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The Due Process and Other Constitutional Rights of Foreign States

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ARTICLE

THE DUE PROCESS AND OTHER CONSTITUTIONAL RIGHTS OF FOREIGN NATIONS

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The rights of foreign states under the U.S. Constitution are becoming more important as the actions of foreign states and foreign state-owned enterprises expand in scope and the legislative protections to which they are entitled contract. Conventional wisdom and lower court cases hold that foreign states are outside our constitutional order and that they are protected neither by separation of powers nor by due process. As a matter of policy, however, it makes little sense to afford litigation-related constitutional protections to foreign corporations and individuals but to deny categorically such protections to foreign states.

Careful analysis shows that the conventional wisdom and lower court cases are wrong for reasons that change our basic understanding of both Article III and due process. Foreign states are protected by Article III's extension of judicial power to foreign-state diversity cases, designed to protect foreign states from unfair proceedings and to prevent international conflict. The Article III "judicial power" over "cases" imposes procedural limitations on federal courts that we today associate with due process. In particular, Article III presupposes both personal jurisdiction and notice for all defendants, not just foreign states. Under the Fifth Amendment, foreign states are "persons" due the same constitutional "process" to which other defendants are entitled. "Process" only reaches defendants within the sovereign power, or jurisdiction, of the issuing court, clarifying the obscure relationship between due process and personal jurisdiction for all defendants.

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Examining the Constitution from the perspective of foreign states thus reveals the document in a new light, illuminating its core features in ways that advance our historical and theoretical understanding of Article III and due process. The analysis also lays the groundwork for determining whether foreign states have additional constitutional rights.

INTRODUCTION

What is the status of foreign nations under the U.S. Constitution? The question is strangely unresolved. Foreign nations were, to be sure, an important audience for the Constitution.[1] The framers endeavored to convince foreign states that the United States would make good on its treaty obligations and would otherwise comply with international law, would have

1. Daniel J. Hulsebosch, *Being Seen Like a State: How Americans (and Britons) Built the Constitutional Infrastructure of a Developing Nation*, 59 WM. & MARY L. REV. 1239, 1242 (2018) ("Many Founders conceived of the Federal Constitution in particular as a promise to foreign nations . . . .").

the power to control foreign commerce, and would be strong enough to ward off potential foreign invasion and other depredations.[2] Enhanced credibility with foreign governments would create the commercial and political conditions necessary for the United States to grow and prosper.[3] The opinions, interests, and rights of foreign nations were thus an omnipresent and even menacing backdrop to the drafting and ratification of the Constitution. Yet concerns about foreign nations were, in the main, satisfied by centralizing power in the federal government, not by conferring any constitutional rights or benefits on foreign nations themselves. Indeed, Britain was the foreign nation whose presence loomed largest, but the Revolutionary War was fought for the very purpose of political and constitutional independence from British rule. It might seem unlikely that the Constitution would protect Britain, or any other foreign nation.

The "foreign State," the U.S. Supreme Court observed in the early twentieth century, "lies outside the structure of the Union."[4] Consistent with that view, modern case law from the lower courts generally excludes foreign states and some foreign state-owned corporations from constitutional protections. But current doctrine is haphazard and unclear. The Supreme Court has suggested,[5] and lower courts have held, for example, that foreign states are not "persons" within the meaning of the Due Process Clause of the Fifth Amendment.[6] The Daimler corporation and the Palestine Liberation Organization are thus protected by due process, but Germany and Israel are not.[7] All other aliens, after all, have constitutional rights—just not foreign states.[8] The Supreme Court has emphasized in various contexts the need to avoid judicial decisions that threaten to generate conflict with other

2. *See, e.g.*, JAMES MADISON, *Vices of the Political System of the United States*, *in* 2 THE WRITINGS OF JAMES MADISON 361–69 (Gaillard Hunt ed., 1901); *see also* THE FEDERALIST NOS. 15, 22 (Alexander Hamilton), NO. 3 (John Jay), NO. 63 (James Madison).

3. JOHN E. CROWLEY, THE PRIVILEGES OF INDEPENDENCE: NEOMERCANTILISM AND THE AMERICAN REVOLUTION 117, 128 (1993).

4. Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934); *see also* Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic, 582 F.3d 393, 399 (2d Cir. 2009) (stating that the "foreign State lies outside the structure of the Union") (quoting *Principality of Monaco*, 292 U.S. at 330); Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96 (D.C. Cir. 2002) ("[F]oreign nations . . . are entirely alien to our constitutional system . . . ."); Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 522 (1987) (similar).

5. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992).

6. *See, e.g.*, *Frontera*, 582 F.3d at 399; *see also infra* Part I.A.1.

7. *See, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014) (holding without analysis that Daimler AG, a German corporation, has Fourteenth Amendment due process rights); Livnat v. Palestinian Auth., 851 F.3d 45, 52 (D.C. Cir. 2017) (holding that the Palestinian Authority has Fifth Amendment due process rights); Waldman v. Palestine Liberation Org., 835 F.3d 317, 344 (2d Cir. 2016) (overturning a $655.5 million judgment because the district court lacked personal jurisdiction over the defendants); Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92, 102 (2d Cir. 2016) (noting that foreign nations have no Fifth Amendment due process rights).

8. *See generally* Gerald Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991).

countries,[9] but modern doctrine involving the constitutional rights of foreign states has developed in the opposite direction. Affording constitutional protections to foreign corporations but not to foreign states also requires courts to distinguish between the two kinds of entities for constitutional purposes. Courts have struggled with this task in personal jurisdiction cases, which is unsurprising because the constitutional rationale for the distinction is unclear.[10] Also unresolved is the extent to which foreign states and foreign state-owned enterprises are protected by the "principle of separation of powers,"[11] which limits the conduct of each branch of government.

