferences should be permitted to extend—is now an increasingly important one. The Court's affirmation of the federalism dimension of personal jurisdiction in *Fuld* and other recent cases comes at a moment when increasing state-level polarization has made interstate extraterritorial regulation a far more urgent problem than it has generally been in the past.[29] Today, the policies of liberal and conservative states differ from each other along systematic lines on numerous issues: for example, whether and how to regulate certain ingredients used in prepared food,[30] whether to ban abortion or increase access to it, whether to require public investments to take account of environmental considerations, or the extent to which livestock should be subject to standards of humane treatment.[31] These questions spark public passions and inspire dedicated activists who wish to cement their views into law as widely as possible; public pressures, in turn, often drive state legislatures and courts to be more forceful in attempting to apply state law to far-flung events.[32] In such circumstances, as both judges[33] and commentators[34] have noted, some way of geographically allocating state power is necessary in order both to prevent states from clashing with each other and to allow individual actors to know whose legal standards will govern.

Yet as important as the question of how far state law should extend may be, the issue would seem, at least superficially, to have little to do with the personal jurisdiction of state courts. Both

29. *See* Katherine Florey, *The New Landscape of State Extraterritoriality*, 102 Tex. L. Rev. 1135, 1143–44 (2024) [hereinafter Florey, *Landscape*] (discussing increasing polarization among the states that make conflicts more likely).

30. *See* Nicholas Florko, *The States Are Going Full RFK Jr.*, The Atlantic (July 16, 2025), https://www.theatlantic.com/health/archive/2025/07/rfk-jr-maha-states-louisiana-texas/683557/ [https://perma.cc/H6JS-GJK7] (discussing actions taken by conservative-leaning states in response to align their policies with those of Robert F. Kennedy, Jr.); *see also* Grace Segers, *Blue States Are Teaming Up to Counter RFK Jr.'s Policies. Can It Work?*, The New Republic (Oct. 17, 2025), https://newrepublic.com/article/201881/blue-state-health-alliances-kennedy [https://perma.cc/4FSE-JJKH].

31. *See* Florey, *Landscape*, *supra* note 29, at 1145–51 (cataloging state differences on these issues).

32. *See id.* at 1144 (noting increased "zeal for a fight" to extend extraterritorial reach).

33. *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 154 (2023) (Alito, J., concurring in part) (noting that the Constitution "restricts a State's power to reach out and regulate conduct that has little if any connection with the State's legitimate interests").

34. *See, e.g.*, Jeffrey M. Schmitt, *Rethinking the Scope of State Power: Territorial Jurisdiction, Popular Sovereignty, and Extraterritorial Legislation*, Wm. & Mary L. Rev. (forthcoming 2025) (discussing that "each state should have the power to control policy within its borders without outside interference").

domestically[35] and internationally,[36] courts' judicial jurisdiction—the question of their authority to hear cases against particular defendants or involving certain subject matter—has been treated as a separate question from a sovereign's prescriptive jurisdiction—the degree to which a sovereign can apply its legal rules to particular conduct. In the United States, doctrine for the most part reflects this separation: Multiple doctrines and constitutional provisions collectively determine whether state legislatures can pass laws reaching conduct outside state borders, as well as the extent to which courts can apply forum law to out-of-state events,[37] while a single and wholly separate body of doctrine governs the constitutionality of personal jurisdiction.[38] Beyond this current doctrinal separation, it is also the case that, as a historical matter, these two sources of limits on state power have seldom directly engaged with each other. As noted, concerns about state courts' jurisdictional overreach are much older and arose at a time when, because of the influence of the general law and the uniformity of state choice-of-law approaches, disputes about the scope of state *regulatory* authority were relatively uncommon.[39]

35. *See* Restatement (Fourth) of Foreign Rels. L. of the U.S. § 481 (A.L.I. 2018) ("Except as provided in §§ 483–84 and § 489, a final and conclusive judgment of a court of a foreign state granting or denying recovery of a sum of money, or determining a legal controversy, is entitled to recognition by courts in the United States.").

36. To be sure, limits on application of forum law are exceptionally modest. *See* Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 592 U.S. 351, 368 (2021) (explaining that it is appropriate for the forum state to apply its own policies to out-of-state conduct when the forum has "significant interests at stake" that center on the protection of its residents).

37. *See* sources cited *infra* note 232 and accompanying text.

38. *See* Florey, *Landscape*, *supra* note 29, at 1168.

39. *See* Florey, *supra* note 17, at 144 (discussing shared general-law source of both state and federal common law and prevalence of "formalistic conflicts rules" that "sidestepped the more difficult question of regulation's geographical scope"). Uncommon, of course, does not mean nonexistent. In particular, questions of the extraterritorial effects of personal status created notable friction between states dating at least from the time of slavery; courts confronted questions such as, for example, whether a Mississippi man seeking to free his enslaved sons, an action prohibited under then-current Mississippi law, had successfully done so by relocating the boys to Ohio. *See generally* Shaw v. Brown, 35 Miss. 246 (1858). Later, the question whether an ex parte divorce obtained in a state with liberal divorce laws was valid in a more restrictive state created legal confusion and interstate friction for the better part of a century. *See* Michael J. Higdon, *If You Build It, They Will Come: The History and Enduring Legal Legacy of Migratory Divorce*, 2022 Utah L. Rev. 295, 324–25 (citing *Williams I* which, "established that states are required to recognize ex parte divorces obtained in a sister state whenever either party to the marriage established domicile in the divorce-granting state."). Personal status issues, however, have distinct qualities that make such conflicts more likely—they have immediate effects on

Although nineteenth-century notions of personal jurisdiction were preoccupied with territory, courts and scholars cared about territorial reach mostly in the sense that a state's physical control over people and property within state borders served to explain and legitimate its courts' exercises of power over defendants and cases.[40] Meanwhile, concerns about the excessive geographical extension of state law were relatively slow to emerge and germinated in a completely different line of cases.[41]

Little has changed in this respect today, even though our notions of territoriality have shifted significantly. Minimum contacts doctrine now ostensibly grounds the legitimacy of personal jurisdiction on "fair play and substantial justice" rather than raw territorial power,[42] but personal jurisdiction continues to operate separately from the many doctrines that speak more directly to the question of the proper geographical reach of states' legal rules, which are rooted in various constitutional provisions, particularly the dormant Commerce Clause.[43] Further, even as personal jurisdiction doctrine has become more complicated and sprawling, taking into account such factors as the deliberateness of the defendant's connections to the forum state itself[44] or the particular burdens that U.S. litigation might impose on small artisanal producers,[45] it continues to mandate an analysis that generally focuses on fairness and convenience to the

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daily life (indeed, this is a severe understatement in the case of slavery) and a lack of uniform treatment of them causes widespread, concrete legal problems (such as the validity of remarriage by someone considered divorced by one state but married in another). *See* Pennoyer v. Neff, 95 U.S. 714, 734 (1877) (recognizing the exceptional nature of personal status issues).

40. *See supra* note 16 and accompanying text.

41. *See supra* note 27 and accompanying text.

42. *See* Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945) (contrasting historical view with current one under which due process permits the exercise of jurisdiction even "if [the defendant is] not present within the territory of the forum" so long as the defendant has "certain minimum contacts with [the forum].").

43. *See* Berman, *supra* note 19, at 1189–90 (suggesting that the Court's concerns in personal jurisdiction cases would fit more naturally in the separate body of doctrine applying the dormant Commerce Clause).

44. *See* Walden v. Fiore, 571 U.S. 277, 290 (2014) (explaining that personal jurisdiction doctrine requires the defendant to have "formed a contact with the forum State," not merely a contact with a resident of that state).

45. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 891–92 (2011) (Breyer, J., concurring) (expressing concerns about the effects of broad personal jurisdiction on domestic producers such as an "Appalachian potter[] who sells his product (cups and saucers) exclusively to a large distributer, who resells a single item (a coffee mug) to a buyer form a distant State (Hawaii)," and on international producers such as "a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer . . . .").

defendant[46] and that takes little or no explicit account of the appropriateness of applying the law of the forum state.

Yet despite this formal separation between fairness-driven personal jurisdiction considerations and doctrines purporting to regulate the geographical scope of state regulatory authority, territory remains entwined with personal jurisdiction doctrine in at least two ways, one explicit and the other tacit and functional. First, the Supreme Court has, at various points, simply proclaimed the existence of a link between personal jurisdiction and restraints on state territorial overstepping—a connection it has made persistently, if sometimes to the puzzlement of scholars and in contradiction to its own past statements[47]— and that it reaffirmed once again with particular force in *Fuld*. Despite the surprising consistency with which this theme appears, however, the Court has done little to articulate *why* this connection exists, *what* it is that personal jurisdiction restrains, and *how* exactly it functions to allocate territorial power. This lack of explanation, coupled with the obvious incongruity of locating structural federalism concerns in the individual fairness-focused Due Process Clause,[48] has frequently led scholars to criticize the presence of this strain of argument in the doctrine at all.[49]

The second way in which personal jurisdiction and territorial concerns coincide has, in notable contrast, seldom been remarked upon by courts. But despite little judicial commentary on the issue, many scholars agree that personal jurisdiction seems to function in practice as a limit on state courts' application of forum law to geographically far-flung events.[50] In most contexts, that is to say, few

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46. *See* Berman, *supra* note 19, at 1173 (observing that, in personal jurisdiction doctrine from *Pennoyer* to the present, "the focus has not been on the connection between the case and the community, but on fairness to the defendant").

47. *See* Megan M. La Belle, *Personal Jurisdiction and the Fairness Factor(s)*, 72 Emory L.J. 781, 835–36 (2023) (noting that multiple scholars have found the Court's invocation of federalism and state sovereignty concerns in personal jurisdiction doctrine to be "inconsistent and, frankly, confusing").

48. S*ee* Mallory v. Norfolk S. Ry.Co., 600 U.S. 122, 156 (2023) (Alito, J., concurring in part) (commenting on the incongruity of using the Due Process Clause as a mechanism to address federalism concerns given that "[t]he Due Process Clause confers a right on person[s], not States." (internal citation and quotation marks omitted)).

49. *See* sources cited *supra* note 4.

50. Multiple scholars have noted this connection. *See, e.g.*, George Rutherglen, *Personal Jurisdiction and Political Authority*, 32 J.L. & Pol. 1, 4 (2016) ("If the plaintiff can get personal jurisdiction over the defendant, the plaintiff can often persuade the forum to apply its own law to the case."); Katherine Florey, *What Personal Jurisdiction Doctrine Does—And What It Should Do*, 43 Fla. St. U. L. Rev. 1201, 1239 (2016) [hereinafter Florey, *Personal*] (arguing that personal jurisdiction requirements minimize

meaningful constraints exist on state choice-of-law decision-making, leaving open the possibility that states will go too far in their application of forum law to out-of-state actors or conduct. Moreover, the Court has seemed generally uninterested either in strengthening these standards or in explaining their theoretical underpinning; indeed, it has appeared to signal its intent to get out of the business of policing state conflicts decisions in most circumstances.[51] In this context, personal jurisdiction doctrine steps in where choice-of-law limits do not, by requiring connections between the dispute and the forum state that make the application of forum law less likely to be an overstep.[52]

Abundant commentary has considered the relationship between personal jurisdiction and choice of law[53] and, separately, debated whether ideas of territoriality and federalism are relevant to personal jurisdiction.[54] In the wake of *Fuld*'s strong reaffirmation of personal jurisdiction's territoriality component, this Article aims to explore a related but more fundamental set of questions: How did it come to be that minimum contacts doctrine, created as a forceful rejection of the traditional territorial-formalist universe, began to encompass territorial concerns in the first place? What accounts for the persistent concern with the interstate balance of power that shows up so frequently in Supreme Court opinions, and how is this concern related, if at all, to personal jurisdiction's practical (but generally unacknowledged) effect of ensuring that courts do not apply forum law too broadly? And finally, given the Court's decades' worth of suggestions that personal jurisdiction doctrine serves some anti-extraterritoriality function, how well does it fulfill that role?

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scenarios where "states are . . . tempted to overextend the reach of their law."); Sterk, *supra* note 4, at 1165–66 (contending that many aspects of personal jurisdiction doctrine are "rooted in choice-of-law concerns"); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. Rev. 529, 572 (1991) [hereinafter Perdue, *Beetle*] (describing personal jurisdiction as a "handmaiden of choice of law" that is a "first cut" response to fears about state overreach); John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 Iowa L. Rev. 1015, 1050 (1983) (suggesting that the minimum contacts requirement helps to ensure that constitutional choice-of-law doctrine is not "overburden[ed]").

51. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 727–29 (1988) (emphasizing that the Court should not interfere with longstanding state conflict-of-laws practices); *see also infra* note 287 and accompanying text.

52. *See* Mallory, 600 U.S. at 154 (Alito, J., concurring in part) (noting that the Constitution "restricts a State's power to reach out and regulate conduct that has little if any connection with the State's legitimate interests").

53. *See id.*

54. *See* sources cited *supra* note 4.

Ultimately, the Article argues that the extraterritoriality-restraining aspect of personal jurisdiction is a response to the lack of clear standards (or any animating underlying theory) for when state courts should be permitted to use litigation to influence out-of-state conduct. And although personal jurisdiction is a highly imperfect vehicle for restraining the exorbitant application of forum law,[55] the absence of clear alternatives means that it is likely to continue to fulfill this role. Given that reality, acknowledging this aspect of personal jurisdiction could both help it serve this function more effectively and bring coherence to this often-perplexing aspect of the doctrine.

This Article proceeds in four Parts. Part II traces the ways in which territoriality and personal jurisdiction have been intertwined historically and how that relationship has shifted over time. Part III discusses the persistent appearance of federalism and territoriality concerns in modern personal jurisdiction case law. Part IV explores some of the theories that have been advanced about why personal jurisdiction has become a locus for extraterritoriality and horizontal federalism concerns and builds on them to advance its own, arguing that personal jurisdiction doctrine fills a void that case law does not otherwise effectively address by setting minimum standards of how related a dispute must be to a state for courts to apply forum law to resolve it. Part V assesses how well personal jurisdiction fulfills this function and explores implications of this argument for personal jurisdiction standards going forward. The Article concludes by arguing for a more particularized and explicit consideration of the actual role that extraterritorial-regulation concerns play in personal jurisdiction doctrine.

II.
TERRITORIALITY, OLD AND NEW, AND PERSONAL JURISDICTION DOCTRINE

Personal jurisdiction and territory have long been intertwined; indeed, personal and in rem jurisdiction are sometimes referred to jointly as the court's territorial jurisdiction,[56] and nineteenth-century views of personal jurisdiction generally focused narrowly on the court's territorial power. Even today's more forgiving personal jurisdiction standards are inescapably territorial, centering on the defendant's connections with or effect on a particular place. At the

55. *See infra* Part V.

56. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 5 cmt. a (A.L.I. 1982) (stating the scope of personal jurisdiction and reaffirming "the rules regarding territorial jurisdiction").

same time, "territory" and "territoriality" can mean many things, and both the common understanding of territory and its role in personal jurisdiction doctrine have changed dramatically over time. This Part contrasts *Pennoyer*-era territorial formalism, which functioned as a justification for exercises of coercive state power, with minimum contacts-based jurisdiction, which—at least in its initial iterations—abandoned these formalist ideas and suggested that the location of litigation or activity should be relevant only insofar as it bears on fairness to the defendant. Finally, this Part differentiates both historical views of personal jurisdiction from current issues of territoriality, which focus on maintaining an appropriate geographical balance of regulatory power among states.

A. The Territorial-Formalist Framework

Historically, personal jurisdiction was intimately connected to territory, but in a manner that has ceased to be particularly relevant today. For nineteenth- century commentators, the territorial element of personal jurisdiction doctrine was highly focused on legitimacy, which served to explain why a state should have the ability to coerce an unwilling nonresident defendant into court.[57] Many commentators agreed that the state's physical power over people and things within its borders created this ability. For early nineteenth-century commentators, for example, the reach of process into other states was an intolerable overstep not principally because it inconvenienced the defendant but because the very notion of states asserting power outside their borders was inherently illegitimate.[58]

These beliefs were standard long before the Fourteenth Amendment became law. In the early nineteenth century, state courts frequently assessed the propriety of personal jurisdiction in deciding whether to enforce sister-state judgments.[59] After some uncertainty

57. *See* Florey, *supra* note 17, at 161 (describing how the legitimacy of jurisdiction comes from the state's ability to physically take custody of a defendant).

58. *See* Jesse M. Cross, *Rethinking the Conflicts Revolution in Personal Jurisdiction*, 105 MINN. L. REV. 679, 685 (2020) (suggesting that *Pennoyer*-era doctrine involved "draw[ing] a circle around the territory of the state" then holding that only "actors that intrude into that circle . . . could be justifiably subject to state legislative or judicial authority"). *See also* Florey, *supra* note 17, at 162–64 (summarizing *Pennoyer*-era views in similar terms).

59. *See* Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 278–79 (1990) (stating that state courts "guarded certain aspects of state sovereignty held before ratification" by "engrafting an exception onto the full faith and credit clause that, in effect, retained the common-law doctrine of territorial jurisdiction").

about whether this practice was permissible, the Supreme Court endorsed it in the 1850 case *D'Arcy v. Ketchum.*[60] Of course, assessing whether a court had validly obtained personal or in rem jurisdiction required an understanding of what proper jurisdiction actually was. Courts at the time were clear on this question: Valid *in personam* jurisdiction required that the defendant "either consented to personal jurisdiction or was served while physically present in the forum."[61] In rem and quasi in rem jurisdiction likewise required the physical presence of property within the state.[62]

This focus on the territorial nature of power was rooted in the general law, which was reworked as a distinctive body of law by American judges.[63] Strict territoriality had symbolic importance, affirming states' sovereignty and independence at a time when "the power of the federal government was not fully established and the relationship of the federal government to the states was not well-defined."[64] The requirement of in-state service reinforced the broader belief that jurisdiction was legitimate only when founded on the state's physical power over the defendant's person.[65] In addition to these largely abstract considerations, courts also looked at the issue more pragmatically, believing that strict territorial

60. *See* 52 U.S. (11 How.) 165, 176 (1851) (holding that judgment rendered without personal jurisdiction need not be enforced in another state).

61. Jacobs, *supra* note 20, at 1595.

62. *See* Charles W. "Rockey" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 Fla. L. Rev. 387, 391 (2012) (explaining that in rem jurisdiction, like in personam jurisdiction, rested on a "state's power with regard to its territorial boundaries").