As foreign states and foreign state-owned enterprises expand their commercial activities and engage with the United States in new ways, especially in the cyber, terrorism, and economic-espionage contexts, litigation against them is increasing in scope and importance.[12] Questions about their constitutional status, which to date have been litigated mostly in the context of personal jurisdiction, are likely to assume greater significance in many additional contexts, including in criminal prosecutions of corporations owned by foreign states.

Missing is a historical and textual analysis of what the Constitution says about foreign states and of the goals that animated their inclusion in, or exclusion from, our constitutional system. In terms of current doctrine, the constitutional status of foreign states is of most importance for personal jurisdiction, an area in which originalist sources have often had little significance. Yet when it comes to the personal jurisdiction protections due to foreign states, the Supreme Court's influential dicta is based on constitutional text: the word "person" in the Fifth Amendment.[13] As it turns out, a textual and historical analysis of the constitutional rights of foreign states ultimately gives us an important originalist lens for understanding the Article III and due process–based personal jurisdiction rights of all defendants. Text and history are also fruitful avenues of inquiry because they

9. *See, e.g.*, RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106 (2016); *Daimler*, 134 S. Ct. at 762–63; Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115 (2013); Pasquantino v. United States, 544 U.S. 349, 369 (2005).

10. *See, e.g.*, GSS Grp. Ltd. v. Nat'l Port Auth., 680 F.3d 805, 819 (D.C. Cir. 2012) (Williams, J., concurring); *see also infra* Part I.A.2.

11. South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (noting that "courts have consistently regarded . . . the principle of the separation of powers only as protections for individual persons and private groups"). *But cf.* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1329 (2016) (assuming without discussion that an Iranian state-owned enterprise was protected by separation of powers). This Article occasionally (including in the title) uses the term "rights" to refer both to the separation of powers limitations on governmental power and to the direct protections afforded by the Constitution to individuals and other entities. That usage is consistent with this Article's claim that there was substantial overlap in the protections afforded by Article III and those afforded by the Fifth Amendment.

12. *See infra* notes 29–44 and accompanying text.

13. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992). The leading scholarly treatment of foreign states and the Constitution concludes that text and history have little to offer and that foreign states lack constitutional rights as against the federal government. *See* Damrosch, *supra* note 4, at 488. This Article disagrees.

yield straightforward and sensible answers to modern questions about the constitutional status of foreign states.

The Constitution mentions foreign states in several places: in negative terms through the prohibition on emoluments and other relationships[14] and also in the positive grants of authority in Articles I and III.[15] Of particular importance to the litigation-related rights of foreign states, Article III extends federal judicial power to cases involving foreign states, termed here "foreign-state diversity jurisdiction." Largely uncontroversial, this form of diversity jurisdiction was intended to provide a fair forum to resolve disputes involving foreign nations and to avoid conflict between the United States and foreign powers.[16] Article III also assigns cases between foreign states and U.S. states to the Supreme Court's original jurisdiction,[17] giving foreign states a right of access to the Supreme Court that does not depend upon Congress for its execution. That Article III protects foreign states in this way might not seem so important. But it means that foreign states are not categorically excluded from separation-of-powers protections, that the Constitution was intended to benefit foreign states as a way of ensuring peace and prosperity for the United States, and that foreign states are not entirely outside the structure of the federal government.

Turning to the Fifth Amendment,[18] historical sources show that foreign states were viewed as "persons" entitled to "process." Both "process" and "persons" were terms with straightforward application to states, foreign states, and the property of both during the country's founding era.[19] Foreign states, like other litigants, are thus protected by due process. Note, however, that the *content* of those due process protections is a distinct issue. With respect to personal jurisdiction, the best reading may be that Congress controls the content of personal jurisdiction protections due to all defendants under the Fifth Amendment.[20] That argument is contrary to many lower court cases holding that the Fifth Amendment (like the Fourteenth Amendment) requires minimum contacts, but the Supreme Court has not

14. U.S. CONST. art. I, § 9, cl. 8 ("And no Person holding any Office of Profit or Trust under them, shall . . . accept of any present, Emolument, Office, or Title . . . from any King, Prince, or foreign State."); *id.* § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power . . . .").

15. *Id.* § 8 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations . . . ."); *id.* art. III, § 2, cl. 1 (extending the judicial power of the United States to cases "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects").

16. *See infra* Part II.A.1.

17. U.S. CONST. art. III, § 2, cl. 2.

18. This Article analyzes due process under the Fifth but not the Fourteenth Amendment. Foreign states are almost always sued in federal court under the Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

19. *See infra* Part II.B.

20. *See infra* Part III.A; *see also* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 420 (2010) ("This positivist interpretation of the Due Process Clauses reads the due process requirement to mean only whatever 'process' is 'owed according to positive law.'").

resolved the issue.[21] In any case, however, foreign states and private foreign corporations are on equal due process footing, contrary to a long line of lower court cases drawing a constitutional distinction between them.[22]

The procedural protections to which foreign states are entitled, including the requirements of personal jurisdiction, flow not just from the Fifth Amendment, however. Perhaps not surprisingly, although almost entirely overlooked,[23] Article III also imposes procedural limitations on the federal courts beyond those that we normally characterize as limitations on subject matter jurisdiction. Approaching the Constitution from the perspective of the protections due to foreign states brings the argument into focus. Even if foreign states are not "persons" entitled to due process—contrary to the argument advanced in Part II.B of this Article—they are nevertheless protected by any limitations on judicial power that are baked into Article III. And limitations there are, including those that arise from Article III's language vesting the federal courts with "judicial power" over "cases." These terms confer subject matter jurisdiction only if there are "parties to come into court, who can be reached by its process, and bound by its power."[24] To have "judicial power" over a "case" requires both personal jurisdiction and notice, as a matter of separation of powers, not due process.