63. *See* Jay Conison, *What Does Due Process Have to Do With Jurisdiction?*, 46 Rutgers L. Rev. 1071, 1087 (1994) (discussing the general law as "vitally important in the nineteenth century and . . . vital to the development of the modern law of jurisdiction").

64. Drobak, *supra* note 50, at 1022. *See also* Kogan, *supra* note 59, at 279 (noting that this category of cases represented an "opportunity to sketch the outlines of a vision of interstate relations under the Constitution.").

65. *See* Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine,* 78 Yale L.J. 52, 94 (1968) (observing that "common law courts neither exercised nor believed they could exercise jurisdiction in personal actions without either physical custody of the defendant or an appearance by him"); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 Tex. L. Rev. 689, 693 (1987) (describing nineteenth-century views that "the state [must] have immediate physical power over the defendant or her property as a predicate to exercising jurisdiction" and the "clear rationale for [this] rule: a state has police power over persons and property within its borders, and judicial actions constitute an exercise of that police power"); McDonald v. Mabee, 243 U.S. 90, 91 (1917) (equating "service upon the person" with an exercise of the state's "physical power").

limits on state power promoted fairness by protecting out-of-state defendants from home-state bias[66] and from the lack of notice that might ensue were the requirement of in-person service to be dispensed with.[67]

Yet one issue notably missing from early cases was any concern that states might inappropriately project their regulatory policies to reach conduct in neighboring states. This was largely because, in many situations, courts took their decisional rules from the general law, a law that "existed by common practice and consent among a number of sovereigns" rather than being "attached to any particular sovereign."[68] Because the bulk of the decisional law applied by courts drew from interjurisdictional consensus rather than being seen as the expression of an individual sovereign's policy preferences, courts were mostly untroubled by the idea that state courts might be tempted to extend forum law too far. Although this view would begin to change after the Civil War, "antebellum jurists rarely expressed concern over the possibility that the application of municipal law by the forum amounted to impermissibly giving extraterritorial effect to that law[.]"[69]

In 1878, *Pennoyer v. Neff*[70] famously suggested for the first time that limits on personal jurisdiction could be challenged by means of the Due Process Clause of the newly ratified Fourteenth Amendment,[71] while also stressing that in-person, in-forum service was an indispensable prerequisite to proper *in personam* jurisdiction in nearly all cases.[72] In so doing, *Pennoyer* strongly affirmed the territorial-formalist perspective on personal jurisdiction—which centered on the idea that "every State possesses exclusive jurisdiction and

66. *See* Kogan, *supra* note 59, at 283 (discussing courts' concerns about possible bias toward nonresidents); Hall v. Williams, 23 Mass. (6 Pick.) 232, 240 (1828) (expressing concern over citizen being bound by judgment in faraway state of which he received no notice).

67. *See id.*

68. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984).

69. *See* Spillenger, *supra* note 27, at 1259–60.

70. 95 U.S. 714, 733 (1877).

71. See Sachs, *supra* note 16, at 1252–53 (explaining that the Due Process Clause of the Fourteenth Amendment "turned the presence or absence of jurisdiction, full stop, into a matter of constitutional concern," while general law dictated whether a state court actually had jurisdiction).

72. *See id.* at 1289–90 (discussing *Pennoyer*'s holdings that neither mailing process to out-of-State defendants nor internal publication of notice could accomplish the "official legal act" of personal service necessary for personal jurisdiction).

sovereignty over persons and property within its territory," while lacking authority to extend its process beyond it.[73]

Scholars have disagreed about whether *Pennoyer* developed,[74] resolved,[75] or merely restated a general consensus upon[76] the principles of territory and power on which it relied. In any event, although *Pennoyer* certainly rested on a robust notion of territorial limits, it was one fundamentally different from the ideas that the Court would later interject into cases like *World-Wide Volkswagen v. Woodson*.[77] The Court was not, that is, principally concerned with maintaining a flexible federalist balance of power or ensuring that states would only hear matters in which they were legitimately interested. Rather, it was reinforcing a view of state sovereignty that emphasized each state's unquestioned dominion within its borders and its absence of authority outside them;[78] federalism came into play only to the extent that the same rules were considered to bind all sovereigns and any violations of them by one state would necessarily constitute an impingement on the powers of others.

B. From Formalism to Fairness

How the territorial-formalist view eventually changed is a familiar story.[79] As interjurisdictional disputes became more common, the rigidity of the territorial-power approach became apparent. States wanted to secure their citizens redress against out-of-state corporations that might have bilked them or reckless drivers from

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73. *Pennoyer*, 95 U.S. at 722. *But see* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 293–300 (1956) (contesting the view that pre-*Pennoyer* notions of judicial jurisdiction focused so closely on the state's physical power to summon a defendant to court).

74. Geoffrey C. Hazard, Jr., for example, has argued that, in insisting that property be seized at the outset of the case for proper in rem jurisdiction to be present, the Court invented a "wholly novel" requirement. Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 269 (1965); *see also* James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 190 (2004) (noting, while departing from, the views of many scholars that *Pennoyer* developed new theories of jurisdiction).

75. *See* Ehrenzweig, *supra* note 73, at 308 (arguing that the question of in-state service and its underlying jurisdictional justification "remained unsettled" until *Pennoyer* helped to resolve them).

76. *See, e.g.*, Weinstein, *supra* note 74, at 191–99.

77. 444 U.S. 286 (1980).

78. *Pennoyer*, 95 U.S. at 722.

79. *See* Jacobs, *supra* note 20, at 1594 (recounting, while critiquing, the "popular story of personal jurisdiction").

other states who caused them injury.[80] The resulting patchwork of legal fictions that served as territorial workarounds began to fray until the Court finally replaced it with the comprehensive system of contacts-based personal jurisdiction first rolled out in *International Shoe v. Washington*, under which the Court famously authorized personal jurisdiction over defendants who had "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[81]

As a result, fairness concerns—to be sure, arguably an embedded limit on personal jurisdiction from the beginning[82]—became for a time the primary focus of personal jurisdiction doctrine.[83] In many ways, this is unsurprising; the act of summoning an unwilling defendant before a judge would seem to logically give rise to questions about the justness of doing so. If a court's command to appear is arbitrary or the costs of doing so unduly onerous, the proceeding may impose an unjust or excessive burden on the defendant.[84] Exorbitant exercises of personal jurisdiction may also be unfair in the sense that they undermine the quality or neutrality of the proceedings—if, for example, distance or expense prevents the defendant from properly mustering evidence, or if local bias makes the forum an inherently hostile one.[85] Place still matters in a fairness analysis, of course, on both sides of the equation: on the one hand, traveling to a distant or unfamiliar location may make the assertion of personal jurisdiction particularly burdensome to the defendant;

80. *See* Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. Ann. Surv. Am. L. 23, 42–43 (2018) (summarizing the mechanisms courts used and later critiques of them).

81. 326 U.S. 310, 316 (1945) (internal citation and quotation marks omitted).

82. *See* Effron, *supra* note 80, at 46 (arguing that the concept of notice went through a "great deal of doctrinal development" between *Pennoyer* and *Shoe*); Drobak, *supra* note 50, at 1023–24 (noting that early personal jurisdiction cases "[u]sually . . . commingled notions of fairness with the territorial theory of jurisdiction").

83. *See* Berman, *supra* note 19, at 1173 (arguing that tying personal jurisdiction to the Due Process Clause has made it so "the focus has not been on the connection between the case and the community, but on fairness to the defendant").

84. *See* Florey, *Personal*, *supra* note 50, at 1203 (one of the purposes of personal jurisdiction outlined by the Supreme Court is "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum.") (citation omitted).

85. *See* Ray Worthy Campbell, *Personal Jurisdiction and National Sovereignty*, 77 Wash. & Lee L. Rev. 97, 154 n.317 ("Expanding the choice of forums systematically disadvantages defendants positioning litigation[—]and the opportunity for making precedents[—]in particularly unfriendly forums."); Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 Hastings Const. L.Q. 441, 449–50 (1991) (nothing difficulties with obtaining tangible evidence and the testimony of witnesses across long distances.).

on the other, the defendant's deliberately forged connections with that place may make the need to submit to jurisdiction there both less surprising and more just.[86] Minimum contacts, at least in theory, made territory simply an ingredient of the overall analysis, not a justification in itself for the exercise of state power.[87]

Of course, one can also imagine how both the older concerns about legitimacy and the newer ones about fairness might become, in certain circumstances, intertwined with various sorts of interstate conflict. Suppose overreaching State A attempts to extend its power improperly outside its borders to summon defendants from State B into its courts, perhaps to benefit its resident plaintiffs. Such an action would raise legitimacy concerns; in attempting to overstep jurisdictional limits, State A is improperly encroaching on State B's sovereign interests in protecting its own citizens and hearing disputes in its own courts.[88] Meanwhile, it would also raise issues of fairness to the State B defendants, who (even assuming they had notice of the proceeding) would have lost the chance to have the case against them heard in a more familiar and convenient (and perhaps friendlier) setting.[89]

Notably, however, under both past and present views of personal jurisdiction, the connection between State A's overreaching in such situations and State B's *regulatory* interests seems less obvious.[90] That is to say, State A's aggressive exercise of power might be criticized on various grounds, but it is difficult to say that it is improperly displacing State B's *policy* preferences with its own. Any concerns about jurisdiction we have in this scenario likely center on the occurrence of the State A proceeding itself, not that the effect of the proceeding

86. *See* Florey, *Personal*, *supra* note 50, at 1206 (suggesting the requirement of purposeful availment in minimum contacts doctrine is rooted in conceptions of fairness).

87. *See* Kogan, *supra* note 59, at 371 (arguing that, although some "lurking" territorial considerations remain, "personal jurisdiction . . . appears on the surface to eschew any consideration of territorial boundaries and sovereignty").

88. *See* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. Davis L. Rev. 207, 266 (2014) (noting the existence of "non-regulatory state interests" that include "protecting citizens and visitors from harms suffered within the state and providing a convenient forum for . . . citizens injured by nonresidents").

89. *See* Campbell, *supra* note 85, at 154 n.317 (discussing concerns about exposing defendants to potentially hostile courts).

90. This would have been especially true in the early to mid-nineteenth century, when courts of different states would have applied roughly similar common-law doctrines in a large swath of cases. *See* Fletcher, *supra* note 68, at 1517–21 (explaining that state courts frequently relied on a general, rather than state-specific, common law).

will be to extend State A's law inappropriately.[91] The same would also seem to be true under newer views of the role of territory in personal jurisdiction, which focus on how the defendant's connections with the forum state establish expectations, familiarity, and reciprocal obligations[92]—an analysis in which the state's own regulatory interests would seem to have little role to play.

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91. This seeming lack of concern is also reflected in the fact that defendants subject to federal claims in state court are also entitled to minimum contacts protections. The operative concern in cases involving federal law cannot, for obvious reasons, be state regulatory overreach; it presumably centers instead on fairness issues involved in requiring the defendant to defend in a particular forum. Likewise, although federal courts follow state long-arm statutes in most cases, they do so only because of the command of Fed. R. Civ. P. 4(k)(1), not constitutional concerns about overreaching state law. Congress appears to possess the power to subject defendants to nationwide jurisdiction in federal court, even as to state-law claims. Congress has, for example, made nationwide jurisdiction available in federal court interpleader proceedings, which are typically rooted in state-law issues; in general, "[w]ithout any fuss, federal courts have assumed that the grant of nationwide jurisdiction here is constitutional." 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, 442 (2017). The different jurisdictional rules attached to federal claims in state court (which must, as a constitutional matter, satisfy minimum contacts standards) and state claims in federal court (where nationwide jurisdiction is constitutional if authorized by Congress) perhaps reflect remnants of territorial-formalist thinking under which, as Justice Scalia has observed, the notion of contacts substitutes for physical presence in the interstate context. *See Burnham*, 495 U.S. at 617–18 (1990) (plurality opinion) ("As International Shoe suggests, the defendant's litigation-related 'minimum contacts' may take the place of physical presence as the basis for jurisdiction.") Under this view, state courts, regardless of whether they are adjudicating state or federal claims, gain authority through the defendant's metaphorical presence through contacts; by contrast, the interpleader statute, which effectuates nationwide jurisdiction through nationwide service of process, relies on the defendant's more literal presence within the borders of the United States. The notion of "presence" in personal jurisdiction has, to be sure, fallen out of favor in the minimum contacts era; the *Int'l Shoe* Court itself notes that the word is "used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." *See Int'l Shoe*, 326 U.S. at 317. But in any event, whether the concerns at play have to do with territorial formalism or fairness, the rules regarding state claims in federal court and federal claims in state court seem to have been constructed without any thought of issues regarding the proper territorial scope of state law.

92. *See* Sterk, *supra* note 4, at 1165 ("[J]urisdictional rules protect an entity against defending itself in a forum likely to ignore the legal norms and rules the entity might reasonably expect to govern its legal affairs."); *id.* at 1166 ("[L]imits on the forum state's sovereign authority protect . . . the reliance interest of defendants who plan their behavior to conform to the regulatory scheme of the jurisdiction in which they act.").

C. Introducing a Sovereignty/Regulatory Focus

Despite the absence of any apparent connection under either the *Pennoyer* or *Shoe* approaches between personal jurisdiction and state regulatory authority, the Supreme Court has in recent decades suggested persistently, if sporadically, that personal jurisdiction doctrine incorporates a concern beyond the two classic functions of ensuring that state judicial power is exercised legitimately (the Court's historical preoccupation) and in a manner fair to the defendant (the Court's post-*Shoe* focus). That third function, the Court has indicated, has to do with maintaining the balance of state spheres of authority necessary to horizontal federalism. In the Court's puzzling yet lastingly influential words in *World-Wide Volkswagen*, personal jurisdiction "ensure[s] that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[93]

Although this language to some extent recalls the Court's rhetoric in *Pennoyer*, its animating concerns are quite different. To the *Pennoyer* Court, any exercise of state power outside state borders was simply illegitimate, full stop. This is clearly not the theory behind current doctrine, which permits the assertion of power over out-of-state defendants all the time in a variety of circumstances. The Court, then, seems to have something else in mind, although exactly what is unclear.

Compounding this ambiguity is the fickleness of Court's pronouncements on the subject. In the years after *World-Wide*, the Court's interest in horizontal-federalism concerns seemed to wane to the point of near-repudiation. In *Insurance Corp. of Ireland, v. Compagnie des Bauxites de Guinee*,[94] the Court appeared to shut down the federalism-focused elements of *World-Wide* more or less conclusively, setting forth as a common-sense proposition that the Due Process Clause protects "first of all an individual right"[95] and thus "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[96] The Court continued to rely on this reasoning in later cases, such as *Omni Capital v. Rudolf Wollf & Co.*[97]

More recently, however, the idea that personal jurisdiction doctrine polices the excessive projection of state regulatory power

93. World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980).

94. 456 U.S. 694 (1982).

95. *Id.* at 703.

96. *Id.* at 702.

97. 484 U.S. 97, 104 (1987) ("[The personal jurisdiction requirement] represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." (quoting *Ins. Corp. of Ir.*, 456 U.S. at 702)).

appears to have gained renewed ground. In *McIntyre v. Nicastro*, Justice Kennedy's plurality opinion reasoned that "if [a] 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."[98] A near-unanimous Court in *Bristol-Myers Squibb v. Superior Court*,[99] citing *World-Wide* among other cases, noted that personal jurisdiction is a "consequence of territorial limitations on the power of the respective States" and that in some cases "this federalism interest may be decisive."[100] Concurring in *Mallory v. Norfolk Southern Railway Co.*, Justice Alito—while recognizing the incongruity of locating federalism concerns in the Due Process Clause—also worried that an undue expansion of a state's personal jurisdiction over suits with little connection to the forum "may violate fundamental principles that are protected by . . . the very structure of the federal system."[101] Most recently, the Court in *Fuld v. Palestine Liberation Organization* forcefully returned to the federalism fold, describing the Court's focus on individual liberty in cases like *Insurance Corp. of Ireland* as merely an "occasional[] frame[]" that was "best understood" as being less about inconvenience than about the "individual's right to be subject only to lawful power," with "lawful" meaning within the scope of state sovereign authority.[102]

The Court, therefore, has intimated that personal jurisdiction plays some role in maintaining the horizontal-federalist balance, but it has failed either to articulate that interest clearly or to tie it to the Due Process Clause that ostensibly provides personal jurisdiction's constitutional anchor. Perhaps as a result, scholars have taken disparate positions on the degree to which federalism concerns should or do figure in personal jurisdiction analysis.[103] Before exploring possible normative stances on this issue, however, it is worth considering a couple of prior questions. First, how did a concern with maintaining

98. 564 U.S. 873, 884 (2011) (plurality opinion).

99. 582 U.S. 255 (2017).

100. *Id.* at 263 (citing Hanson v. Denckla, 357 U.S. 235, 251 (1958)).

101. 600 U.S. 122 (2023) (Alito, J., concurring in part and concurring in the judgment).

102. 606 U.S. 1, 17 (2025). This somewhat confused and circular formulation, abundantly criticized when Justice Kennedy first introduced it in *McIntyre*'s plurality opinion, seems directly at odds with what the Court actually said in *Insurance Corp. of Ireland*. *See infra* notes 138–45 and accompanying text.

103. *Compare* Allan Erbsen, *Impersonal Jurisdiction*, 60 Emory L.J. 1, 73–74 (2010) (critiquing courts' treatment of personal jurisdiction as a "separate enclave" from horizontal federalism issues), *with* Drobak, *supra* note 50, at 1047 (arguing that "the federalism theme in personal jurisdiction cannot be an independent restriction on the sovereign power of a court; otherwise, waiver would not be possible").

the federalist balance of power by ensuring that states do not "reach out" beyond reasonable limits become embedded into personal jurisdiction doctrine in the first place? And second, what precisely is the Court talking about when it speaks of a significant, perhaps determinative federalism interest?

II.
THE EMERGENCE OF "MODERN" TERRITORIALITY CONCERNS IN PERSONAL JURISDICTION

This Part traces the route by which personal jurisdiction doctrine, having forcefully rejected territorial formalism, nonetheless came to be bound up (even if only intermittently and inconsistently) with a new set of territoriality issues. For all their differences, that is, *Pennoyer* and *Shoe* were both largely unconcerned with the issue of regulatory overreach. Later minimum contacts cases, however, began to speak of personal jurisdiction doctrine as an important mechanism for maintaining the federalism balance—a position that appeared to encompass previously unexpressed concerns about the extraterritorial impact of state policy. This Part explores that evolution.

A. The Absence of Regulatory Overreach Concerns in Pennoyer *and* Shoe

Consider first the question of why personal jurisdiction might ever be said to have anything to do with federalism or extraterritoriality at all. As the previous Part discussed, one answer is that, in the nineteenth century, commentators believed that a state's physical power over people and property within its borders justified its exercise of authority over them.[104] This particular strain of territoriality, however, has long ceased to be a factor in the law, and even those who find some aspects of *Pennoyer*-era jurisdictional reasoning to be appealing have for the most part not advocated the return of territorial-formalist beliefs per se.[105] Notably, when the Court in *International Shoe* developed a new theoretical basis for the assertion of personal jurisdiction based on contacts, it specifically critiqued the *Pennoyer*-era belief that jurisdiction must be rooted in physical

104. *See* Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945) ("Historically the jurisdiction of courts to render judgment in personam [was] grounded on their de facto power over the defendant's person.").

105. *See, e.g.*, Sachs, *supra* note 16, at 1249–50 (arguing that, as conventions in international law and American practice evolve over time, "*Pennoyer*'s reasoning can be right without *International Shoe*'s outcome being wrong").

power, observing that the *capias ad respondendum* (a centuries-old British procedure under which the defendant was physically confined to ensure their presence in court and payment of any damages) had "given way to" methods of service not based on states' "de facto power over the defendant's person."[106]

Accordingly, *Shoe* lacked any mention of the federalism concerns that the Court would bring up in later cases. Rather, the Court's sole concern appeared to be fairness—the "fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[107] The term "federalism" and "sovereignty" do not appear a single time in the opinion.[108] Justice Black's separate opinion—while also containing little hint of horizontal-federalism concerns per se—critiqued the majority for focusing on "fair play and substantial justice" rather than deciding the case based on sovereign states' inherent power to "tax and sue those dealing with its citizens within its boundaries."[109]

It is notable that *Shoe*'s focus on fairness rationales was, in some ways, more consistent with earlier case law than the Court's later interjections of structural federalism concerns would be. After all, as the Court specifically observed in *Pennoyer*, a potential problem with more lenient personal jurisdiction requirements was that they were less reliably able to provide notice—a particular issue, of course, before the existence of modern communications—and thus would allow bad actors to make lawsuits "the constant instruments of fraud and oppression."[110] To be sure, this observation was less an independent justification for *Pennoyer*'s holding than an illustration of its broader rationale that the projection of state physical authority beyond territorial boundaries was an illegitimate act that might work multiple evils. Nonetheless, the same concern for notice occurs in other early personal jurisdiction cases,[111] and it is consistent

106. *Int'l Shoe*, 326 U.S. at 316.

107. *Id.* at 319. Interestingly, a decade prior to *International Shoe*, its main opinion's author, Justice Stone, had endorsed the idea that a state court's jurisdiction over a case suggested the propriety of applying forum law. *See* Alaska Packers Ass'n v. Industrial Acc. Com'n, 294 U.S. 532, 547–48 (1935) (stating that "[p]rima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted" unless "the conflicting interests . . . of the foreign state are superior to those of the forum").

108. The closest the Court comes to any mention of these concerns is a brief note that satisfaction of due process is considered "in the context of our federal system of government." *Int'l Shoe*, 326 U.S. at 317.

109. *Id.* at 323–24 (Black, J., concurring).

110. Pennoyer v. Neff, 95 U.S. 714, 726 (1877).

111. *See* Florey, *supra* note 17, at 159–60 (citing a case in which the court addressed the issue of notice in regard to state court jurisdiction over those who could be thousands of miles from the state in question).

with courts' linkage of personal jurisdiction issues to general-law norms, under which notice and proper authority to hale a defendant into court represented separate but sometimes overlapping requirements.[112] It is also worth noting that, despite its territorial-formalist rhetoric, *Pennoyer* also contained a note of pragmatism, suggesting ways by which courts could determine issues of personal status even as to those residing outside the state[113] or allow citizens to seek redress against out-of-state corporations[114] within the strictures of the framework *Pennoyer* imposed.

Pennoyer and *Shoe* thus differed sharply on one point—the extent to which a court's power must derive from its territorial control—but displayed a degree of common ground in their concerns about both fairness to the defendant and courts' practical ability to deliver relief on important issues. In any case, in neither opinion did the Court appear particularly troubled by federalism issues per se. The *Pennoyer* Court applied what it would have seen as standard international norms for legitimizing a court's exercise of authority over someone—norms that were rooted in territory, to be sure, but that nonetheless had little to do with the proper scope of sovereign *regulatory* power or with the particular context of U.S. federalism at all. *Shoe*, as noted, simply sidelined ideas of state sovereignty and federalism entirely. It would not be until significantly later that the idea of personal jurisdiction as a guardian of the interstate regulatory balance would come into play.

B. Early Mentions of Federalism in the Minimum Contacts Era

The first introduction of "new" territoriality concerns into minimum contacts doctrine appears to have emerged thirteen years after *Shoe*. In *Hanson v. Denckla*, the Court announced that, even in the minimum contacts era, personal jurisdiction restrictions were rooted in "territorial limitations on the power of the respective States." [115] Further, the Court linked this idea specifically to the minimum contacts standard, noting that "[h]owever minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State

112. *See* Sachs, *supra* note 16, at 1300.

113. *See Pennoyer*, 95 U.S. at 734–35 (noting that States retain power to adjudicate divorce proceedings between citizens and former citizens).

114. *See id.* at 735 (noting that states retain power to condition non-residents' business relationships with residents on appointment of in-State agent to receive process).

115. 357 U.S. 235, 251 (1958).

that are a prerequisite to its exercise of power over him."[116] In some ways, this passage simply reiterated what had already been clear: Minimum contacts had replaced territorial formalism as the basis for the validity of the court's authority. But by suggesting that minimum contacts did not have to do with burden per se but instead formed the basis for the legitimacy of the court's power over the defendant, the Court introduced an angle that was largely absent in *Shoe* itself.

What could account for this surprising turn just thirteen years after *Shoe*? To some extent, the Court's renewed stress on sovereignty and legitimacy may have been merely instrumental—a product of its wish to resolve the case in a particular way. A year prior to *Hanson*, the Court had decided *McGee v. International Life Insurance Co.*[117] Aside from involving a notably more sympathetic plaintiff,[118] *McGee* featured roughly similar circumstances to *Hanson* in that both cases rested on a defendant's single contact with the forum state.[119] Yet the Court purported to distinguish them based on a fairly technical ground[120] that one commentator has called "an obvious example of result-orientation."[121] Reorienting minimum contacts doctrine to focus less on fairness per se and more on examining the precise nature of the defendant's contacts with the state—including the degree to which the defendant had "invoke[ed] the benefits and protections of

116. *Id.*

117. 355 U.S. 220 (1957).

118. *See id.* at 221–22 (Lulu McGee was a bereaved parent wrangling with her late son's life insurer); by contrast, *Hanson* involved the efforts of two sisters, who had already received substantial bequests under their mother's will, to invalidate a trust their mother had created for the benefit of a third sister's children, a scenario that at least one commentator has analogized to the plot of King Lear (with the sister-plaintiffs presumably taking on the Goneril and Regan roles). *See* Michael Vitiello, *The Supreme Court's Latest Attempt at "Clarifying" Personal Jurisdiction: More Questions Than Answers*, 57 Tulsa L. Rev. 395, 402 (2022) (noting that "like King Lear," the mother "divided her estate into three roughly equal parts" and arguing that the Court was likely swayed to some extent by the "equities" of the situation).

119. *See* Rebecca Hollander Blumoff, *The Procedural Justice of Personal Jurisdiction*, 65 Ariz. L. Rev. 643, 663–64 (2023) (noting that both cases arose out of the defendant's lone contact with the forum state, although the defendant in *McGee* had arguably engaged in the more purposeful contact).

120. The *McGee* defendant had mailed a reinsurance certificate to the insured in California after agreeing to assume the business of his prior insurer, 355 U.S. at 221–22, while the *Hanson* defendant had merely continued to administer a Delaware-formed trust after the settlor moved from Pennsylvania to Florida, an activity the Court found to be more passive. *See Hanson*, 357 U.S. at 251–52 ("[T]he record discloses no instance in which the trustee performed any acts in Florida that bear the same relationship to the agreement as the solicitation in McGee").

121. Vitiello, *supra* note 118, at 402.

[the forum state's] laws"[122]—gave the Court space to reach different outcomes in these two cases.

In addition to its concerns about the specific result in *Hanson*, the Court may also have wished to reorient the doctrine more generally to avoid giving the impression that personal jurisdiction would be available whenever the defendant would not be inconvenienced, a view that could have resulted in an undesirable broadening of the doctrine at a time when long-distance travel was becoming ever more commonplace. In *McGee*, the Court had taken a multifaceted approach in which its primary focus was a balancing of fairness concerns, such as the comparatively minor inconvenience to the defendant in that case, the general recognition that "modern transportation and communication have made it much less burdensome" to defend across state lines, the location of witnesses, and the "severe disadvantage" that plaintiffs might face if forced to litigate in a "distant state."[123] By contrast, *Hanson* sidelined these considerations, focusing almost entirely on the defendant's contacts and the idea that the defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum,"[124] a requirement that would ultimately become virtually synonymous with the test for specific jurisdiction more generally.[125] More broadly, the Court attempted to clarify that the trend toward relaxed personal jurisdiction requirements did not "herald[] the eventual demise of all restrictions . . . ."[126] In this context, the Court's callback to *Pennoyer*-esque "territorial limitations" on state power was perhaps intended to reinforce its shift in *Hanson* to a stricter standard more focused on the defendant's conduct than simply the absence of severe inconvenience.

Whatever the Court's motives in *Hanson* for suggesting—more or less in passing—that personal jurisdiction and structural territorial limitations on state power might be intertwined, it is notable that *Hanson* specifically indicated that neither choice-of-law concerns nor convenience played a role. As the Court explained, "[a court] does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law."[127] This leaves the meaning

122. *Hanson*, 357 U.S. at 253.

123. *See McGee*, 355 U.S. at 222–24.

124. *Hanson*, 357 U.S. at 253.

125. *See, e.g.*, Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 592 U.S. 351, 359 (2021) (explaining that "the contacts needed for [specific] jurisdiction often go by the name 'purposeful availment'").

126. *Hanson*, 357 U.S. at 251.

127. *Id.* at 254.

of the Court's pronouncements somewhat mysterious; if the danger of overreach here is neither the burden on the defendant in traveling to the forum nor the risk of excessively broad application of the forum's law, what exactly was the Court concerned about?

This confusion would be compounded by mixed signals in later cases considering the issue. *Shaffer v. Heitner*, [128] for example, represented in most respects the clearest repudiation of *Pennoyer* territorial formalism since *Shoe* itself. The Court overruled an aspect of *Pennoyer* that *Shoe* had left untouched, holding that the presence of property in a state alone could not be the basis for *quasi in rem* jurisdiction over an unrelated matter.[129] Further, the Court made clear that (at least for the moment) *Pennoyer*'s territorial focus would no longer carry the day, rejecting *quasi in rem* jurisdiction as an "ancient form without substantial modern justification" and concluding that, going forward, "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny"[130] (language from which, to be sure, a plurality of the Court would ultimately retreat in *Burnham v. Superior Court*).[131] It is perhaps unsurprising, then, that the *Shaffer* Court, in a footnote,

128. 433 U.S. 186 (1977).

129. *See id.* at 211 ("Although the theory that territorial power is both essential to and sufficient for jurisdiction has been undermined, we have never held that the presence of property in a State does not automatically confer jurisdiction over the owner's interest in that property.").

130. *Id.* at 212.

131. *See* Burnham v. Superior Court of California, 495 U.S. 604, 621 (1990) (plurality opinion) (arguing that this statement was intended to be limited to the observation that "*quasi in rem* jurisdiction, that fictional 'ancient form,' and *in personam jurisdiction* . . . are really one and the same and must be treated alike"). Notably, however, despite the efforts of a plurality of justices in *Burnham* to distance themselves from *Shaffer*'s reasoning, and despite the Justices' unanimous endorsement, albeit in fractured opinions, of transient jurisdiction, the case does not really mark a return to territorial formalism. Rather, all four opinions in the case rest to an extent on some notion of fairness—for Justice Scalia in his plurality opinion, the traditional nature and wide contemporary acceptance of transient jurisdiction, *id.* at 622; for Justice Brennan, speaking for an equal plurality, the minimal burden of requiring someone who has already traveled to a state on their own to defend in litigation there, *id.* at 638–39 (Brennan, J., concurring); for Justice White, the belief that the procedure had not been shown to be "arbitrary" or "lacking in common sense," *id.* at 628 (White, J., concurring); for Justice Stevens, some combination of the above. *Id.* at 640 (Stevens, J., concurring). Of course, some early affirmations of transient jurisdiction were rooted in more rigidly territorial thinking. In *Grace v. MacArthur*, 170 F. Supp. 442, 447 (E.D. Ark. 1959), a federal district court famously found service on a plane passing through Arkansas's airspace sufficient to confer personal jurisdiction over the defendant; the court's conclusion rested entirely on its reasoning that a state's airspace constituted space within the state's territorial limits.

appeared to dismiss the state-sovereignty language in *Hanson* as essentially meaningless, explaining that "the *Hanson* Court's statement that restrictions on state jurisdiction 'are a consequence of territorial limitations on the power of the respective States' simply makes the point that the States are defined by their geographical territory," and reflected the fact that, in *Hanson*, "the Court . . . determined that the defendant over which personal jurisdiction was claimed had not committed any acts sufficiently connected to the State . . . ."[132] In other words, the Court seemed to be arguing, territory was relevant to personal jurisdiction only in the obvious sense that, because states have territorial borders, minimum contacts with a particular state are also defined by reference to a state's territory.

Yet despite *Shaffer*'s overall rejection of the *Pennoyer* framework and its sidelining of territoriality and state sovereignty rhetoric in particular, the Court picked up the federalism theme forcefully less than three years later in *World-Wide Volkswagen Corp. v. Woodson*.[133] There, the Court appeared to clarify the relationship between fairness and federalism concerns, calling these "two related, but distinguishable, functions" of the "concept of minimum contacts"[134]—on the one hand, "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum" and, on the other, "ensur[ing] that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[135] The Court went further in suggesting that the second function swept beyond the defendant's immediate interests; it noted that "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State . . . , the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."[136]

The Court's decision to situate considerations of federalist balancing as central to *World-Wide* perplexed and divided scholars.[137] This was especially true in light of another about-face: the Court's seeming repudiation of such concerns shortly thereafter in *Insurance*

132. *Shaffer*, 433 U.S. at 204 n.20.
133. 444 U.S. 286, 292 (1980).
134. *Id.* at 291–92.
135. *Id.* at 292.
136. *Id.* at 294.
137. *See* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. Rev. 1669, 1706–07 (2011) ("Currently, there is a lively debate among jurisdiction scholars over whether due process concerns are the sole considerations relevant to assessing the boundaries of state court jurisdiction, or whether state sovereignty concerns are also pertinent.").

Corp. of Ireland v. Compagnie des Bauxites de Guinée.[138] There, the Court had to consider whether a federal court was justified in imposing a finding of personal jurisdiction over the defendant as a sanction for its failure to produce discovery relevant to the question of whether it had minimum contacts with Pennsylvania.[139] In a unanimous decision—with only Justice Powell in concurrence expressing any reservations[140]—the Court found that such a sanction was valid, clearly and forcefully rejecting the idea that personal jurisdiction was bound up with state sovereignty for two central reasons. First, the Court reasoned, protection against overreaching personal jurisdiction derived from the Fourteenth Amendment Due Process Clause rather than Article III or other structural limitations on judicial power; therefore, the Court argued, it involved an "individual right"[141] and "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[142] Second, in many circumstances, personal jurisdiction restrictions could be waived or estopped based on the defendant's conduct, a "characteristic[]" that, for the Court, "portray[s] it for what it is—a legal right protecting the individual."[143]

The Court made little effort to explain its divergence from prior cases. The opinion's only mention of *World-Wide* came in a footnote responding to Justice Powell's concurrence, in which the Court dismissed the discussion of state sovereignty in *World-Wide* as "ultimately a function of the individual liberty interest preserved by the Due Process Clause."[144] Again, the Court rested on the same two points—that the Due Process Clause "is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns" and that personal jurisdiction is waivable, whereas "if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement[.]"[145]

Notably, then, the Court appeared to take three quite different positions on the issue within a five-year period from 1977 to 1982.

138. 456 U.S. 694 (1982).

139. *Id.* at 699–700.

140. *Id.* at 710 (Powell, J., concurring) (expressing concerns that the Court's "theory could require a sweeping but largely unexplicated revision of jurisdictional doctrine" that might have unwarranted effects on "sovereign limitations on state jurisdiction").

141. *Id.* at 703 (majority opinion).

142. *Id.* at 702.

143. *Id.* at 704.

144. *Id.* at 702 n.10.

145. *Id.*

In *Shaffer*, the Court sidelined territoriality and stressed that the advent of the minimum contacts standard represented a sharp break with the *Pennoyer*-era worldview. In *World-Wide*, the Court couched more modern concerns about overstepping states in *Pennoyer*-esque rhetoric, ultimately suggesting that minimum contacts requirements had a sovereignty-policing function quite apart from any issues of unfairness to the defendant. In *Insurance Corp. of Ireland*, the Court appeared to think better of this idea, stressing that the location of limits on personal jurisdiction in the Due Process Clause necessitated a focus on the defendant's interests. Although scholars continued to debate the issue, for many the more extensively reasoned rejection of the state sovereignty rationale in *Insurance Corp. of Ireland* suggested for the moment that such concerns had gone by the wayside, perhaps representing an unfortunate intrusion of *Pennoyer*-era language that the Court had quickly thought better of and repudiated. But the Court's later embrace of *World-Wide*'s federalism concerns would ultimately prove this interpretation to be incorrect.[146]

C. The Meaning and Impact of World-Wide's Federalism Dimension

Given such rapid-fire shifts on the relevance of territoriality concerns, it is worth considering at this juncture what exactly the Court might have meant in the first place when it suggested in *World-Wide* that personal jurisdiction serves as an "instrument of interstate federalism" that restrains states from "reach[ing] out beyond the limits imposed on them . . . as coequal sovereigns in a federal system."[147] Both commentators and later cases have attempted to supply explanations, but despite the Court's frequent invocation of this passage in subsequent cases, its meaning remains far from clear. One common interpretation is that *World-Wide*'s interstate federalism discussion is simply a nod to tradition, an effort to stress that the *Pennoyer*-era understanding of state sovereignty has not gone away (at least in the sense that territory still poses meaningful limits on a court's power over out-of-state defendants).[148] A second view, more prominent recently and invoked by the Court in *Fuld*, is that a defendant's due

146. *See, e.g.*, 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, 70 (1990) (giving modest praise to *Insurance Corp. of Ireland* by noting that "[f]or once, the Court appeared to have read the fourteenth amendment [sic] before launching into another long opinion reciting a huge laundry list of factors" and expressing optimism that the case was "perhaps . . . the first crack in the foundation" of the irrational aspects of minimum contacts doctrine).

147. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

148. *See infra* notes 150–51.

process rights have less to do with fairness (in the sense of convenience or lack of forum bias) than with being subject to jurisdiction only in a court that is acting within federalism-driven limits on its regulatory authority.[149] As the following discussion argues, however, neither of these explanations is fully satisfactory.

To begin with, an obvious way of understanding the sovereignty/federalism discussion in *World-Wide* is as a callback to *Pennoyer*, either in the more direct sense of suggesting a fundamental continuity between the minimum contacts standard and the territorial-formalist view or in a looser way intended to stress more generally that, despite its break with the strict territoriality of the past, minimum contacts is not an anything-goes standard. Either understanding would suggest that the Court was motivated by some of the same preoccupations that it was in *Hanson*, and the two cases do share similar postures and concerns: As in *Hanson*, the defendant in *World-Wide* prevailed on the personal jurisdiction issue, and the *World-Wide* opinion at several points stressed the importance of maintaining significant limits on personal jurisdiction's availability even in an interconnected world.[150]

Many commentators, particularly those who defended *World-Wide*'s approach, initially understood the case this way, seeing a consistent line of territoriality concern within personal jurisdiction doctrine dating from *Pennoyer*- era and even pre-*Pennoyer* times.[151] Under this view, as commentators have argued,[152] the Court was

149. Fuld v. Palestine Liberation Org., 606 U.S. 1, 17–18 (maintaining that assessing burden on defendant involves not only a consideration of practical problems created by litigating in a certain forum, but also of interstate federalism concerns of submitting the defendant to the power of a certain state); J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 884–85 (2011) (explaining the relationship between personal jurisdiction and the restraints imposed by federalism on the scope of each state's lawful power).

150. *World-Wide,* 444 U.S. at 296 (expressing concern that, under the broader theory of personal jurisdiction proposed by the plaintiffs, "[e]very seller of chattels would in effect appoint the chattel his agent for service of process").

151. *See, e.g.*, Stein, *supra* note 65, at 690 (arguing that, from *Pennoyer* through *Shoe*, "inappropriate assertions of jurisdiction were viewed not as mere infringements on a defendant's freedom, but as violations of the sovereignty of other states"); Rhodes, *supra* note 62, at 406 (noting that the purposeful availment requirement reflects commonalities between "post-*Shoe*" and "pre-*Shoe*" doctrine); *id.* at 391, nn.12–14 (collecting pre-*Pennoyer* cases that applied a territorial approach to jurisdiction).

152. *See* Rhodes, *supra* note 62, at 387–88 (arguing that while "the nomenclature has changed [and] realism has replaced formalism," modern personal jurisdiction doctrine has "the same conceptual core as it did in the nineteenth century," with both relying on a "social contract philosophical tradition"); Kogan, *supra* note 59, at 262 (describing different iterations of personal jurisdiction doctrine over the centuries as versions of a "neo-federal autobiography"); Glenn B. Manishin, Comment,

perhaps attempting to rework *Pennoyer*'s territorialist framework for a later era less comfortable with rigid formalist limits.

If the territorial-formalist worldview is understood in a very broad and general way to mean a perspective that dangers exist in broadly extending individual states' personal jurisdiction over far-flung defendants, this interpretation perhaps has some merit. Indeed, the Court's own apparent, if temporary, repudiation of the state-sovereignty idea in *Insurance Corp. of Ireland* suggests that the Court itself saw *World-Wide* this way—as an offhand invocation of *Pennoyer*-era values of which it later thought better.[153]

At the same time, there are several reasons why this idea fails to provide a complete or fully satisfactory explanation. To begin with, it is difficult to trace a meaningful connection between the formalism that informed *Pennoyer* to anything the Court might have been concerned with in *World-Wide*.[154] The Court has, over the years, advanced many theories to explain why contacts-based personal jurisdiction is constitutional: the idea that contacts ensure the forum state's legitimate interest in hearing a case,[155] that they manifest the defendant's implicit acquiescence to suit in a particular forum,[156] and—perhaps most persistently—that they reflect a basic bargain of fairness, in which a defendant who has voluntarily benefited from an association with a state should be reasonably expected to answer for any harm arising from its activities there.[157] All of these justifications, however, reflect a worldview that is not just different from *Pennoyer*'s

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Federalism, Due Process, and Minimum Contacts, 80 Colum. L. Rev. 1341, 1343, 1350, 1357 (1980) (explaining that there was a shift from the more rigid *Pennoyer* framework to a "more pragmatic evaluation of the defendant's activities in relation to the forum state.").

153. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S 694, 702 n.10 (1982) (attempting to minimize *World-Wide*'s invocation of federalism and sovereignty).

154. *See* Drobak, *supra* note 50, at 1024 (pre-*Pennoyer* courts "accepted the proposition of territorial limits on jurisdiction as a maxim, but they did not justify their use of this proposition as a means to protect federalism or the sovereignty of the states").

155. *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Court, 582 U.S. 255, 263 (2017) (suggesting that personal jurisdiction is improper when the forum state has "little legitimate interest in the claims in question").

156. *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 882 (2011) ("The principal inquiry in [personal jurisdiction] cases . . . is whether the defendant's activities manifest an intention to submit to the power of a sovereign.").

157. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (noting that, when a defendant has significant contacts with a state, "because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well").

but fundamentally incompatible with it.[158] Territorial-formalist reasoning about personal jurisdiction had nothing to do with whether a state had a meaningful interest in a dispute or whether the defendant might be reasonably held to account based on its activities in a certain place. Rather, it reflected an inherent limit on the assertion of state coercive power outside state borders, in the same way that today we do not permit state authorities to journey into another state to make an arrest or to ensure that a factory is conforming to relevant environmental standards.[159] On some level, to be sure, these restrictions protect each state's territorial integrity and thus, in some sense, safeguard their retained sovereignty within a federalist system. At the same time, they have nothing to do with the question of balancing interstate power in the realm of regulatory authority, where the proper reach of state power is not so neatly delineated.

Another reason why the *Pennoyer*-revival explanation seems inadequate is that the Court itself, in recent years, appears to have opted for an alternative understanding. Perhaps cognizant of the need to reconcile its continued invocation of state sovereignty with *Insurance Corp. of Ireland* in some fashion, the Court has attempted—at times rather awkwardly and despite concerns like those expressed by Justice Alito in *Mallory*[160]—to yoke these concerns to the due process interests of the defendant and, in particular, to reconcile them with the defendant's ability to waive personal jurisdiction objections.

This line of reasoning seems to have surfaced first in *McIntyre*, in which Justice Kennedy, writing for a plurality, reasoned as follows: Citing *Insurance Corp. of Ireland*, he framed the due process interests protected by the Fourteenth Amendment as centering on "the individual's right to be subject only to lawful power."[161] But power, in this formulation, is lawful only when "the defendant's activities manifest an intention to submit to the power of a sovereign,"

158. To be sure, some commentators have seen continuities between *Pennoyer* and minimum contacts-era cases. *See, e.g.*, Weinstein, *supra* note 74, at 210 (noting that the minimum contacts standard "[l]ike its predecessor . . . focuses on state borders" and that "[t]he problem of adequately explaining highly territorial rules in due process terms has thus persisted even after [*International Shoe*]").

159. *See* Campbell, *supra* note 85, at 157 (arguing that, in contrast to many instances in which state courts assert personal jurisdiction, states would have a "legitimate grievance" in such scenarios).

160. *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 156 (Alito, J., concurring in part and concurring in the judgment) (noting that defendant's ability to waive personal jurisdiction defenses creates "a significant obstacle to addressing [federalism] concerns through the Fourteenth Amendment").

161. *McIntyre*, 564 U.S. at 884 (plurality opinion).

which the defendant presumably does by forming the sort of contacts with the forum sufficient for specific personal jurisdiction.[162] As Kennedy went on to explain, "[t]he question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."[163] Although this explanation is primarily focused on the defendant's conduct, Kennedy also suggested that overreaching assertions of personal jurisdiction could have broader consequences for interstate relations, explaining that a state's decision "to assert jurisdiction in an inappropriate case" would "upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States."[164]

A few features of this explanation are worth noting. To begin with, Justice Kennedy seems to introduce a new, consent-like formulation to respond to the incongruity, regularly noted by the Court itself,[165] of locating structural federalism issues in the individual rights-focused Due Process Clause.[166] The *McIntyre* plurality suggests—straightforwardly enough, though in a way that is in some tension with other personal jurisdiction cases that had sought to move away from a consent-based framework[167]—that power over the defendant is lawful where minimum contacts are present because, by undertaking various activities in a state, the defendant has implicitly acceded to it.

As presented in *McIntyre*, however, this explanation falters for two reasons. First, there is an element of circularity in conceiving of the Due Process Clause as protecting the "right to be subject only to lawful power" where the standards of lawfulness derive from the Due Process Clause itself.[168] Second, restating the test for personal jurisdiction as an index of the lawfulness of state power still does

162. *Id.* at 881–82.

163. *Id.* at 884.

164. *Id.*

165. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n. 10 (1982) (nothing that the Fourteenth Amendment Due Process Clause is "the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.").

166. *See McIntyre*, 564 U.S. at 879–80 (plurality opinion) (explaining that due process protections exist both "with respect to the power of a sovereign to resolve disputes through judicial process [and] with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere.")

167. *See Burnham*, 495 U.S. at 617–18 (describing the Court as having moved away from an implied consent framework in personal jurisdiction doctrine).

168. *See* Robert E. Pfeffer, *A 21st Century Approach to Personal Jurisdiction*, 13 U.N.H. L. Rev. 65, 118–19 (2015) (arguing that *McIntyre*'s conclusion that "a lack of

not explain why it should be spoken of as a federalism question at all rather than an individual right. In this initial framing, that is, the lawfulness of state power rests entirely on the defendant's intentions and activities that manifest those intentions, not on any larger structural constraints on state authority. Ultimately, then, as Professor Scott Dodson has argued, the plurality's reasoning seems primarily a way to recast the focus of minimum contacts doctrine to an idea of implicit consent as a measure of fairness.[169]

Although this understanding is at least consistent with the idea that jurisdiction is a process-based, waivable right, it does nothing to explain why or how personal jurisdiction doctrine might function as a cap on state sovereignty in a way unrelated to the defendant's immediate interests.[170] Indeed, *McIntyre*'s plurality seems to tacitly acknowledge its failure to make this connection by suggesting that, despite the opinion's apparent focus on whether the defendant has displayed an "intention to submit to the power of a sovereign," its true concern is not the defendant's intent but the state's legitimate stake in the dispute. After all, one of the key question, the plurality suggests, is whether the defendant's conduct is sufficiently connected to the state's "society or economy" such that the state may legitimately render "judgment concerning that conduct" without "upset[ting] the federal balance."[171] Thus, the plurality suggests, a defendant submits to the forum state's power precisely to the extent that the defendant engages in conduct that the forum state has a right to regulate. Given that, framing the issue in terms of the defendant's intent seems largely superfluous; the real question is whether the

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submission to a sovereign means that the exercise of personal jurisdiction violates the defendant's due process rights" is circular).

169. Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. Rev. 1, 25 (2018). Notably, in *Mallory*, the Court also focused on consent in personal jurisdiction, finding that Pennsylvania could assert general personal jurisdiction over a nonresident defendant based on a statute requiring consent to personal jurisdiction as a condition of doing business in the state. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 144–46 (2023) (plurality opinion). Nonetheless, the *Mallory* defendant's "submission to Pennsylvania's corporate registration statute was unlike any of *McIntyre*'s recognized categories of consent." *See* Linda S. Mullenix, *Railroading Personal Jurisdiction*, 43 Rev. Litig. 141, 172 (2024).

170. *See* Perdue, *supra* note 26, at 740 (noting how, "despite frequent references to sovereignty," Justice Kennedy's jurisdiction analysis ultimately centers defendants); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in* J. Mcintyre Machinery, Ltd. v. Nicastro, 63 S.C. L. Rev. 481, 497–98 (2012) (noting that Justice Kennedy's "choosing to speak in terms of sovereignty or submission does not necessarily entail a substantive difference in terms of the permissible scope of jurisdiction").

171. *See McIntyre*, 564 U.S. at 884.

defendant's actions are sufficiently connected to the forum state to justify that state's intervention. And if that is the case, it remains unclear why the Due Process Clause enters into the equation at all.

McIntyre in general, and its plurality opinion in particular, received highly negative reviews from commentators.[172]; Patrick J. Borchers, for example, described Kennedy's opinion as "quite possibly the most poorly reasoned and obtuse decision of the entire minimum contacts era," in large part because of its "bull-headed attempt to ground personal jurisdiction in a sovereignty theory."[173] But despite such criticism, as well as Justice Kennedy's apparent failure to garner a majority for the sovereignty theory in *McIntyre* itself,[174] the Court nonetheless has sounded similar themes in subsequent personal jurisdiction cases. Of particular note, in *Bristol-Myers Squibb v. Superior Court*,[175] an 8–1 majority put forth an argument similar to the *McIntyre* plurality's in a context where structural limits on state power appeared all the more relevant to the dispute. At stake in *Bristol-Myers Squibb* were California's efforts to assert personal jurisdiction over a large, multi-state action alleging harm from the defendant's blood-thinning prescription drug; although the defendant sold and marketed the product in California, the out-of-state plaintiffs had been prescribed and ingested the drug elsewhere.[176] Calling the California court's finding that it could assert personal jurisdiction over the defendant based on its extensive California contacts a "loose and spurious form of general jurisdiction," the Court reversed.[177]

As the plurality had in *McIntyre*, the Court tried once more to thread the needle of suggesting that personal jurisdiction encompassed federalism concerns while also attempting to cast such concerns in terms of due process owed to the defendant personally. Although acknowledging that the burden on the defendant,

172. Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1263 (2011); *see also* Mullenix, *supra* note 169, at 168 (noting that "*McIntyre* did little to clarify" unsettled doctrinal issues and instead "offered a surprising, new, and lengthy digression on a state sovereignty theory of personal jurisdiction . . . ."); Perdue, *supra* note 26, at 729 ("Personal jurisdiction also seems to inspire foolish remarks and poor opinions, and [*McIntyre v.*] *Nicastro* may set a new low in that regard."); Charles W. "Rocky" Rhodes & Cassandra B. Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. LEGIS. 377, 395 n. 111 (2020) (citing scholarly criticism).

173. Borchers, *supra* note 172, at 1263.

174. *See id.* (noting that the only "saving grace" of Kennedy's opinion is that it garnered only four votes).

175. Bristol-Myers Squibb Co. v. Superior Court, 582 U.S. 255 (2017).

176. *Id.* at 258–59.

177. *Id.* at 264.

including the "practical problems resulting from litigating in the forum," was personal jurisdiction's primary focus, the Court suggested that the defendant's burden also "encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question."[178] Quoting *Hanson*, the Court reiterated that personal jurisdiction limits are a "consequence of territorial limitations on the power of the respective States" and noted that "this federalism interest may be decisive" even in situations where the defendant suffers no inconvenience.[179]

Again, the argument the Court is making is difficult to parse. To begin with, although the Court clearly wished to tie federalism and state sovereignty considerations to the defendant's individual rights protected by the Due Process Clause, the Court failed to explain why this "more abstract matter" would ever be a concern to a defendant who suffers no practical harm from being sued in a particular forum. To be sure, it is possible to imagine why the application of a particular forum's *law* might be unfair to the defendant, but exorbitant application of forum law has traditionally been seen as another matter entirely, governed by a separate line of cases with no connection to personal jurisdiction doctrine per se.[180] Moreover, after having suggested that concerns about improper projection of state authority played a role in personal jurisdiction doctrine only because of their effect on the defendant, the Court went on to discuss the possibility that federalism interests apart from the defendant's individual concerns could be "decisive" in personal jurisdiction cases.[181]

One can certainly understand why the defendant might have resisted a personal jurisdiction finding in this case, but the defendant's true concerns likely centered either on the scale of the action (it is obviously to defendants' advantage if it is more difficult for mass litigation involving parties from multiple states to proceed) or dislike of the forum (the defendant might prefer to be sued in in its home forum or at least a state it perceives to be less plaintiff-friendly).[182] Both

178. *Id.* at 263.

179. *Id.*

180. *See, e.g.*, Allan Erbsen, *Personal Jurisdiction's Moment of Opportunity: A Reform Blueprint for Originalists and Nonoriginalists*, 75 Fla. L. Rev. 415, 473 (2023) (describing personal jurisdiction and choice of law as "discrete silos of doctrine"). Stewart E. Sterk has suggested that the concerns at issue when the Court speaks of sovereignty and federalism are not limited to the forum's substantive rules of law but involve its "legal environment" more generally. *See* Sterk, *supra* note 4, at 1175–76. Again, however, the Court fails to spell this out.

181. *Bristol-Myers Squibb*, 582 U.S. at 263.

182. Stewart E. Sterk thus suggests that personal jurisdiction restrictions are related to restrictions on choice of law but go beyond them by attempting to ensure

concerns, to the extent they are relevant to personal jurisdiction doctrine at all, would seem to fall under a fairness/burden umbrella rather than a federalism one.