Analyzing due process and Article III in terms of their significance for foreign states does not track modern doctrinal categories, and it has a variety of implications beyond the rights of foreign states themselves. It reveals the Constitution as pragmatic, outward-facing, and innovative.[25] Doctrinally, the analysis suggests that, contrary to the modern consensus, U.S. states are "persons" protected by due process. The procedural content of Article III, and its overlap with Fifth Amendment protections, opens up a new area of inquiry and also supports the claim that due process limitations on legislative and executive power are instantiations of separation of powers.[26] Due process as separation of powers, indeed.

The analysis of foreign states also illuminates our understanding of personal jurisdiction. Modern scholars have generally focused on the Fourteenth Amendment Due Process Clause and struggled to understand the relationship between personal jurisdiction and "due process" as famously

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21. *See infra* notes 45–47 and accompanying text.

22. *See infra* Part I.A.2, III.A.

23. *But cf.* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1654 (2002) (arguing that without personal jurisdiction there is no "case" under Article III but focusing only on the implications of this argument for litigation involving U.S. states).

24. John Marshall, Speech of the Hon. John Marshall Delivered in the House of Representatives of the United States on the Resolutions of the Hon. Edward Livingston, *in* 4 THE PAPERS OF JOHN MARSHALL 82, 96 (Charles T. Cullen ed., 1984).

25. *See* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 935–36, 980–1015 (2010) (describing the founders' objectives, including their desire to integrate the United States into the community of "civilized" nations).

26. *See generally* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

articulated in *Pennoyer v. Neff*.[27] The foreign-state perspective shifts focus to the Fifth Amendment and establishes a robust relationship between its requirement of due process and personal jurisdiction for all defendants in federal courts. Process was limited not just by territory but also by the power or jurisdiction of the sovereign. The latter limitation on process often arose when sovereigns were sued because they (and their property) could be within the territory of another state, yet "process" could not reach them because the court lacked power or jurisdiction over them.[28] The language used to describe whether foreign states and U.S. states could be sued in particular courts shows that "process" was understood in jurisdictional terms: *process* reached only those within the court's jurisdiction. By requiring *due process*, the Fifth Amendment required not just the act of service or notice but also personal jurisdiction.

An overarching purpose of Article III was to create a forum that brings the "foreign" into the domestic. Diversity jurisdiction and alienage jurisdiction perform this function for out-of-state parties and for noncitizens. Article III's inclusion of foreign states in this system was no aberration and was not left to chance. Foreign states are unequivocally drawn into the fabric of the Union for the very purpose of protecting them and limiting international conflict. Litigation-related rights, both civil and criminal, should thus generally apply to foreign states and state-owned enterprises. In terms of additional constitutional rights, many have limited applicability because foreign states are not natural persons and because much of their conduct takes place abroad. But the analysis should be right-by-right, not one that trades on false conceptions of general constitutional inclusion and exclusion.

This Article unfolds in three parts. Part I analyzes recent cases on the due process and separation of powers rights of foreign states and their state-owned enterprises. Part II argues that Article III extends federal judicial power to foreign-state diversity cases in order to protect foreign states and to avoid foreign conflict. Article III itself includes personal jurisdiction and notice limitations on federal judicial power, and those limitations apply to all defendants. This Part also explains that Fifth Amendment due process protects foreign states, which are "persons." Part III explores the content of personal jurisdiction protections due to all defendants today, considers other due process rights to which foreign states are entitled, and lays the groundwork for analyzing additional constitutional rights to which foreign states may be entitled.

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27. 95 U.S. 714 (1878); *see* Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1111 (1994) (questioning the relationship between due process and personal jurisdiction); Robin Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23, 26 (2019) (noting that personal jurisdiction "encompasses doctrines and concepts that are not . . . obvious fits with due process"); Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1251 (2017) (describing the relationship between due process and jurisdiction as a "mystery").

28. *See infra* Parts II.B.1, III.

I. CURRENT DOCTRINE AND CONVENTIONAL WISDOM

Consider the following scenarios. A foreign state is designated as a sponsor of terrorism and is sued by American citizens who claim they were tortured in the foreign state. The foreign state moves to dismiss for lack of personal jurisdiction under the Fifth Amendment Due Process Clause. The plaintiffs argue that foreign states are not "persons" protected by due process.[29] Or, a foreign corporation related to a foreign state is sued in federal court. The corporation moves to dismiss for lack of personal jurisdiction. The plaintiff argues that the foreign corporation has no due process rights because the foreign corporation should be treated as the foreign state itself and foreign states are not entitled to due process protections.[30] Or, a foreign state argues that a statute is unconstitutional because it creates liability for actions that took place in the past, because it directs the court to hold for a particular party during ongoing litigation, or because it violates the nondelegation doctrine.[31]

Situations like the foregoing are increasingly common, in part because the Foreign Sovereign Immunities Act of 1976[32] (FSIA) has been repeatedly amended to reduce the immunity to which foreign states are entitled. Those amendments also reduce the immunity to which certain state-related entities, such as some state agencies and state-owned enterprises (SOEs), are entitled.[33] To the extent that such entities cannot be sued under the FSIA, personal jurisdiction and other due process issues will not arise. As the statute is amended to limit immunity, however, these defenses are litigated

29. *See, e.g.*, Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96 (D.C. Cir. 2002); *see also* Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 694 (7th Cir. 2012) (asking whether due process limits the exercise of personal jurisdiction over a foreign state); Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic, 582 F.3d 393, 398–400 (2d Cir. 2009) (same); Estate of Hirshfeld v. Islamic Republic of Iran, 330 F. Supp. 3d 107, 137 (D.D.C. 2018) (same); Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 697 F. Supp. 2d 46, 56–57 (D.D.C. 2010) (same).