In other post-*McIntyre* cases mentioning a federalism/sovereignty interest, the Court has devoted less effort to packaging these concerns as part of a due process/defendant-fairness analysis, further complicating the landscape by suggesting, contrary to the *McIntyre* plurality, that any sovereignty component that personal jurisdiction doctrine might contain can, in fact, be wholly differentiated from the defendant's individual rights. Thus, in *Ford Motor Co. v. Montana Eighth Judicial District*,[183] the Court concluded that Ford's sales and advertisements in the two forum states at issue were sufficient to establish personal jurisdiction over it for claims involving injuries allegedly caused by Ford vehicles, even though the cars in question had been designed and purchased out of state. Although the Court's analysis rested largely on the idea that "allowing jurisdiction in these cases treats Ford fairly" because Ford had availed itself of the privileges of doing business in the forum states and could reasonably expect to be sued there,[184] the Court also considered the federalism angle. From that perspective, the Court found, personal jurisdiction would be proper because the forum states had "significant interests at stake," including "providing . . . residents with a convenient forum for redressing injuries inflicted by out-of-state actors," and "enforcing their own safety regulations."[185]

This analysis again suggests, in more explicit terms than some other cases, that the federalism element of personal jurisdiction is

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that defendants are subject to the "the entire legal environment" (including such issues as discovery restrictions or corporation-friendly statutes of limitations) of the state with the strongest interest in regulating them. *See Sterk*, *supra* note 4, at 1175–76. In this vein, it is worth noting that a likely effect of *Bristol-Myers Squibb* is to require multistate class actions to be filed in the defendant's principal place of business or state of incorporation, where general jurisdiction is likely to be present. *See Bristol-Myers Squibb*, 582 U.S. at 268 (suggesting that plaintiffs could bring suit by "joining together in a consolidated action in the States that have general jurisdiction" over the defendant, and naming the states where Bristol-Myers Squibb was incorporated or had its principal place of business). Scholars have commented on the Court's "undue solicitude for corporations" in *Bristol-Myers Squibb* and other personal jurisdiction cases. *See, e.g.*, Judy M. Cornett, *The Not-So-Stealthy Revolution in Personal Jurisdiction: A Response to Michael Hoffheimer*, University of Tennessee Law Faculty Publications (2018), https://ir.law.utk.edu/utklaw_facpubs/111/ [https://perma.cc/9ETJ-ESMX].

183. 592 U.S. 351, 355-57 (2021).

184. *Id.* at 367–68.

185. *Id.* at 368 (internal quotation marks omitted) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985)).

closely linked to the assumption that the forum will apply its own law. The Court both assumed that the forum states would apply "their own" regulations (even though much of the conduct at issue—vehicle design and sale—had occurred out of state[186]) and would do so out of a concern for protecting their own domiciliaries—an interest that is frequently determinative in modern choice-of-law analysis.[187] However this language is understood, the Court omitted any explanation of why the presence or absence of state interests should bear on the defendant's due process rights.

D. Fuld*'s Sharp Turn Toward a Federalism-Centered View*

Despite the Court's failure to satisfactorily explain in *McIntyre* or *Bristol-Myers Squibb* why interstate federalism issues should be bound up with the Due Process Clause or with personal jurisdiction doctrine more generally,[188] it appears in *Fuld v. Palestine Liberation Organization*[189] to have doubled down on the same reasoning. Unlike the other personal jurisdiction cases in which the Court has discussed federalism/sovereignty functions of personal jurisdiction, *Fuld* had nothing to do with state power at all. Rather, the question at issue was whether the federal government could subject alleged perpetrators of terrorism to personal jurisdiction in U.S. courts by construing certain statutorily enumerated activities as consent to jurisdiction.[190] In analyzing this question, the Court declined to apply the Fourteenth Amendment minimum contacts framework at all.[191] The Court found instead that Congress's assertion of jurisdiction was valid because it rested on "conduct closely related to the

186. *See id.* at 366–67 ("[T]he company sold the specific cars involved in these crashes outside the forum States, with consumers later selling them to the States' residents.").

187. *See* Spillenger, *supra* note 27, at 1243 ("The most important change wrought by the revolution in American choice-of-law doctrine during the second half of the twentieth century is the increased emphasis on party domicile in resolving conflicts of laws." (footnote omitted)); *see also infra* Part IV.

188. In *Mallory*, Justice Alito suggests that exercises of personal jurisdiction could in fact raise federalism concerns but that it would be inappropriate to address such issues via the Due Process Clause. *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 156–57 (2023) (Alito, J., concurring in part and concurring in the judgment).

189. 606 U.S. 1 (2025).

190. *Id.* at 1–2.

191. *See id.* At 16 ("Because the State and Federal Governments occupy dramatically different sovereign spheres, the Court declines to import the Fourteenth Amendment minimum contacts standard into the Fifth Amendment. Rather, the Fifth Amendment permits a more flexible jurisdictional inquiry commensurate with the Federal Government's broader sovereign authority.").

United States that implicates important foreign policy concerns."[192] Without deciding whether a separate fairness analysis was necessary, the Court also found that the exercise of personal jurisdiction was reasonable under the test first applied in *Asahi Metal*.[193]

Reaching this result, however, required the Court to clarify precisely *which* elements of standard personal jurisdiction analysis did not apply in the Fifth Amendment context and to explain why that was the case. And in concluding that, for the most part, the strictures of minimum contacts had no relevance in the federal arena, the Court—leaning on language from *World-Wide Volkswagen*, *Nicastro*, and *Bristol-Myers Squibb*, among other cases—suggested that the explanation for this holding was that minimum contacts doctrine was inextricably linked to issues of interstate federalism (and thus would obviously have no relevance to the federal and international context at hand). Quoting *World-Wide*'s pronouncement that personal jurisdiction doctrine serves "two related, but distinguishable, functions"[194] of both "treating defendants fairly" and "protecting interstate federalism,"[195] the Court nonetheless highlighted the importance of the second purpose in at least three ways. First, the Court stressed that "interstate federalism concerns . . . may be *decisive* for Fourteenth Amendment purposes," even in situations where personal jurisdiction is not unduly burdensome to the defendant.[196] Second, the Court suggested that the fairness function was in fact closely related to (or even derivative of) the

192. *Id.* at 18.

193. In *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), the Court was evenly divided on whether minimum contacts were present, but nonetheless held that there was no personal jurisdiction over the defendant on the ground that it would be unreasonable to require the defendant to appear in the case at hand. *Id.* at 116 (Brennan, J., concurring in part and concurring in the judgment). The Court thus suggested that reasonableness considerations could defeat personal jurisdiction even where the defendant had established minimum contacts with the forum, especially where a non-domestic defendant was concerned. *See id.* at 116 (plurality opinion) (citing "the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State" as grounds for a finding of unreasonableness). The reasonableness factors named by the Court included "the burden on the defendant, the interests of the forum State, . . . the plaintiff's interest in obtaining relief[,] . . . 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies.'" *Id.* at 113 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

194. *Fuld*, 606 U.S. at 14 (quoting *World-Wide*, 444 U.S. at 291–92).

195. *Id.* at 13 (internal quotation marks omitted) (quoting *World-Wide*, 44 U.S. at 293).

196. *Id.* at 17.

interstate federalism one, echoing the *McIntyre* plurality's reasoning that a central measure of fairness is ensuring that the defendant is "subject only to lawful power"[197]—in other words, power that does not exceed the state's proper territorial scope. Finally, in a later discussion of fairness in the federal personal jurisdiction context, the Court suggested that the so-called "reasonableness" factors first articulated in *Asahi Metal*, as opposed to the minimum contacts analysis itself, were the area of doctrine intended to address core fairness concerns.[198]

Because *Fuld* is only indirectly about the purpose of minimum contacts, it is possible that it will have little direct doctrinal relevance in future cases. Moreover, it is certainly less than clear that the Court intended for its minimum contacts comments to have broad significance. It is conceivable, that is, that the Court was not so much concerned with cementing the state sovereignty/minimum-contacts connection as it was eager to find a basis for finding the minimum contacts standard inapplicable to the federal context in order to uphold a federal statute that it clearly thought was a valid exercise of congressional power.[199]

Nonetheless, the Court's preoccupation with the federalism elements of personal jurisdiction doctrine in *Fuld*, in a discussion that carefully stitches together relevant language from several prior cases,[200] is striking. And while *Fuld* itself may be a one-off case in the sense that it addresses a novel issue unrelated to how personal jurisdiction in the state context is administered, it nonetheless caps off what seems to be a clear trend in recent personal jurisdiction cases for the Court to reassert the centrality of the interstate balance of power.

Further, the implications of the Court's minimum contacts discussion in *Fuld* potentially sweep further than any of its previous statements. By suggesting that it is only through the *Asahi Metal* reasonableness factors—first applied more than forty years after

197. *Id.* at 14 (quoting J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 884).

198. *Id.* at 23–24 (maintaining that because the PSVJTA comports with the *Asahi* reasonableness factors, its authorization for the exercise of personal jurisdiction is fair).

199. For example, despite Justice Alito's seeming discomfort in his *Mallory* concurrence with locating federalism concerns in due process-based personal jurisdiction analysis, he joined the *Fuld* opinion without comment. *Compare* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 156 (2023) (Alito, J., concurring in part and concurring in the judgment), *with* Fuld v. Palestine Liberation Org., 606 U.S. 1 (2025).

200. *See Fuld*, 606 U.S. at 11–16 (analyzing the line of personal jurisdiction cases applying to jurisdiction arising from federal statute).

International Shoe was decided[201]—that convenience and burden issues are weighed, the Court implied, in what would be a sharp departure from past understanding, that minimum contacts analysis has little or nothing to do with these issues.[202] Rather, the purposes of minimum contacts, in the Court's view, are (1) "treating defendants fairly"[203]—fairness, however, meaning not the practical burdens of litigation but the lawful-sovereignty-as-due-process formulation of the *McIntyre* plurality[204]; and (2) "protecting interstate federalism," a goal advanced "in particular," in the Court's view, through "the requirement that a defendant have minimum contacts with the forum State," which "functionally 'ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.'"[205] This formulation suggests several novel propositions simultaneously: that minimum contacts doctrine's central purpose is to restrain the excessive extraterritorial projection of state authority; that the only individual right the doctrine protects is the right of the defendant to be free from inappropriate assertions of state regulatory power; and that an equally important function of the doctrine is to restrain state overreaching even when the defendant is personally unaffected by it. It is worth remarking on how radically this description of minimum contacts departs from the way the doctrine is presented in *International Shoe* (not to mention *Insurance Corp. of Ireland*);[206] it further bears noting how incongruous this federalism-policing purpose is in a doctrine that is rooted in constitutional due process and that focuses almost exclusively on the defendant's own actions.

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201. Although the Court first mentioned the factors in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), it was not until *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), that the Court clarified how they should be used and applied them in a way that affected the ultimate outcome.

202. *See Fuld*, 606 U.S. at 23–24 (declining to apply Fourteenth Amendment minimum contacts requirement to the Fifth Amendment Due Process Clause in favor of a flexible reasonableness standard).

203. *Id.* at 13.

204. The Court appeared to indicate as much by citing the *McIntyre* plurality in stating that this "framing" of these issues "follows from the principles of interstate federalism embodied in the Constitution . . . and the related protections of due process which ensure that individuals are 'subject only to lawful power[.]'" *Id.* at 14 (internal citation and quotation marks omitted).

205. *Id.* at 13–14 (internal quotation marks omitted) (quoting *World-Wide*, 444 U.S. at 292).

206. *See World-Wide*, 444 U.S. at 292 (noting that personal jurisdiction "ensure[s] that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system").

IV.
MAKING SENSE OF MINIMUM CONTACTS AS A TOOL TO RESTRAIN STATE POWER

As the previous Part has emphasized, it is not clear that the Court's halting, intermittent, and self-contradictory explanations of the federalism-personal jurisdiction link can be trusted as a guide to the Court's true concerns. Although some of the Court's characterizations of this connection evoke *Pennoyer*, they seem to focus on territoriality in an altogether different sense—not as a theoretical justification for the exercise of the state's physical power but as a way of delineating the proper reach of the state's regulatory interests. And, although the Court has tried awkwardly to cast interstate federalism issues as an element of the defendant's due process rights, it has failed to explain the connection between the two—that is, to spell out why a defendant sued in a convenient and unbiased forum that has not overreached in the application of forum law could possibly have any sovereignty-based complaints.

Given these realities, what could it possibly mean to enlist personal jurisdiction as a mechanism to ensure that states do not reach out beyond the proper limits of their power? The following Part discusses several possibilities suggested by scholars and then advances its own: that U.S. law is currently lacking in a theory of when states should be permitted to apply their decisional rules to out-of-state conduct or events. Under this view, personal jurisdiction is an attempt to fill this gap.

A. Previously Suggested Rationales

A primary way many scholars have understood the Court's federalism/sovereignty rhetoric is that the Court is cognizant of the tendency of state courts to favor forum law in many cases and that, given this, personal jurisdiction doctrine helps to ensure that the defendant has a meaningful enough connection with the forum state to justify application of that state's law.[207] Although this concern might be better addressed through direct limits on choice of law, the difficulty of policing such limits perhaps makes personal jurisdiction, as one scholar has suggested, an attractive "first cut" solution to the problem.[208]

Indeed, commentators have argued with some frequency that concerns about choice of law (or prescriptive jurisdiction more

207. *See generally supra* note 52.
208. *See* Perdue, *Beetle*, *supra* note 50, at 572.

broadly) have been baked into minimum-contacts analysis from the start. Joseph William Singer suggests that the Court's decision to focus on contacts indicates that its concern has never been purely with the burden on the defendant but instead has also included "sovereign regulatory interests."[209] For example, he argues, the defendant's in-state sales activity in *International Shoe* gave rise to Washington's legitimate interests in collecting its unemployment insurance tax.[210] Stewart E. Sterk has tied a similar argument more explicitly to choice of law, arguing that "jurisdictional rules protect an entity against defending itself in a forum likely to ignore the legal norms and rules the entity might reasonably expect to govern its legal affairs."[211] Although, Sterk observes, the Court's "explicit acknowledgment that choice of law plays a role in jurisdictional determinations has been grudging at best," choice of law has nonetheless proved a "critical factor" in Supreme Court decisions that the forum state lacked jurisdiction.[212]

Despite the fact that, as Sterk notes, the Court has been somewhat oblique in its allusions to this concern, mentions of the issue have not been entirely absent from personal jurisdiction opinions. Dissenting in *Hanson*, for example, Justice Black objected to the majority's conclusion that no personal jurisdiction existed over the defendant in Florida, explaining that "it could hardly be denied that Florida had sufficient interest so that a court with jurisdiction might properly apply Florida law . . . ."[213] Although recognizing that jurisdiction and choice of law were separate questions, he contended that "the two are often closely related and to a substantial degree depend upon similar considerations."[214]

A second rationale that many commentators have proposed is that personal jurisdiction might be an effort to replace the gap left by *Pennoyer*'s waning by establishing an alternative theory for establishing the legitimacy of judicial power.[215] This legitimacy, for different

209. Joseph William Singer, *Hobbes & Hanging: Personal Jurisdiction v. Choice of Law*, 64 Ariz. L. Rev. 809, 823 (2022).

210. *Id.*

211. Sterk, *supra* note 4, at 1165.

212. *Id.*

213. *Hanson v. Denckla*, 357 U.S. 235, 258 (1958) (Black, J., dissenting).

214. *Id. See also supra* note 107 (noting that *Alaska Packers* expresses a somewhat similar sentiment in the choice-of-law context).

215. Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. Fla L. Rev. 293, 308–09 (1987) (discussing how justifications for personal jurisdiction have evolved post-*Pennoyer* while continuing to be flawed and incomplete); Perdue, *Beetle*, *supra* note 50, at 535–36 (describing the Supreme Court's grounding of personal jurisdiction in due process as "an attempt to delineate the scope of one aspect of legitimate state authority").

commentators, has been grounded in several possible (and perhaps overlapping) sources: the implicit state-benefits-for-obligations "bargain" the defendant takes on by availing itself of the state's resources; the implied consent in defendant's voluntary decision to affiliate with the forum; or a more abstract sense that some degree of connection with a forum state renders it appropriate for the defendant to be subject to that state's policies.[216] Scholar Wendy Collins Perdue has critiqued these theories on various grounds, arguing, for example, that focusing on the defendant's actions as a source of legitimacy "cloaks governmental power with a veil of consent in a way that is destructive of individual dignity,"[217] but also suggesting the futility of the entire project, noting that "if a coherent doctrine of personal jurisdiction depends on the development and acceptance of a coherent philosophy of political legitimacy, then we are in for a long fight."[218]

Finally, personal jurisdiction might be intertwined with federalism concerns in the sense that restricting the reach of state courts helps to prevent unfair favoritism toward the forum state or its residents. That is, personal jurisdiction might, like various dormant Commerce Clause doctrines, serve as a constitutional mechanism that prevents the inappropriate projection of state self-interest—for example, by shielding out-of-state defendants from protectionism or bias[219] or simply by decreasing what Justice Alito has called the "intolerable unpredictability" of litigation for businesses operating across multiple jurisdictions.[220]

Stewart E. Sterk has argued along these lines that personal jurisdiction has "distinct . . . advantages over limits on choice of law" in protecting a defendant's rights.[221] A primary such advantage, in his view, is that personal jurisdiction concerns not merely the application of particular decisional rules but the "entire legal environment" of a particular state, including statutes of limitations, rules about discovery, or "allocating burdens of proof in particular ways."[222] As

216. *See id.* at 539–46 (summarizing these views).

217. *Id.* at 543.

218. *Id.* at 546.

219. *See id.* at 550–60 (describing arguments for personal jurisdiction based on the Commerce Clause-related concerns of undue burdens on intrastate commerce and discrimination against out-of-staters).

220. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 161 (2023) (Alito, J., concurring in part and concurring in the judgment) ("Aside from the operational burdens it places on out-of-state companies, Pennsylvania's scheme injects intolerable unpredictability into doing business across state borders.").

221. Sterk, *supra* note 4, at 1175.

222. *Id.* at 1175–76.

a result, Sterk notes, "[c]onstraints on personal jurisdiction—but not direct constraints on choice of law—protect against all the vagaries of trial in potentially unfriendly states," such as "judges selected by plaintiff-friendly voters or governors" or "forum antipathy to foreigners or foreign corporations."[223] Indeed, one such procedural vagary includes the application of another state's law itself; as Sterk notes, in a hypothetical world where choice- of-law limits were more stringent and personal jurisdiction requirements looser, courts would be more frequently called upon to interpret another state's law, raising the danger that they would "inadvertently or intentionally . . . subvert the regulatory policies of the state whose sovereign interests the Court had deemed worthy of protection."[224]

Although written before the decision in *Bristol-Myers Squibb*, this line of argument appears to anticipate the reasoning and result in that case in some respects, and it seems eminently plausible that the majority was driven by concerns similar to the ones Sterk raises, which might be particularly important to the Court in the mass litigation context. As has been frequently noted, *Bristol- Myers Squibb* caps off a line of corporate-friendly personal jurisdiction decisions;[225] its practical effect is to make a defendant corporation's principal place of business or its place of incorporation (where general jurisdiction would likely be present) the exclusive venues in most situations for large, multistate actions against it.[226] Such an outcome might be driven by the Court's beliefs both that a defendant corporation might receive fairer, more predictable treatment in its home bases *and* that, from a perspective of federalism, it might be more logical if high-stakes litigation were heard in a forum more closely connected to the defendant.[227]

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223. *Id.* at 1176.