30. *See, e.g.*, Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92, 103 (2d Cir. 2016); GSS Grp. Ltd. v. Nat'l Port Auth., 680 F.3d 805, 819 (D.C. Cir. 2012) (Williams, J., concurring); *Frontera*, 582 F.3d at 400; TMR Energy Ltd. v. State Prop. Fund of Ukr., 411 F.3d 296, 301 (D.C. Cir. 2005).

31. *See, e.g.*, Bank Markazi v. Peterson, 136 S. Ct. 1310, 1329 (2016) (rejecting the Central Bank of Iran's argument that the Iran Threat Reduction and Syria Human Rights Act violated separation of powers); Owens v. Republic of Sudan, 531 F.3d 884, 888–93 (D.C. Cir. 2008) (rejecting Sudan's contention that terrorism-related provisions of the FSIA violate the nondelegation doctrine); *In re* Terrorist Attacks on Sept. 11, 2001, 298 F. Supp. 3d 631, 659 n.19 (S.D.N.Y. 2018) (rejecting Saudi Arabia's argument that the Justice Against Sponsors of Terrorism Act violated due process).

32. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

33. *See, e.g.*, Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 852 (2016) (codified as amended in scattered sections of 18 and 28 U.S.C.); Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214 (codified as amended in scattered sections of the U.S.C.); *see also Bank Markazi*, 136 S. Ct. at 1317–19 (describing congressional limitations on the immunity of foreign states and related entities for conduct related to terrorism); Comment, *Immunity of Foreign Governmental Instrumentalities*, 25 U. CHI. L. REV. 176, 178–80 (1957) (distinguishing between agencies, instrumentalities, and SOEs).

with greater frequency. The scope of activity by foreign states and state-owned enterprises is also expanding: terrorism, election-meddling, cybertorts, investments by sovereign wealth funds, and economic espionage serve as examples.[34] State-owned enterprises are big business and so are judgments and arbitral awards against them.[35]

Litigation involving foreign states and SOEs appears to be increasing in part due to growing scrutiny of their conduct by the U.S. government. For example, the Department of Justice has indicted several SOEs for economic espionage.[36] Individual actors with varying ties to the governments of China, Iran, North Korea, and Russia have also been indicted over the past few years;[37] some of those individuals work for private entities with unclear relationships to the government in question.[38] Changes to the Committee on Foreign Investment in the United States, an interagency committee that reviews foreign direct investment in the United States, now require greater scrutiny of transactions involving foreign states, setting the stage for constitutional and other challenges to its procedures.[39] Two private companies with apparently significant ties to their governments have recently challenged various restrictions on their business activities as unconstitutional. Kaspersky Lab, a Russian company, unsuccessfully argued that a law prohibiting the federal government from using its products or

34. *See, e.g.*, Shoham v. Islamic Republic of Iran, No. 12-CV-508 (RCL), 2017 WL 2399454, at *15 (D.D.C. June 1, 2017); Ingrid Wuerth, *The DNC v. Russia: The Question of Foreign Sovereign Immunity*, LAWFARE (Apr. 22, 2018), https://www.lawfareblog.com/dnc-v-russia-question-foreign-sovereign-immunity [https://perma.cc/Z2VF-YKNH] (describing a case brought against Russia for election-related hacking).

35. *See, e.g.*, *Pemex-Exploración*, 832 F.3d at 99 (analyzing a $300 million arbitral award against a Mexican state-owned enterprise); Sarah Kramer, *Public v. Private: State-Owned Enterprises as Claimants in ICSID Arbitration*, U. PA. J. INT'L L., http://pennjil.com/about-the-journal-of-international-law-jil [https://perma.cc/3ZPN-7A9Q] (last visited Oct. 6, 2019) ("SOEs are increasingly becoming leaders in international investment . . . .").

36. *See* Press Release, U.S. Dep't of Justice, PRC State-Owned Company, Taiwan Company, and Three Individuals Charged with Economic Espionage (Nov. 1, 2018), https://www.justice.gov/opa/pr/prc-state-owned-company-taiwan-company-and-three-individuals-charged-economic-espionage [https://perma.cc/28LZ-ZMMF]. Both the U.S. government and U.S. companies have linked many other cyberattacks to foreign governments. *See generally* Kristen E. Eichensehr, *Public-Private Cybersecurity*, 95 TEX. L. REV. 467, 489 (2017).

37. *See, e.g.*, Press Release, U.S. Dep't of Justice, Nine Iranians Charged with Conducting Massive Cyber Theft Campaign on Behalf of the Islamic Revolutionary Guard Corps (Mar. 23, 2018), https://www.justice.gov/opa/pr/nine-iranians-charged-conducting-massive-cyber-theft-campaign-behalf-islamic-revolutionary [https://perma.cc/Z5S6-QB44]. *See generally* Chimène Keitner, *Attribution by Indictment*, 113 AJIL UNBOUND 207 (2019).

38. *See* Jack Goldsmith & Robert D. Williams, *The Chinese Hacking Indictments and the Frail "Norm" Against Commercial Espionage*, LAWFARE (Nov. 30, 2017), https://www.lawfareblog.com/chinese-hacking-indictments-and-frail-norm-against-commercial-espionage [https://perma.cc/P98L-RW68].

39. The Foreign Investment Risk Review Modernization Act of 2018 reformed the procedures used by the Committee on Foreign Investment in the United States to increase scrutiny of foreign states. *See* Robert D. Williams, *CFIUS Reform and U.S. Government Concerns over Chinese Investment: A Primer*, LAWFARE (Nov. 13, 2017), https://www.lawfareblog.com/cfius-reform-and-us-government-concerns-over-chinese-investment-primer [https://perma.cc/T534-5MH6].

services was an unconstitutional bill of attainder,[40] and Huawei has alleged that a similar ban on its products violates its due process and other constitutional rights.[41]

A basic issue lies at the heart of cases brought by and against foreign states and SOEs: the constitutional rights to which such parties are entitled. Congress has opened the door to more litigation against foreign sovereigns and SOEs, including some that arguably lack "minimum contacts" with the United States, and has increased the scrutiny of property interests acquired by foreign states and SOEs, raising other potential due process issues.[42] Furthermore, Congress has designated the property of foreign SOEs for execution in pending litigation, has delegated broad authority to the President to designate entities as state sponsors of terrorism, and has limited the ability of certain foreign corporations to do business in the United States, all of which arguably violate separation of powers or other constitutional limitations. The constitutional rights of SOEs may also limit the work of federal prosecutors in criminal cases alleging economic espionage and theft. The significance of SOEs to federal law enforcement is highlighted by the grand jury subpoena directed at an unidentified SOE from an unnamed country as part of the Mueller investigation.[43] Yet it remains unclear whether foreign states are entitled to any constitutional protections at all. If they are, the actions of Congress may be constitutionally limited by due process, separation of powers, the Takings Clauses, and so on. Federal prosecutors might be limited by various constitutional protections generally available to corporate defendants in criminal cases, including protections against excessive fines, double jeopardy, and the constitutional rights to a jury trial and to the assistance of counsel. If foreign states lie outside the protections of the Constitution then the constitutional rights of SOEs need clarification: under what circumstances are they treated as foreign states (without constitutional rights) as opposed to private corporations (with some constitutional rights)?[44]

These questions have, to date, been litigated mostly in terms of personal jurisdiction. That litigation brings together three distinct and questionable lines of cases. First, the Supreme Court has held that foreign private

40. Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec., 909 F.3d 446 (D.C. Cir. 2018).

41. *See* Stephanie Zable, Huawei Technologies v. U.S.: *Summary and Context*, LAWFARE (Apr. 9, 2019), https://www.lawfareblog.com/huawei-technologies-v-us-summary-and-context [https://perma.cc/Z7BR-ARBU].

42. For a due process challenge to the work of the Committee on Foreign Investment in the United States, see Ralls Corp. v. Committee on Foreign Investment in the Unites States, 758 F.3d 296, 302 (D.C. Cir. 2014).

43. *See* Amy Howe, *Redacted Petition Made Public in Grand Jury Dispute*, SCOTUSBLOG (Jan. 22, 2019, 3:41 PM), https://www.scotusblog.com/2019/01/redacted-petition-made-public-in-grand-jury-dispute [https://perma.cc/YGG3-YQM3].

44. In other words, difficult technical and factual questions about attributing the conduct of nominally private companies to foreign governments and about the ownership and control of such corporations take on constitutional significance. *See generally* Christopher Balding & Donald Clarke, Who Owns Huawei? (Apr. 17, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372669 [https://perma.cc/Q3LX-8KJS] (discussing whether the Chinese government owns or controls Huawei).

corporations have Fourteenth Amendment due process rights that entitle them to personal jurisdiction defenses based on minimum contacts and reasonableness.[45] The Court's analysis in those cases is problematic,[46] but this Article does not address it. Important here is, instead, whether the Fifth Amendment affords comparable rights to private litigants in federal court, an issue the Court has not resolved but which lower courts have answered in the affirmative.[47] Second, the Supreme Court has suggested in dicta[48] and lower courts have held[49] that foreign states are not "persons" within the meaning of the Fifth Amendment Due Process Clause. These first two lines of cases draw a constitutional distinction between foreign states and private foreign corporations. Foreign private corporations get minimum contacts protections but foreign states do not.

Third, lower courts have to decide whether SOEs should be treated like foreign states or like private corporations for constitutional purposes. To do so, lower courts have applied a federal common law rule (called the *Bancec* test), originally developed to determine when foreign states and state-owned corporations can be held substantively liable for the actions of the other.[50] Lower courts have applied the *Bancec* test to resolve questions about the constitutional status of SOEs,[51] but the fit is not obvious as a doctrinal matter. As discussed above, the distinction between foreign states without due process rights and state-related corporate entities with due process rights hinges—at least following the Court's reasoning—upon the meaning of the word "person" in the Constitution. The *Bancec* test, by contrast, is drawn

45. *See, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746 (2014); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011); *see also* Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath* Daimler *Wrought?*, 91 N.Y.U. L. REV. 344, 395 (2016) (describing the importance of personal jurisdiction in litigation to enforce judgments, including those obtained against foreign sovereigns).