224. *Id.* at 1177.

225. *See infra* note 227.

226. *See Bristol-Myers Squibb*, 582 U.S. at 268.

227. Of course, many commentators as well as Justice Sotomayor in dissent have argued strenuously against this sympathetic treatment for corporations, noting that it may come at an unwarranted cost to plaintiffs' ability to proceed. *See, e.g.*, *Bristol-Myers Squibb*, 582 U.S. at 269 (Sotomayor, J., dissenting) (noting that the result "will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone" and "will result in piecemeal litigation and the bifurcation of claims"); Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. Rev. 1251, 1256 (2018) ("Plaintiffs who have similar claims stemming from a defendant's nationwide course of conduct (like a nationally marketed defective product) and wish to sue together will now face a more limited set of options."). But whether normatively desirable or not, this is at least a plausible linkage between personal jurisdiction and federalism.

At the same time, although it is easy to imagine that the considerations Sterk raises were part of the Court's motivation for reaching the result it did in *Bristol-Myers Squibb*, it is also striking that the Court never mentions them specifically. In *Bristol-Myers Squibb*, similar to other federalism-invoking cases, the Court hand-waves toward "the practical problems resulting from litigating in the forum" but insists that it is also centrally concerned with "the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question."[228] Thus, although Sterk's arguments would seem more than adequate to explain both the result in *Bristol- Myers Squibb* and the Court's persistence in invoking federalism, they do not explain the Court's stubborn insistence that it is not just these practical burdens and biases but also some ineffable state sovereignty-balancing interest that is at stake.

B. Another Theory: Personal Jurisdiction as a Response to a Doctrinal Void

Although building on all these previously mentioned theories, this Article advances a somewhat different argument for why the Court has so persistently linked personal jurisdiction with federalism. Under this view, personal jurisdiction has come to fill a doctrinal void: the absence in case law of a meaningful theory of when state courts should be permitted to impose the forum's own policies—whether through choice of law or other outcome-affecting mechanisms—on events or conduct with some extraterritorial element. Personal jurisdiction occupies this space in part in a theoretical sense, supplying at least some of what is under today's doctrine an otherwise-missing rationale for why a court's decision to apply forum policies to people or conduct outside its borders is justified. This implicit rationale would appear to rest on ideas similar to those the Court has invoked in the choice-of-law context and that are perhaps most clearly explained in *Ford*—that is, that it is appropriate for the forum to apply its own policies to out-of-state conduct when the forum has "significant interests at stake" that center on the protection of its residents.[229] At the same time that minimum contacts doctrine provides this guiding maxim as to when a state *should* be able to apply its own law, it also, as Perdue and others have observed,[230] provides a mechanism for implementing this principle in practice, requiring connections between the

228. *Bristol-Myers Squibb*, 582 U.S. at 263.
229. Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 592 U.S. 351, 368.
230. *See supra* note 50.

forum and the dispute that serve to reduce opportunities for a state court to apply forum law too broadly.

There is little indication that the Supreme Court has directly or explicitly relied on personal jurisdiction doctrine to fulfill this role. Indeed, as one commentator has observed, the federalism interests the Court has invoked recently are of a "curious kind" that "the Justices have shown no interest in explaining how they understand and wish to apply."[231] The Court, however, *has* acknowledged the limitations and ambiguities of relying on other doctrines that have some role in limiting the possibilities of regulatory clashes between states.[232] Thus, this Part argues, the Court appears cognizant of both the link between forum and substantive outcome and the absence of alternative mechanisms for restraining the excessive projection of state regulatory policy though litigation.

1. The Link Between Personal Jurisdiction and Forum Law

In advancing the argument that personal jurisdiction fills a doctrinal gap in guarding against the exorbitant application of forum law, it is first worth reiterating two points: First, personal jurisdiction and choice of law are not necessarily connected; on the international stage (and, historically, in the United States), they have been regarded as two distinct issues. Second, despite this, states' exercise of personal jurisdiction in the United States in is in fact closely linked in several ways to the application of forum law.

To the first of these points, it should be stressed that permitting a court to exercise jurisdiction and permitting it to apply its own law are, in theory, separate inquiries. Principles of private international law recognize a distinction between prescriptive or legislative jurisdiction—a sovereign's ability to prescribe rules of conduct, whether through legislation, judicial decisions, or otherwise[233]—and judicial or adjudicative jurisdiction, which is the ability to subject

231. *See* Campbell, *supra* note 85, at 140 (2020).

232. *See, e.g.*, Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 376 (2023) (acknowledging "vigorous and thoughtful critiques" of Court's invocation of the dormant Commerce Clause as limit on extraterritorial economic regulation and suggesting that many difficult issues remain undecided (quoting Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 588 U.S. 504, 515 (2019)); Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 155 (2023) (Alito, J., concurring in part and concurring in the judgment) (describing use of personal jurisdiction to address federalism concerns as an example of how the Due Process Clause has "become a refuge of sorts for constitutional principles that are not 'procedural' but would otherwise be homeless as the result of having been exiled from the provisions in which they may have originally been intended to reside").

233. Restatement (Fourth) of Foreign Rels. L. of the U.S. § 401 (A.L.I. 2018).

people or property to legal process.[234] The jurisdictional rules of many countries reflect this distinction. In European Union law, for example, the rules addressing prescriptive[235] and judicial[236] jurisdiction are fairly crisply separated; in both cases, further, they provide straightforward formulas rather than a complex weighing of contacts and factors.[237] For example, a tort will, in nearly all cases, be governed either by the law of the country where the damage occurred or, in applicable cases, the law of the tortfeasor and victim's joint domicile.[238] A tort suit may be brought, by contrast, in the "place where the harmful event occurred or may occur."[239] Although these rules will likely in most cases point to the same jurisdiction, they are governed by two separate conventions and presumably reflect somewhat different considerations. Further, under this scheme, forum choice should not, in theory, affect the law that governs the dispute. Even if the defendant is subject to personal jurisdiction in more than one nation, that is, the relevant rules dictate that all potential fora should, at least in most cases, apply the same law.[240]

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234. *See id.*

235. Regulation (EC) No. 593/2008 of the European Parliament and the Council on the Law Applicable to Contractual Obligations, 2008 O.J. (L 177) 6 ("Rome I") [hereinafter Rome I]; Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations, 2007 O.J. (L 199) 40 ("Rome II") [hereinafter Rome II].

236. *See generally* Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, 2012 O.J. (L 351) (the "Recast Brussels Regulation").

237. Notably, the European Union is far from anomalous on the international stage in this regard. As Ray Worthy Campbell notes, China and many other civil-law countries permit jurisdiction in tort cases wherever the tortious act took place, which may encompass both "the places where the tort is committed and the places where the result of the tort occurs." *See* Campbell, *supra* note 85, at 137–38 (2020).

238. Rome II, *supra* note 235, Ch. II, Art. 4. The rule contains an exception if the dispute presents a "manifestly closer connection with another country," as when the tort is closely connected to a preexisting contractual relationship centered in another country. *Id.*

239. *See* Recast Brussels Regulation, *supra* note 236, § 2, art. 7(2).

240. This separation of choice-of-law and personal jurisdiction rules is also characteristic of other common-law, federalist countries like Australia and Canada. In Australia, courts of a particular Australian state generally obtain personal jurisdiction over a defendant from another Australian state via service pursuant to the Service and Execution of Process Act. *See* Michael Douglas, *New Rules for Extra-Territorial Jurisdiction in Western Australia*, Conflict of Laws.Net (Mar. 27, 2024), https://conflictoflaws.net/2024/new-rules-for-extra-territorial-jurisdiction-in-western-australia [https://perma.cc/2HQ8-J9BX] ("If within Australia, the rules are effected by the *Service and Execution of Process Act 1992* (Cth) as modified by the rules of the forum court."). Until recently, Western Australia was alone among Australian

Historically, these two concepts were also treated separately in the United States. As this Article has argued, early restrictions on personal jurisdiction derived from certain ideas about state sovereignty and its limits, but courts applying them normally did not grapple with or even consider the question of how far the operation of specific state regulatory standards, as opposed to the abstract reach of state power, should extend.[241] The Supreme Court ultimately did turn its attention to the regulatory-reach issue, but it did so much later and in lines of doctrine that were, at least initially, wholly disconnected from personal-jurisdiction cases.[242]

In contrast, current U.S. personal jurisdiction and choice-of-law rules vary from both international models and domestic historical ones in two ways that together have caused these areas of doctrine to become closely linked. The first is that, at least when personal jurisdiction is based on minimum contacts, both areas of doctrine have evolved to be informed by similar—indeed, close to identical—considerations.[243]

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states in maintaining somewhat stricter standards, but it now follows practice in the rest of Australia. *See id.; see also Service, Appearance and Extradition*, WESTLAW PRACTICAL LAW (database updated Sep. 2025) ("Generally [in Australia], service is the basis of the court's personal jurisdiction over the respondent") (citing *Laurie v Carroll* [1958] 98 CLR 310, 323 (Austl.)). Choice of law is generally governed by rules that are uniform throughout Australia, such as *lex loci delicti* in intranational torts. *See* Robert Pietriche, *The Ascendancy of the Lex Loci Delicti: The Problematic Role of Theory in Australian Choice of Tort Law Rules*, 16 MELB. J. INT'L L. 86, 97 (2015) ("[T]he *lex loci delicti* was considered the appropriate rule for intranational torts in the modern Australian context."). Canada appears to be the only country other than the United States where personal jurisdiction is subject to constitutional limits. *See* Audrey Feldman, Note, *Rethinking Review of Foreign Court Jurisdiction in Light of the Hague Judgments Negotiations*, 89 N.Y.U. L. REV. 2190, 2195 n. 25 (2014) ("Canada is apparently the only other country in which personal jurisdiction has a constitutional component."). Standards are nonetheless both less demanding than those in the U.S. and governed by a wholly different analysis than Canadian choice of law. Personal jurisdiction over defendants from outside the forum province requires a "real and substantial connection" to the forum, a test that calls for a "more fluid analysis" that is "potentially looser than the 'minimum contacts' standard." Caroline Davidson, *Tort au Canadien: A Proposal for Canadian Tort Legislation on Gross Violations of International Human Rights and Humanitarian Law*, 38 VAND. J. TRANSNAT'L L. 1403, 1437 (2005). By contrast, choice of law in Canada also is governed by *lex loci delicti* and similarly uniform rules, particularly in purely domestic cases. *Id.* at 1439.

241. *See supra* notes 73–76 and accompanying text (explaining that early discussions about intrusions on state sovereignty were abstract in nature and not concerned with the inappropriate extension of state regulatory policies).

242. *See* Florey, *Landscape*, *supra* note 29, at 1169–72 (discussing line of cases extending extraterritorial reach of state law).

243. In the choice-of-law realm, this is a fairly recent development; the current standard was not even articulated until 1981 and was not adopted by a majority until several years later. *See id.* at 1180–81.

Current limits on both are rooted, at least in part, in the Fourteenth Amendment Due Process Clause.[244] Further, both have come to rely on contacts with the state as the measure of constitutionality. Personal jurisdiction requires that the defendant have "minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice";[245] meanwhile, valid choice of law must rest on a "significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction."[246]

Although from the bare recitation of these standards, "significant" contacts might seem to require more extensive interaction with the forum than "minimum" ones, this has not proved true in practice, given that the Court's application of the choice-of-law standard "is a relatively modest hurdle" outside of the class action context.[247] Indeed, in most cases, personal jurisdiction rules are *stricter* than those for choice of law. In other words, the existence of valid personal jurisdiction in most cases also implies that the forum has the constitutional power to apply its own law. This is in part because the choice-of-law test takes into account the plaintiff's contacts as well as the defendant's—and, because plaintiffs often prefer to sue in their home forum or one to which they have other ties, those contacts may go a long way toward satisfying the standard in themselves.[248] Thus, when personal jurisdiction over the defendant is founded on minimum contacts[249]—and in many cases even when it is not—it is almost

244. Although the Full Faith and Credit Clause is nominally also a source of limits on choice of law, it has in practice ceased to play any independent role. *See id.* at 1142 (noting that the Full Faith and Credit Clause has "lost most of [its] force in recent years.").

245. *See* Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945) (internal quotation marks and citation omitted).

246. Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) (plurality opinion).

247. *See* Florey, *Personal*, *supra* note 50, at 1228.

248. *See* Scott Dodson, *Why Do In-State Plaintiffs Invoke Diversity Jurisdiction?*, 49 L. & Soc. Inquiry 1283, 1301 (2024) (suggesting that plaintiffs may prefer to sue in their home state "for reasons of geographic convenience and ease of finding local counsel.").

249. One exception to this principle is in the class action context. Courts have personal jurisdiction over members of a plaintiff class even if they have not themselves had any part in the decision to file in a particular location. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985). Because of this, if there is some basis for personal jurisdiction over the defendant, a class action may be brought in a forum that has very little connection to the subject matter of a dispute and that is consequently not permitted to apply its own law. *See id.* at 821. Recent Supreme Court cases have reduced the chance of this scenario occurring by limiting the fora in which class action defendants are subject to jurisdiction. *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 263–65 (2017) (holding that a state cannot

unthinkable, at least in individual litigation, that that court's application of forum law would be deemed invalid under the relevant standard.[250]

It is further worth noting that even these minimal restrictions do not apply to the application of forum procedural law. Rather, it is the general practice for states to apply their own procedures, even when using another jurisdiction's substantive law as the decisional rule in the case.[251] The Court has never suggested that this practice is subject to even the modest standards that restrain the application of the forum's substantive law. Indeed, it has indicated the opposite: that states enjoy virtually unlimited freedom both to characterize given legal rules as procedural and to apply them to any claim they wish.[252] Yet procedural law can also, of course, be an instrument of policy; a state can, for example, require a screening process for medical malpractice claims in order to insulate doctors from liability[253] or, on the other end of the ideological spectrum,

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assert specific jurisdiction where there is no relationship between forum, plaintiffs, and the "specific claims at issue").

250. In theory, of course, a court's decision to apply not the law of the forum but the law of another state could violate the "significant contact or significant aggregation of contacts" standard. In practice, however, the cases applying the standard—including both Supreme Court cases to consider the issue—deal with the presumably more common problem of exorbitant application of forum law. *See Shutts*, 472 U.S. at 818; *Hague*, 449 U.S. at 306 ("Interpreting Wisconsin law to disallow stacking, the [Minnesota District Court] concluded that Minnesota's choice-of-law rules required the application of Minnesota law permitting stacking.").

251. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 6, intro. note (A.L.I 1971) ("Commonly, it is said that the forum will apply its own local law to matters of procedure and the otherwise applicable law to matters of substance.").

252. *See* Sun Oil Co. v. Wortman, 486 U.S. 723, 727–30 (1988) (holding that neither the Full Faith and Credit nor the Due Process Clause prevents a state from either characterizing its own statute of limitations as procedural rather than substantive or applying it to claims otherwise governed by the law of a different state).

253. In Vest v. St. Albans Psychiatric Hosp., Inc., 387 S.E.2d 282, 282–84 (1989), for example, the West Virginia Supreme Court of Appeals declined to apply a Virginia requirement that medical malpractice claims be screened by a review panel to an injury sustained in Virginia by a West Virginia resident. The court's stated ground for decision was that, as the forum, West Virginia should apply its own procedures, not Virginia's. *Id.* Notably, however, even while resting on this reasoning, the court appeared to recognize the substantive goals of the Virginia requirement, recognizing that one of its aims was to "change the average and aggregate value of tort judgments by making plaintiffs bring their claims in a particular way" and that a consequence of its decision might be to "short-circuit a valuable social experiment in Virginia . . . ." *Id.* at 286.

liberalize class action requirements to allow consumers more power vis-à-vis corporations.[254]

A second distinctive feature of the current U.S. landscape is that, in addition to enjoying wide latitude to apply forum law in many circumstances, states also vary considerably in which choice-of-law principles they have adopted.[255] Thus, in many cases, forum choice is determinative of—or at least exerts a great degree of influence on—the law applied, sometimes in ways that may advantage one litigant over another. The connection between forum and substantive law does not necessarily mean that courts will apply forum law in all circumstances, but it does mean that forum choice has a profound influence on the law applied in a way that is generally not true outside the United States.

Although the Court has at times denied any connection between personal jurisdiction and choice of law,[256] personal jurisdiction doctrine has seemed at times to take this connection between forum and substantive law into account. As one commentator has noted, Supreme Court cases finding that no personal jurisdiction existed "have almost uniformly been cases in which application of forum law posed an unjustified threat to the regulatory scheme of another jurisdiction[.]"[257]

Further, certain of the Court's comments about personal jurisdiction and federalism appear to recognize the links among the forum, the law applied, and the outcome. Recall that in *McIntyre*'s plurality opinion, Justice Kennedy described the relevant personal jurisdiction inquiry as "whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."[258] This characterization seems to rest on the view that state courts are not simply neutral venues applying the law of other jurisdictions

254. *See Developments in the Law: Class Actions* 89 Harv. L. Rev. 1318, 1328, n.42 (1976) ("Many recent state class action statutes are drawn specifically with regulatory, often consumer protection, purposes in mind.").

255. *See* Florey, *Personal*, *supra* note 50, at 1238 ("State courts apply at least seven different conflicts methodologies, and even courts that nominally use the same one often in practice interpret it in different ways and with a great degree of judicial discretion.") (citation omitted).

256. *See* Stanley E. Cox, *Personal Jurisdiction for Alleged Intentional or Negligent Effects, Matched to Forum Regulatory Interest*, 19 Lewis & Clark L. Rev. 725, 727 (2015) (noting that the Court "has rejected efforts to link the . . . concepts" of personal jurisdiction and the constitutional scope of forum law).

257. *See* Sterk, *supra* note 4, at 1165.

258. J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 884.

where appropriate but also act as instruments of their own state's social policy and regulation. Likewise, partially concurring in *Mallory*, Justice Alito characterized a world of loosened personal jurisdiction requirements as one in which businesses would be called upon to "manage the patchwork of liability regimes, damages caps, and local rules in each state."[259] Because "liability regimes" and "damages caps" are closely linked to the forum state's policy goals, Justice Alito's concern again appears founded on the reasonable—but unstated and unexplored—assumption that expanding the fora in which defendants are subject to suit will similarly multiply the defendant's exposure to differing state laws.