46. *See* Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 9 (2006).

47. The Fifth Amendment limitations on personal jurisdiction are infrequently litigated because Federal Rule of Civil Procedure 4(k)(1) authorizes personal jurisdiction in federal courts to the extent that a state court in the forum would have personal jurisdiction. *See generally* A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. (forthcoming 2019), https://ssrn.com/abstract=3312766 [https://perma.cc/AW7A-CT7X]. Rule (4)(k)(2) does authorize personal jurisdiction in federal question cases based upon contacts with the United States as a whole but only when there is no state with jurisdiction over the defendant. When they have reached the issue, lower courts have often assumed or held that the Fifth and Fourteenth Amendments impose comparable limitations, except for the relevant territory. *See* Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455, 456 (2004); *see also infra* note 312.

48. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992).

49. *See, e.g.*, Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96 (D.C. Cir. 2002); *see also* Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 694 (7th Cir. 2012); Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic, 582 F.3d 393, 395 (2d Cir. 2009); Estate of Hirshfeld v. Islamic Republic of Iran, 330 F. Supp. 3d 107, 137 (D.D.C. 2018); Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 697 F. Supp. 2d 46, 56–57 (D.D.C. 2010).

50. *See infra* text accompanying notes 101–09.

51. *See, e.g.*, cases cited *supra* note 30.

from public international law, corporate law, and the FSIA—not the text, nor history, nor values, nor purposes of the Constitution.[52] As a policy matter, the *Bancec* test means that SOEs are not treated as the equivalent of foreign states unless a high "alter ego" standard is met.[53] Courts have given no rationale for this constitutional distinction.

This section explains the haphazard way in which the second and third lines of cases—those involving personal jurisdiction over foreign states and SOEs—developed. It also describes the current doctrinal uncertainty around a closely related issue: whether foreign states are protected by separation of powers.

A. Personal Jurisdiction

The claim that foreign sovereigns and some foreign-state owned enterprises are not entitled to due process rights is of recent vintage. Before the Supreme Court's dicta in *Republic of Argentina v. Weltover, Inc.*,[54] courts, litigants, Congress, scholars, and the U.S. government all reasoned or assumed that the Due Process Clauses (and thus the minimum contacts analysis) applied to foreign states.[55]

1. Foreign States

Early cases against foreign states were sometimes brought against the person of the sovereign, with jurisdiction based on the presence of the sovereign him- or herself. For example, a mid-nineteenth-century case on foreign sovereign immunity was brought in British courts against the King of Hanover, who was temporarily visiting Britain.[56] The court had in personam jurisdiction.[57] The king was accorded immunity for sovereign acts but not for acts he committed as a British subject in Britain.[58] The primary justification for this distinction was that an action based on sovereign acts

52. *See* GSS Grp. Ltd. v. Nat'l Port Auth., 680 F.3d 805, 818 (D.C. Cir. 2012) (Williams, J., concurring); *see also infra* notes 105–10 and accompanying text.

53. *See, e.g.*, Arch Trading Corp. v. Republic of Ecuador, 839 F.3d 193, 201 (2d Cir. 2016); DRC, Inc. v. Republic of Honduras, 71 F. Supp. 3d 201, 216 (D.D.C. 2014). *See generally* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: SELECTED TOPICS IN TREATIES, JURISDICTION, AND SOVEREIGN IMMUNITY § 454 reporters' note 10 (AM. LAW INST. 2018).

54. 504 U.S. 607 (1992).

55. *See, e.g.*, William Harvey Reeves, *The Foreign Sovereign Before United States Courts*, 38 FORDHAM L. REV. 455, 482, 486 (1970); Comment, *Sovereign Immunity—Waiver and Execution: Arguments from Continental Jurisprudence*, 74 YALE L.J. 887, 887–88 (1965); *see also* Damrosch, *supra* note 4, at 493.

56. *See* Duke of Brunswick v. King of Hanover (1844) 40 Eng. Rep. 724, 724–25; 6 Beav. 1, 1–4, *aff'd*, (1848) 9 Eng. Rep. 993.

57. *See id.* at 731; 6 Beav. at 17.

58. *See id.* at 744; 6 Beav. at 52–54.

abroad could not be enforced.[59] Other cases against foreign sovereigns were based on consent to the jurisdiction of the forum state.[60]

Until well into the twentieth century however, most cases against foreign sovereigns were brought based upon property of the sovereign located in the United States—almost always a maritime vessel or its cargo.[61] Jurisdiction was often considered in terms of "process," just as it had been during the founding era, as discussed below in Part II.B. In *Berizzi Bros. v. Steamship Pesaro*,[62] for example, a libel in rem was brought against the steamship *Pesaro*: "The usual process issued, on which the vessel was arrested; and subsequently she was released" because the vessel was "owned and possessed by [the Italian] government" and was "therefore immune from process of the courts of the United States."[63] The immunities of state governments were often interchangeable with the immunities given to foreign sovereigns.[64]

For several reasons, the mid-twentieth-century revolution in personal jurisdiction ushered in by *International Shoe Co. v. Washington*[65] had little immediate effect on cases against foreign sovereigns. In personam cases against foreign sovereigns continued to be unusual, in part because there was no clear mechanism for serving foreign states until the FSIA was enacted in 1976.[66] Before those amendments, commencing an action through service of process upon a foreign sovereign was described as a "'catch as catch can' proposition."[67] Moreover, most in personam cases against foreign sovereigns were based on consent, typically as a result of arbitration agreements,[68] which provided a basis for jurisdiction even absent minimum contacts. *International Shoe* also had limited impact on cases involving foreign sovereigns because those cases were usually brought in rem or quasi in rem and those bases for jurisdiction were not directly addressed by

59. *Id.* at 742–43; 6 Beav. at 46–51; *see also* Laughlin v. La. & New Orleans Ice Co., 35 La. Ann. 1184, 1185 (1883) ("[I]f any judgement based on such substituted service would be an absolute nullity, incapable of any effect whatever against the person or property of defendant, it would be mere folly to permit the ear of the Court to be vexed with such useless and inconsequential proceedings.").