The tendency to equate personal jurisdiction and the application of forum law also weighs in the other direction, favoring personal jurisdiction over a defendant who has assented to the application of forum law. Courts have tended to count a choice-of-law clause selecting the law of a particular state as a factor supporting the existence of personal jurisdiction in that forum.[260] Although courts often justified this practice on the basis that such a clause reflects the defendant's "deliberate affiliation with the forum,"[261] it is not much of a stretch to imagine that it is also informed by the belief that, given that a forum with personal jurisdiction over the defendant is probably more apt to apply its own law than that of another state, such an exercise of jurisdiction is fairer if the defendant has chosen the forum's law to govern its activities to begin with.

Especially because choice-of-law rules and outcomes vary by forum, the equation between choice of forum and choice of law is in many ways justified. In state courts, forum law is almost always the rule for procedural matters and the default in substantive ones; generally, a court will apply a different state's law only if a litigant raises

259. *Mallory*, 600 U.S. at 161–62 (Alito, J., concurring in part and concurring in the judgment).

260. The Court first endorsed the consideration of this factor in *Burger King Corp. v. Rudzewicz*, in which the Court found that a choice-of-law clause "reinforced [the defendant's] deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there." 471 U.S. 462, 482 (1985). Lower courts continue to incorporate choice-of-law clauses as a factor, although not always a dispositive one, in personal jurisdiction analysis. *See, e.g.*, Sunward Elecs., Inc. v. McDonald, 362 F.3d 17, 23 (2d Cir. 2004) ("A choice of law clause is a significant factor in a personal jurisdiction analysis because the parties, by so choosing, invoke the benefits and protections of [the forum]."); Tejal Vyas, LLC v. Carriage Park, Ltd. P'ship, 600 S.E.2d 881, 887 (N.C. Ct. App. 2004), *aff'd*, 608 S.E.2d 751 (N.C. 2005) (mem.) ("While choice of law clauses are not determinative of personal jurisdiction, they express the intention of the parties and are a factor in determining whether minimum contacts exist.") (citation omitted).

261. Burger King v. Rudzewicz, 471 U.S. 462, 482 (1985).

the issue and persuades the court to do so.[262] In addition to these built-in procedural weights toward forum law, many courts' choice-of-law systems have some preference, either explicit or de facto, for forum law in situations of inveterate conflicts with other states' decisional rules.[263] In such a choice-of-law process, state courts have little, if any, constitutional obligation to consider independently the interests of other states in deciding which law will apply.[264] Finally, many have argued that—particularly in a common-law system—even when a court applies the law of another state, the other state's law is "domesticated" in the sense that it is filtered through a different state's understanding and procedures in way that may significantly change its meaning.[265]

Although the extent of forum law bias is debated,[266] most conflicts scholars agree that it exists to some degree.[267] Some courts

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262. *See* Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Under Federal Rule of Civil Procedure 23(B)(3)*, 2004 MICH. ST. L. REV. 799, 802 ("State choice-of-law rules generally authorize courts to apply the law of the forum, unless the party seeking application of non-forum law demonstrates that forum law should not be applied."). Notably, a preference for forum law often drives decisions about where to file. *See* Rutherglen, *supra* note 50, at 3 ("In many cases, forum law is exactly what a nonresident defendant is seeking to avoid and exactly what the plaintiff hopes to obtain.").

263. *See* Luke Meier, *Simplifying Choice-of-Law Interest Analysis*, 74 OKLA. L. REV. 337, 343 (2022) ("Many jurisdictions have employed such a tiebreaker (either explicitly or implicitly), usually defaulting to either forum law (Currie's preference) or to the law that would be selected under the First Restatement's traditional approach.").

264. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (plurality opinion) (requiring, as a prerequisite for application of forum law, contacts that "creat[e] [forum] state interests" without reference to interests that other jurisdictions might possess). *But see id.* at 322–24 (Stevens, J., concurring in the judgment) (arguing for additional consideration, under Full Faith and Credit Clause, of whether "choice of forum law . . . threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State").

265. *See* Katherine Florey, *Honoring Statutory Restraint in Conflicts Analysis*, 137 HARV. L. REV. F. 271, 285–86 (2024) (discussing "local law" conflicts theories and noting that, in practice, states have few constraints on how they interpret sister-state law).

266. *Contrast* William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1405, 1432–35 (2020) (arguing that state courts' extraterritorial applications of state law are "generally unobjectionable" and that "state conflicts rules […] give priority to the laws of other jurisdictions in appropriate cases"), *with* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 495 (2011) (citing view among several scholars that modern choice-of-law methods create a "strong bias" toward forum law). *See also* John T. Parry, *Some Realism About Choice-of-Law Statutes and the Common Law: The Oregon Example*, 27 LEWIS & CLARK L. REV. 197, 201 n.12 (2023) (citing evidence that both supports and tends to disconfirm, the idea that courts favor forum law).

267. Whytock, *supra* note 266, at 495.

have even acknowledged and embraced this preference, characterizing themselves as "instruments of state policy" tasked with favoring state law in close cases.[268] And even when courts apply the law of another state, procedural differences can of course affect results. In particular, choice-of-law rules often differ substantially from state to state *and* frequently encode forum-law preferences.[269] This means both that each state will put its distinctive stamp on choice-of-law issues and that, all things being equal, states are likely to put special weight on the forum's own policies and interests in the process.

2. The Failure of Other Doctrines to Restrain State Overreach in Litigation

That forum choice may affect results, however, does not fully account for the Court's choice to focus on personal jurisdiction as a central means of ensuring that states do not overreach in regulating conduct in which they lack a legitimate interest. Indeed, because the international norm is to regard judicial and prescriptive jurisdiction as distinct[270]—and because structural issues of state regulatory overlap would seem to have little to do with core due process concerns[271]—personal jurisdiction is in many ways an improbable locus for these issues. The connection between minimum contacts and state regulatory scope may make more sense, however, when seen in the context of the Court's failure to develop a more general account of the relationships among state-court litigation, sovereignty, and the extraterritorial projection of state regulation in the post-territorial-formalist world. For the *Pennoyer* Court, it was self-evident that states had no power to compel absent out-of-state residents to appear in their courts because borders marked the limits of their sovereignty.[272] Today, although we have discarded this formalist view, we still recognize a relationship between adjudication of cases and state power. The nature of this relationship, however, and what the proper limits on it should be remain blurry. In other words, though a strain of concern about the potential for litigation to encroach on other states' spheres of influence runs through personal jurisdiction doctrine, the Court has not clarified where this intrusion exists.

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268. *See, e.g.*, Lilienthal v. Kaufman, 395 P.2d 543, 549 (Or. 1964).

269. *See* Florey, *Personal*, *supra* note 50, at 1223, n.135, 1238 (noting that choice-of-law systems tend to be "biased at least to some degree in favor of forum law" but that the "choice-of-law landscape is almost unimaginably complex").

270. *See supra* notes 233–42 and accompanying text.

271. *See* sources cited *supra* note 4.

272. *See supra* Section II.A.

This lack of specificity about the goals of restricting courts' application of forum law contrasts, to some extent, with the way the Court regards state *legislation* that reaches beyond what the Court sees as the state's area of proper concern. Although there exists a great deal of fuzziness about how the relevant principles should be applied, the Court has suggested fairly consistently in recent years that state laws are invalid if they "directly regulate[]" conduct in other states,[273] discriminate against out-of-state businesses,[274] or impose a burden on interstate commerce that, even if not motivated by a discriminatory purpose, clearly exceeds their local benefit.[275] To be sure, these principles have come under fire for their vagueness and subjectivity.[276] But the evils they are designed to address seem fairly clear. States unfettered by such restrictions might choose to interfere with conduct outside their proper sphere of influence, with the risk that they might improperly reach into other states' affairs, encroach upon other polities' democratic choices, and subject individual actors to inconsistent regulation.[277] Another category of risks involves favoritism: States might take action to advance their residents' interests at the expense of others, either through directly advantaging them relative to citizens of other states or by heedlessly ignoring the

273. Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 376 n.1 (2023) (emphasis omitted) (citing Edgar v. MITE Corp., 457 U.S. 624 (1982)).

274. *See* General Motors Corp. v. Tracy, 519 U.S. 278, 298 n.12 (1997) ("[S]everal cases that have purported to apply the undue burden test . . . arguably turned in whole or in part on the discriminatory character of the challenged state regulations . . . .").

275. *See Nat'l Pork*, 598 U.S. at 391 (Sotomayor, J., concurring in part and concurring in the judgment) (affirming the "balancing and tailoring principles" first distilled in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and "most frequently deployed to detect the presence or absence of latent economic protectionism"). *But see id.* at 377 (plurality opinion) (rejecting view of *Pike* balancing test as unconnected from core antidiscrimination concerns under dormant Commerce Clause).

276. *See, e.g.*, Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax*, 2012 MICH. ST. L. REV. 41, 62 (2012) (criticizing *Pike* balancing as a "subjective exercise"); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 79 (1993) (Scalia, J., concurring in part) (expressing disapproval of the "vague and open-ended tests that are the current content of our negative Commerce Clause jurisprudence").

277. *See* Healy v. Beer Institute, Inc., 491 U.S. 324, 335–37 (1989) (discussing dangers of extraterritorial regulation, including interference with the "autonomy of the individual States within their respective spheres" and subjecting businesses to "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State"); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1616–17 (2005).

consequences that locally beneficial legislation may have for out-of-state entities.[278]

Although doctrines limiting territorial overreach are generally limited to state legislation, litigation and the judgments that arise from it can, of course, have similar effects. A court may, for example, impose liability on an out-of-state entity for failing to comply with in-state standards[279] or issue an injunction requiring it to do so.[280] In most cases, such judgments will be formally binding only on particular parties, but they will nonetheless have influence on similarly situated actors. In other cases—class actions, other mass litigation, or broad injunctions that affect large entities—litigation may have still more sweeping effects beyond state borders.[281]

Such effects can further create problems mirroring those present when states attempt to regulate extraterritorially through legislation. For example, unpredictable choice-of-law decisions, like overlapping legislative efforts by different states, may result in a lack of certainty about which standards will apply to primary conduct.[282] Excessive reliance on forum law by one state also undermines the ability of other states to enjoy an "autonomous sphere in which to make policy free of interference from other sovereigns"—again, in a manner similar to that of overreaching state statutes.[283] Finally, state courts can apply forum law in a parochial manner to provide benefits to state residents.[284]

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278. *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (explaining how the dormant Commerce Clause restricts various sorts of state protectionism).

279. *See, e.g.*, Bernhard v. Harrah's Club, 546 P.2d 719, 725–76 (Cal. 1976) (en banc) (applying California's dram-shop act to a Nevada tavern keeper whose conduct could have foreseeably had negative effects in California).

280. *See, e.g.*, Kearney v. Salomon Smith Barney, 137 P.3d 914 (Cal. 2006) (permitting class action to enjoin Georgia-based brokerage from recording the phone calls of Californians to proceed); *see also* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1104–08 (2009) [hereinafter Florey, *Reflections*] (citing several examples of injunctions with extraterritorial effect).

281. *Id.* at 1104–08 (noting extraterritoriality concerns of mass litigation and injunctions).

282. *See* John F. Coyle, William S. Dodge & Aaron D. Simowitz, *Choice of Law in the American Courts in 2022: Thirty-Sixth Annual Survey*, 71 Am. J. Comp. L. 251, 254 (2023) (noting that West Virginia's use of a *lex loci delicti* rule "makes it impossible for a rental car company to foresee which law governs its entrustment decisions"); Florey, *Reflections*, *supra* note 280, at 1115 (arguing that excessive extraterritorial extension of law creates uncertainty about the lawfulness of particular conduct).

283. Florey, *Reflections*, *supra* note 280, at 1115.

284. *See* Parry, *supra* note 266, at 201 n.12 (noting evidence that such favoritism occurs).

Notably, however, the extraterritorial implications of choice-of-law decisions constitute a severely undertheorized area of doctrine. Historically, a combination of forces—including the lack of variation in state common law that often prevailed prior to the twentieth century, the early uniformity of the choice-of-law principles applied across states, and a scholarly obsession with constructing theoretical justifications for applying foreign law rather than specifying when courts should be obliged to do so—served to mute potential concerns about the overapplication of the forum's own law.[285] The imposition of any constitutional limits at all on choice of law is a recent development, and the Court has in the past several decades largely backed away from meaningful restraints outside the class action context,[286] signaling its desire to leave the area primarily to the discretion of state courts.[287] Although state choice-of-law decisions are subject to nominal limits, these limits are extremely lenient in most cases and mostly redundant to personal jurisdiction protections.[288] The rationale behind these modest restrictions, further, is less than clear,[289] and they clearly occupy a separate line of doctrine from the Court's extraterritoriality jurisprudence, which it has never attempted to adapt to the choice-of-law context.[290] Other constitutional provisions, such as the Privileges and Immunities Clause[291]

285. *See* Spillenger, *supra* note 27, at 1259–60 ("[A]ntebellum jurists rarely expressed concern over the possibility [of] . . . giving extraterritorial effect to [forum] law; to them, the evils worked by extraterritoriality consisted, if anything, in compelling the forum to give effect to legal rights and relationships created elsewhere."); Florey, *Resituating Territoriality*, supra note 17, 166–67.

286. *See* Florey, *Reflections*, *supra* note 280, at 1058 (describing the Court's ruling in *Allstate Ins. Co. v. Hague*, 499 U.S. 302 (1981), as permitting state courts to "apply whatever law they please so long as the state possesses a 'significant aggregation of contacts'"). The standard, has, however, been applied more stringently to choice-of-law decisions in class actions. *See id.* at 1078.

287. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 727 (1988) (explaining that "the legislative jurisdictions of the States overlap" such that "frequently . . . a court can lawfully apply either the law of one State or the contrary law of another"); *see also* Florey, *Reflections*, *supra* note 280, at 1080 (noting that *Sun Oil* arguably can be understood to make the *Hague* standard even more lenient).

288. *See id.* at 1058–59 (noting that, where a court has successfully established personal jurisdiction based on minimum contacts, it almost always has the power under *Hague* to apply its own law).

289. *See id.* at 1080–81 (noting that the "animating concerns" of the *Hague* standard are vague and fail to grapple with extraterritoriality considerations).

290. *See id.* at 1062 (discussing precedents that "suggest . . . a more general extraterritoriality prohibition lurk[ing] somewhere in the Constitution, having nothing to do with" the Court's choice-of-law cases).

291. *See* John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 Wm. & Mary L. Rev. 173, 182–83 (1981) (describing arguments that choice-of-law

and the dormant Commerce Clause,[292] have been proposed as limits on state choice of law,[293] but so far the Supreme Court has not embraced these possibilities.

State courts, likewise, rarely make explicit judgments about extraterritorial effects when applying their choice-of-law principles. Although a significant number of states apply presumptions against extraterritoriality to state legislation,[294] such presumptions, as William S. Dodge has noted, often do little beyond what is accomplished by state conflicts rules and tend to be applied inconsistently.[295] Further, such rules lack application, either in theory or in practice, to common-law claims,[296] and they, of course, do not address the issues involved in the application of the forum's policy-driven procedures at all.[297]

To be sure, despite the general lack of constitutional or interpretive guideposts in this area, state courts exercise restraint in many circumstances,[298] and some factors often considered in internal state choice-of-law analysis, such as consideration for the interests of other states, may be an effective substitute in many situations for explicit extraterritoriality analysis. Nonetheless, state-court choice-of-law decisions have two important limitations: First, whatever limitations they rely on are voluntary rather than constitutionally mandated, and as such are somewhat precarious; and second, because they generally fail

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decisions that favor forum residents might violate the Fourteenth Amendment Privileges and Immunities Clause).

292. *See* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 806 (2001) (proposing an approach that "reconciles the extraterritoriality prong of the dormant Commerce Clause with the scores of choice-of-law decisions that have cross-border effects, as well as with constitutional limitations on choice of law").

293. To be sure, some commentators have also suggested that personal jurisdiction doctrine draw on these additional constitutional provisions. *See* Todd Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655, 694 & nn.170–71 (2019) (collecting additional commentators who have rooted contacts requirements in interstate federalism or dormant Commerce Clause); *see* Erbsen, *supra* note 180, at 471 (noting scholarship on potential relevance of Privileges and Immunities Clause and Full Faith and Credit Clause to personal jurisdiction).

294. *See* Dodge, *supra* note 266, at 1405 (noting that, as of 2020, twenty states apply a presumption against extraterritoriality in interpreting the reach of state statutes).

295. *See id.* at 1430 (noting that state presumptions against extraterritoriality often "do little work").

296. *See id.* at 1411–12 (stating that despite variations in state presumptions against extraterritoriality, none extends to common-law claims).

297. *See supra* notes 251–54 and accompanying text.

298. *See* Dodge, *supra* note 266, at 1432 (arguing that state conflicts rules serve as a meaningful limit on overextension of forum law).

to directly grapple with extraterritorial effects as such, they are of limited use to other courts attempting to reason through the issue.

In contrast to choice-of-law limits, personal jurisdiction has long been a topic of intense activity by the Supreme Court and of interest from the broader legal community. Moreover, the doctrine has long been tied to fears of state overreaching, although more modern iterations, to be sure, balance such concerns against the need for state citizens to be able to hold out-of-state wrongdoers accountable.[299] Even the metaphor of the "long-arm statute" by which states assert minimum contacts-based jurisdiction evokes a literal reaching across state borders that suggests some relationship between the doctrine and extraterritoriality. No equivalent concept exists in choice-of-law terminology; indeed, if anything, conflicts scholars have often stressed from various perspectives the purely domestic aspects of choice-of-law decisions.[300] Thus, personal jurisdiction doctrine has perhaps become a locus for extraterritoriality-like considerations simply because, in some sense, it occupies the same neighborhood of concerns, such as protecting defendants from unfair surprise and preventing state courts from engaging in outright favoritism. Arguing that constitutional principles other than the Due Process Clause might be pressed into service to limit state courts' jurisdiction, Justice Alito recognized this sort of due process mission creep, arguing that the Fourteenth Amendment Due Process Clause "has become a refuge of sorts for constitutional principles that are not 'procedural' but would otherwise be homeless as the result of having been exiled from the provisions in which they may have originally been intended to reside."[301]

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299. *See* Burger King v. Rudzewicz, 471 U.S. 462, 476 (1985) (finding it "presumptively not unreasonable" to hold a defendant to account in the courts of a state where the defendant has conducted activities).