60. *See* Duff Dev. Co. v. Gov't of Kelantan [1924] AC 797 (HL) 801–02 (appeal taken from Eng.). *See generally* Sultan of Johore v. Tungku Abubakar [1952] 18 M.L.J. 115 (Sing.).

61. *See, e.g.*, Berizzi Bros. v. S.S. Pesaro, 271 U.S. 562 (1926); Chem. Nat. Res. v. Republic of Venezuela, 215 A.2d 864 (Pa. 1966).

62. 271 U.S. 562 (1926).

63. *Berizzi Bros.*, 271 U.S. at 570.

64. *See, e.g.*, Briggs v. Light Boat, 93 Mass. (11 Allen) 157, 162 (1865); *see also* THEODORE R. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 38–43 (1970).

65. 326 U.S. 310 (1945).

66. *See* Kevin P. Simmons, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543, 559–64 (1977).

67. Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 921 (1969).

68. *See, e.g.*, Transnational Mar., Inc. v. Republic of Bangladesh, 1975 A.M.C. 1411 (S.D.N.Y. 1975).

International Shoe and changed only in 1977 when the Court decided *Shaffer v. Heitner*.[69]

When constitutional issues related to personal jurisdiction did arise in cases against foreign sovereigns, the general assumption was that foreign sovereigns enjoyed the same constitutional protections as other defendants. A federal court held in 1975, for example, that it lacked personal jurisdiction over a foreign sovereign that had "minimal contacts with the forum in which jurisdiction is asserted."[70] Other courts considered whether the notice afforded to foreign sovereigns not immune from suit comported with due process.[71] During congressional deliberation about the FSIA, executive branch officials referred to the due process rights of foreign sovereigns. For example, Attorney General Richard G. Kelindienst and Secretary of State William P. Rogers wrote that under the FSIA, "a district court can authorize a special method of service, as long as the method chosen is consonant with due process."[72] The State Department expressed particular concern with the attachment of property to obtain jurisdiction over foreign states, a practice that dates back to the days of the Articles of Confederation.[73] The relationship between attachment of property before the suit and the power to execute against the property after the suit was also up for debate, linking jurisdiction and the execution of judgment, just as Sir Edward Coke had centuries earlier.[74]

After the enactment of the FSIA, courts continued to reason that due process and the minimum contacts test protected foreign states and state agencies.[75] The Second Circuit held in 1981, for example, that the Central Bank of Nigeria was entitled to due process protections because foreign states are persons under the Fifth Amendment Due Process Clause, citing multiple earlier cases so holding.[76] All of this changed after the Supreme Court wrote

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69. Shaffer v. Heitner, 433 U.S. 186 (1977); Karen Nelson Moore, *Procedural Due Process in Quasi In Rem Actions After* Shaffer v. Heitner, 20 WM. & MARY L. REV. 157, 173 (1978).

70. Rovin Sales Co. v. Socialist Republic of Romania, 403 F. Supp. 1298, 1302 (N.D. Ill. 1975). *See generally* Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir. 1966); Stephen v. Zivnostenska Banka, Nat'l Corp., 222 N.Y.S.2d 128 (App. Div. 1961).

71. *See, e.g.*, Premier S.S. Co. v. Embassy of Alg., 336 F. Supp. 507, 510 (S.D.N.Y. 1971) (holding that registered mail service upon the agency of a foreign sovereign which had signed an arbitration agreement satisfied due process).

72. 119 CONG. REC. 3437 (1973); *see also Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. 41 (1973) [hereinafter *Hearings*] ("[T]he jurisdictional standard is the same for the activities of a foreign state as for the activities of a foreign private enterprise.").

73. *See infra* Part II.A.4.

74. *Hearings*, *supra* note 72, at 22–24 (statement of Charles N. Brower, Legal Adviser, Department of State); *see infra* note 203 and accompanying text.

75. *See, e.g.*, Harris Corp. v. Nat'l Iranian Radio & Television, 691 F.2d 1344 (11th Cir. 1982). *See generally* Melanie Howell, Recent Development, *Foreign Sovereign Immunities Act—Immunity Exception Provisions of § 1330(a)*—Harris Corp. v. National Iranian Radio & Television, 14 GA. J. INT'L & COMP. L. 397 (1984).

76. Tex. Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313 (2d Cir. 1981), *overruled by* Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic, 582 F.3d 393 (2d Cir. 2009).

in *Republic of Argentina v. Weltover, Inc.* that: "[a]ssuming, without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause, we find that Argentina possessed 'minimum contacts' that would satisfy the constitutional test."[77]

Based on this dicta from *Weltover*, lower courts have since uniformly held that foreign states are not "persons" protected by the Fifth Amendment Due Process Clause.[78] As a policy matter, these decisions run counter to the Court's efforts to avoid international discord and potential friction with foreign sovereigns in other personal jurisdiction cases and in other doctrinal areas including the presumption against extraterritoriality, forum non conveniens, and international comity.[79] They also require courts to draw a constitutional distinction between foreign corporations and foreign states—a difficult task that adds complexity and uncertainty.