300. Several influential choice-of-law theorists, for example, have argued that all law applied by a particular state court is in a sense domestic, even if it may mimic the content of foreign law when choice-of-law principles so demand. *See* Carlos M. Vázquez, *Non-Extraterritoriality*, 137 Harv. L. Rev. 1290, 1353–54 (2024) (summarizing this so-called "local law" theory, endorsed by Judge Learned Hand and Professor Walter Wheeler Cook, among others). On a related note, some courts have embraced Robert Leflar's concept of the "justice-administering state"—the idea that courts have an independent concern with providing a fair resolution to the parties before them apart from any other identifiable state interests that may be present in the case. *See* Robert L. Felix, *Leflar in the Courts*, 52 Ark. L. Rev. 35, 44, 85–86 (1999) (describing a few courts' reception of Leflar's "notion of the forum as a 'justice-dispensing court,'" which "requires relating the governmental interests of the forum to the other choice-influencing considerations").

301. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 155 (Alito, J., concurring in part and concurring in the judgment).

These factors go some way toward explaining why personal jurisdiction doctrine has developed to address at least a part of the extraterritoriality problem. Because courts appear somewhat more likely to apply forum law than a sister state's law, and because even the application of foreign law may be domestically inflected in some way, there is some logic in at least partially conflating a forum's exercise of jurisdiction with the application of its law. And because personal jurisdiction doctrine is far better developed than choice-of-law restrictions, the concerns raised by excessive application of forum law have to some extent been shoehorned into the doctrine.

3. The Functional Role of Personal Jurisdiction Limits

Further, even as the Court has failed to explicitly connect doctrinal dots between personal jurisdiction and forum law application, it is fairly undeniable that, as several scholars have recognized,[302] personal jurisdiction plays an important *functional* role in limiting occasions where state courts might be tempted to overextend their own law. One aspect of this is that minimum contacts performs a simple screening function: a state exercising jurisdiction based on minimum contacts will almost universally have the constitutional power under *Hague* to apply its own law, at least apart from class litigation.[303]

Personal jurisdiction limits, moreover, do more than simply assure that the minimal constitutional limits on choice of law are not exceeded. They also provide meaningfully greater protection against improper extension of forum law than choice-of-law limits would on their own.[304] In large part, this is because choice-of-law limits allow consideration of the plaintiff's contacts with the forum state, while personal jurisdiction focuses nearly entirely on the defendant's contacts.[305] If one conceives of choice-of-law limits as an effort to ensure that the forum state has some legitimate interest in applying its law, the focus on both defendant and plaintiff contacts perhaps makes sense. But if the concern is avoiding improper intrusion into other states' regulatory spheres, ensuring that the plaintiff has ties to the

302. *See* La Belle, *supra* note 47, at 834–35 (observing the tension between structural federalism and the individual-rights focus of the Due Process Clause).

303. Florey, *Reflections*, *supra* note 280, at 1058–59.

304. *See* Sterk, *supra* note 4, at 1175–76 (articulating reasons why constraints on personal jurisdiction provide "advantages over limits on choice of law").

305. The specific jurisdiction test includes a reasonableness check that considers such factors as the plaintiff's and forum state's interests, but the test can be used only to defeat personal jurisdiction and is rarely decisive in cases involving domestic defendants. *See* Florey, *Personal*, *supra* note 50, at 1235–36 (describing the reasonableness analysis).

forum state fails to serve as a meaningful restraint, given that the plaintiff may well have chosen the forum precisely in the hope that it will apply its law exorbitantly.[306] Personal jurisdiction limits, therefore, effectively combat plaintiff-initiated overextension of forum law in a way that choice-of-law limits do not.[307]

Class actions provide an interesting counterexample that paradoxically illustrates the utility of personal jurisdiction as this sort of functional backstop. For two reasons, the screening function of personal jurisdiction doctrine works less well when class actions are involved. First, class plaintiffs frequently bring actions against defendants based on general rather than specific jurisdiction,[308] meaning that there is no necessary connection between the subject of the class action and the forum. Second, class members, who may hail from multiple jurisdictions, do not choose the forum, and so considerations of convenience and familiarity that may ordinarily militate in favor of a close-to-home-and- injury location choice for plaintiffs are not present; as a result, possibilities for pure forum-shopping are multiplied.

It is thus intriguing that class actions are the one area in which constitutional choice-of-law restrictions have had real teeth. In *Hague*, the Court affirmed Minnesota's application of forum law in individual litigation where the defendant's only contact with the forum was that, as a national corporation, it did business there[309] (the plaintiff had additional, if minor, contacts).[310] In a subsequent case,

306. *See Mallory*, 600 U.S. at 153–54 (Alito, J., concurring in part and concurring in the judgment) ("If having to defend this suit in Pennsylvania seems unfair to Norfolk Southern, it is only because it is hard to see Mallory's decision to sue in Philadelphia as anything other than the selection of a venue that is reputed to be especially favorable to tort plaintiffs.").

307. To be sure, this observation is in apparent tension with the idea that the application of forum law is justified when the state has legitimate interests in the dispute, and that one important measure of the legitimacy of those interests is that state residents (who would generally be plaintiffs in this scenario) are affected. *See* Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 268 (2017) ("[P]laintiffs who are residents of a particular State . . . could probably sue together in their home States."). It might still be argued, however, that focusing on the defendant's connections with the state provides a more objective and balanced way of measuring those interests that is less subject to plaintiff manipulation.

308. *See* Rhodes & Robertson, *supra* note 88, at 228 (noting that "nationwide class actions . . . often depend on the existence of general jurisdiction").

309. *See* Allstate Ins. v. Hague, 449 U.S. 302, 317–18 (1981) (plurality opinion) ("By virtue of its presence, Allstate can hardly claim . . . surprise that the state courts might apply forum law to litigation in which the company is involved.").

310. The plaintiff's deceased husband had worked in Minnesota, *id.* at 313–14, and the plaintiff had moved from Wisconsin to Minnesota by the time the suit was filed, *id.* at 305.

Phillips Petroleum v. Shutts, the defendant similarly did significant business in Kansas, and the Court accordingly concluded that Kansas actually did have legitimate interests in regulating the defendant's conduct.[311] Notably, however, because *Shutts* was a class action, the Court reached a different result, holding that the Kansas Supreme Court had improperly applied forum law to "abrogate the rights of parties beyond its borders"[312] that would exist under the laws of other states that had stronger connections to the dispute.

It is striking that in the course of deciding the case, the Court held that the Kansas state court did, in fact, have personal jurisdiction over the absent class members. Such jurisdiction was not, however, based on minimum contacts;[313] the majority of class members had no ties to Kansas whatsoever.[314] The decision thus highlights that, without the assurance contacts-based jurisdiction provides of a strong connection between the defendant and the specific claims against it, state courts have less of a check on their ability to apply forum law in a way that the Court finds problematic. Although the Court's recent decisions contracting the scope of general jurisdiction may, by sharply limiting the fora in which class actions may be brought,[315] reduce the possibility of a *Shutts*-like scenario arising, the Court's treatment of choice of law in the class action context nonetheless illustrates the way in which personal jurisdiction and the application of forum law are linked.

That personal jurisdiction is the primary restriction on state courts excessively extending forum law does not, of course, in itself do much to fill the gap in our theoretical understanding of the issue, especially because the Court's articulations of what is really at stake are so vague and incomplete. But it does reduce the probability of

311. *See* 472 U.S. 797, 819 (1986) ("Petitioner owns property and conducts substantial business in the State, so Kansas certainly has an interest in regulating petitioner's conduct in Kansas.").

312. *Id.* at 822.

313. *See id.* at 811 ("In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant."). The Court reasoned that the lack of burden on class-action plaintiffs and the provisions for their protection in class-action rules rendered such personal jurisdiction fair. *See id.* at 810–12 ("Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter").

314. *See id.* at 814–15 ("over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit").

315. *See supra* note 182 and accompanying text.

clashes between state regulatory regimes that would otherwise, in the absence of guiding doctrinal principles, be difficult to resolve. Further, acknowledging this reality helps to make some sense of the Court's federalism rhetoric. Limits on state personal jurisdiction do accomplish, at least to some extent, many of the purposes the Court has claimed for them: they work to ensure that states remain "coequal sovereigns in a federal system";[316] they help maintain the "federal balance" and protect state policy choices from "unlawful intrusion by other States";[317] and they maintain "territorial limitations," albeit flexible ones, on the exercise of state power.[318] It is just that, for the most part, the doctrine does so, not because it has been crafted to serve those purposes, but incidentally and fortuitously.

V.
IMPLICATIONS FOR PERSONAL JURISDICTION DOCTRINE

In some respects, it is easy to see why personal jurisdiction has been pressed into service as a way of maintaining a balance of state power. Although there are clearly differences in the risks of overextending personal jurisdiction versus exorbitant application of forum law, there are also large areas of overlap. Limits on both personal jurisdiction and choice of law derive from the Due Process Clause, and both, among other commonalities, have procedural, defendant-protective elements. In particular, both are concerned at least in part with shielding the defendant from unfair burdens, whether that is litigation in a distant forum or application of an unexpected law.

If not necessarily desirable, it is also at least unsurprising that, of the two sources of limits, personal jurisdiction doctrine is the more robust in addressing concerns about state overreaching. State choice-of-law is a complex landscape in which the Supreme Court has been reluctant to involve itself,[319] given the variety of choice-of-law methodologies states apply and the multifarious contexts in which choice-of-law issues occur. By contrast, personal jurisdiction issues occur at the outset of the case and are less intertwined with the merits; further, constitutional limits on personal jurisdiction apply more or less identically from state to state. And personal jurisdiction's focus on the defendant's deliberate contacts is, in some ways,

316. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292.

317. *See* J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 884 (2011).

318. *See Bristol-Myers*, 582 U.S. at 263.

319. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 727–28 (1988) (expressing a skeptical attitude toward constitutional challenges to state choice-of-law decisions, noting that "it is frequently the case . . . that a court can lawfully apply either the law of one State or the contrary law of another").

peculiarly suited to restraining excessive application of forum law.[320] By emphasizing contacts, personal jurisdiction ensures a connection between the dispute and the forum state that is likely sufficient to give the forum state some interest in regulating the defendant's conduct; by emphasizing the contacts of the defendant in particular, the doctrine restricts the ability of plaintiffs to use a friendly home forum as a means of extending forum law and policy.

That personal jurisdiction is at all suited to these tasks is, as noted, fortuitous; there is little evidence that the *International Shoe* Court, in crafting the minimum contacts standard, designed it to fit these somewhat different needs.[321] Yet the Court's persistent, if vague, efforts to draw a connection between personal jurisdiction and horizontal federalism suggests that the idea is lodged in some way in the Court's subconscious and perhaps has influenced the development of the doctrine.

At the same time, relying on personal jurisdiction as a tacit limit on the choice of forum law promotes a conceptual muddle that is not helpful to either doctrine. Although it is certainly possible that the overreaching application of a particular state's law may cause unfair surprise to the defendant, many of the core considerations that extraterritoriality raises are more general and structural. Above and beyond the question whether application of forum law is fair to a specific defendant in a particular case, extraterritoriality raises questions about which activities states have the right to regulate and where sovereign citizens should look to as a source of legal rules to structure their primary behavior.[322] As a result, the Due Process Clause, as scholars and judges have repeatedly recognized, is an awkward site for such concerns.[323]

Even beyond this objection—which, of course, might be remedied simply by the Court having a change of heart and deciding that the dormant Commerce Clause or Privileges and Immunities Clause also has some relevance in the personal jurisdiction context—it can be argued that injecting extraterritoriality into personal jurisdiction as a covert, secondary concern has prevented the Court from grappling with the issue more directly. Personal jurisdiction and choice-of-law limits may have commonalities, but the Court has neither connected them nor explained how they

320. *See supra* notes 305–07 and accompanying text.

321. *See supra* note 104.

322. *See* Florey, *Reflections*, *supra* note 280, at 1064 (identifying how sovereigns regulating the same behavior can lead to inconsistency and uncertainty for citizens "wish[ing] to conform their conduct to the law").

323. *See* Stein, *supra* note 65, at 694–95.

complement each other. As Allan Erbsen notes, this is part of a larger tendency on the part of the Court to treat restraints on state overreaching as "discrete silos of doctrine."[324] Doing so has led to a patchwork of doctrines that focus on different scenarios in which extraterritoriality issues arise and, in the process, obscure similarities across various contexts.

Finally, personal jurisdiction is not always based on minimum contacts. If the court's power over a case is rooted in the defendant's having been served with process within the forum state or its domicile there, the dispute may have no relationship to the forum whatsoever. In certain of these scenarios—such as a class action founded on general jurisdiction—even the modest *Hague* limits may have some force. In others, particularly cases brought by individual litigants in state court, checks on choice-of-law decisions are minimal. Of course, abundant examples exist of state courts exercising restraint and sound judgment despite this lack of oversight. But there are also instances of state courts doing the opposite, a temptation that may multiply if interstate judicial relations become more strained.[325]

In addition to personal jurisdiction's limitations as an anti-extraterritoriality device, the injection of concerns about state overreach into personal jurisdiction has also had negative effects on the doctrine itself, which has been abundantly criticized for lacking coherence and focus.[326] Precisely how to fix personal jurisdiction doctrine is beyond the scope of this discussion; scholars have advanced numerous and sometimes opposite proposals, from

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324. Erbsen, *supra* note 180, at 473.

325. *See* Florey, *Landscape*, *supra* note 29, at 1138 (arguing that the increasingly partisan nature of state regulatory differences is likely to provoke more interstate clashes).

326. *See, e.g.*, Steven E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. Rev. 1301, 1305-06, 1346 (2014) (contending that "[w]e've gotten used to a world in which personal jurisdiction doctrine is lousy" and describing scholarly consensus on the "confusion" in personal jurisdiction doctrine and noting that its problems have "real costs outside the courtroom" in terms of forum-shopping); David Marcus & Will Ostrander, *Class Actions, Jurisdiction, and Principle in Doctrinal Design*, 2019 B.Y.U. L. Rev. 1511, 1525–26 (2019) (describing the intersection of federalism and current personal jurisdiction doctrine as a "tangle" that is "difficult to parse"); Jacobs, *supra* note 20, at 1631 (critiquing justifications for current personal jurisdiction doctrine as incoherent and self-contradictory); Rutherglen, *supra* note 50, at 1 (lamenting the "deleterious consequences in practice by forcing together the disparate elements of sovereignty and individual rights . . . ."); Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 Lewis & Clark L. Rev. 867, 869 (2012) (noting the "doctrinal confusion" that attends the law of personal jurisdiction).

reorienting the doctrine to focus on state territorial sovereignty[327] to downplaying horizontal federalism concerns to concentrate primarily on fairness.[328] To the extent that personal jurisdiction is an imperfect vehicle for addressing extraterritoriality concerns, there are surely strong arguments for spinning off the area into a different line of doctrine (either an existing one, such as current limits on choice of law, or a new one, as reflected in Justice Alito's proposal that the dormant Commerce Clause should take on this role[329]). Such a change would be a radical one that, frankly, seems unlikely in the face of the Court's longtime preservation of the current scheme, although individual justices have occasionally indicated interest in significant reform.[330]

The most likely scenario, however, is that personal jurisdiction doctrine muddles along with few fundamental changes. In that event, the doctrine could be greatly improved simply by acknowledging personal jurisdiction's connections to the overapplication of forum law. Such a move would bring clarity to the Court's increasingly oracular pronouncements on the role of federalism in the doctrine. It would also promote more reasoned exploration of the issue by courts at all levels, enabling courts to reflect on how personal jurisdiction interacts with other extraterritoriality doctrines. It could, perhaps, even help to foster restraint by state-law

327. *See* Jacobs, *supra* note 20, at 1647 ("Returning to the Territorial Model would finally give personal jurisdiction the doctrinal clarity, theoretical consistency, and democratic and constitutional legitimacy it has been lacking.").

328. *See* La Belle, *supra* note 47, at 787 (arguing that fairness should be part of every jurisdictional analysis). *See also* Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. Davis L. Rev. 531, 559 (1995) (advocating a system of clearer bright-line rules for the circumstances under which a court may exercise personal jurisdiction).

329. *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 150 (Alito, J., concurring in part and concurring in the judgment) ("A State's assertion of jurisdiction over lawsuits with no real connection to the State may violate fundamental principles that are protected by one or more constitutional provisions or by the very structure of the federal system that the Constitution created. At this point in the development of our constitutional case law, the most appropriate home for these principles is the so-called dormant Commerce Clause.").

330. *See id.* (Alito, J., concurring in part and concurring in the judgment) ("I am not convinced . . . that the Constitution permits a State to impose such a submission-to-jurisdiction requirement" that "a large out-of-state corporation with substantial operations in a State compl[y] with a registration requirement that conditions the right to do business in that State on the registrant's submission to personal jurisdiction in any suits that are brought there."); Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 592 U.S. 351, 382 (Gorsuch, J., concurring) (arguing that the minimum contacts framework "just doesn't work quite as well as it once did" and should potentially be revisited).

judges in applying forum law by increasing their attention to the issue.

VI.
CONCLUSION

Interstate personal jurisdiction protections have come to serve as a shield against extraterritoriality for reasons that seem at least substantially a function of historical accident. A variety of forces have contributed to this development: the lingering influence of *Pennoyer*'s rhetoric of territoriality and state sovereignty, the absence of a clear theoretical justification for the minimum contacts framework, and the Supreme Court's decision to largely absent itself from state choice-of-law decisions. Although the Court has alluded to minimum contacts' extraterritoriality-policing function frequently in recent years and endorsed it with particular force in *Fuld v. PLO*, it has failed to explain or justify this aspect of personal jurisdiction doctrine with any clarity, leading to further inconsistency and confusion. Nonetheless, because no other area of U.S. law incorporates a strong theoretical or practical understanding of when states should and should not be allowed to project their regulatory policies on conduct outside their borders,[331] the roles that personal jurisdiction has come to play are important ones that may not be easy to replace. To the extent that personal jurisdiction continues to fulfill this function, the doctrine could benefit from bringing this role explicitly to the fore and attempting to meld its state-overreach concerns both with other extraterritoriality limits and with personal jurisdiction doctrine's other purposes.

331. Of course, ironically, the use of personal jurisdiction as a first-line protection against regulatory overreaching may have contributed to the underdevelopment of doctrines that address the issue more directly.