Lower courts have relied on three arguments to reject personal jurisdiction protections for foreign states: foreign states are foreign or alien;[80] foreign states are governments, not people or persons;[81] and foreign states are sui generis entities whose relationships with the United States are governed by international, not constitutional, law.[82] The first argument fails quickly. Aliens, after all, have many constitutional rights.[83]

The third argument, also advanced by some commentators,[84] fails to acknowledge that the relationship between foreign states and the U.S. government might be regulated by *both* the U.S. Constitution *and* by international law and that both can govern in the same case.[85] The

77. *Id.* at 619 (citation omitted). The Court had previously held that foreign nations are persons entitled to sue for treble damages under section 4 of the Sherman Act. Pfizer Inc. v. Gov't of India, 434 U.S. 308, 311, 320 (1978).

78. *See, e.g.*, Corporacíon Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92, 103 (2d Cir. 2016); GSS Grp. Ltd. v. Nat'l Port Auth., 680 F.3d 805, 819 (D.C. Cir. 2012) (Williams, J., concurring); *Frontera*, 582 F.3d at 400; TMR Energy Ltd. v. State Prop. Fund of Ukr., 411 F.3d 296, 301 (D.C. Cir. 2005).

79. *See* Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1103 (2015); Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995, 1042–43 (2015); *cf.* Austen L. Parrish, *Fading Extraterritoriality and Isolationism?: Developments in the United States*, 24 IND. J. GLOBAL LEGAL STUD. 207, 216–17 (2017) (describing U.S. cases that respect the "territorial integrity, sovereign equality, nonintervention, and self-determination" of other nations).

80. *See, e.g.*, Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96 (D.C. Cir. 2002).

81. *See, e.g.*, *Pemex-Exploración*, 832 F.3d at 103; *Price*, 294 F.3d at 96–97; *see also Weltover*, 504 U.S. at 619.

82. *Price*, 294 F.3d at 97; Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 202 (D.C. Cir. 2001).

83. *See generally* Neuman, *supra* note 8.

84. *See, e.g.*, Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT'L L. 369, 373–74 (2001); Damrosch, *supra* note 4, at 519–26, 557–58.

85. International law governs the relationship between the United States and foreign states. It has also governed some aspects of the relationship among U.S. states and between the U.S. government and foreign individuals. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 730–31 (1878) (applying international law principles regarding personal jurisdiction to resolve

Constitution might require personal jurisdiction, for example, but international or general law might set out the actual rules of personal jurisdiction.[86] And, of course, prize courts in admiralty applied international law to determine the property interests of foreign sovereigns, although Article III conferred subject matter jurisdiction upon the federal courts. A relationship governed by both constitutional law and international law is analogous to cases in which procedure is governed by one source of law and substance by another.[87] Note, too, that the relationship among states of the Union was governed by international law before the Constitution was enacted, and some of those international law protections were preserved and entrenched by the Constitution itself.[88] Finally, affording constitutional protections to foreign states, including access to the federal courts and related procedural protections, may help prevent violations of international law, which were widely associated with the state courts under the Articles of Confederation and which were a key impetus for the drafting of the Constitution.[89]

The remaining argument, one that courts have adopted with almost no analysis of text or history, is that foreign states are not "persons" under the Due Process Clause of the Fifth Amendment. In part, the argument is based on the intuition that foreign states should not have constitutional rights that domestic states lack.[90] As the Court noted in *Weltover*, U.S. states lack due process protections because the Supreme Court so held in *South Carolina v. Katzenbach*,[91] a decision rejecting South Carolina's constitutional challenge to the Voting Rights Act of 1965.[92] The Court reasoned that "[t]he word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union" and that "the principle of the separation of powers [served] only as protections for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt."[93]

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jurisdictional issues amongst U.S. states); Treaty of Peace, Gr. Brit.-U.S., art. IV, Sept. 3, 1783, 8 Stat. 80 (Treaty of Paris) (setting forth the terms for British and American creditors following the Revolutionary War); Hulsebosch, *supra* note 1, at 1309–12 (describing the views of the British government as to how British creditors were protected by the U.S. Constitution).

86. *See, e.g.*, *Pennoyer*, 95 U.S. 714.

87. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 465 (1965).

88. Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1496–97 (2019).

89. *See* Golove & Hulsebosch, *supra* note 25, at 948.

90. *See* Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic, 582 F.3d 393, 399 (2d Cir. 2009); Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 98 (D.C. Cir. 2002).

91. 383 U.S. 301 (1966).

92. *Id.* at 308.

93. *Id.* at 323–24. The Court's statement may be incorrect with respect to states, and it has led courts to the erroneous conclusion that foreign states lack Fifth Amendment rights. It is also in tension with the more recent trend of allowing government institutions to assert structural constitutional claims. Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. 611, 616–22, 634–39, 665–67 (2019).

Even assuming that *Katzenbach* is correct or at least well settled under stare decisis, the decision was not about personal jurisdiction. It also does not mandate the equal treatment of states and foreign states. *Katzenbach* rests on the specific relationship between domestic states and the United States and is explicitly limited to "States of the Union." The Court's reasoning that Article I's separation of powers should protect those persons and groups "who are peculiarly vulnerable to nonjudicial determinations of guilt" also puts U.S. states and foreign states on different footing.[94] Foreign states do not enjoy many of the institutional protections that U.S. states are entitled to—foreign states are, in this sense, vulnerable to political action by the majority in ways that domestic states are not.

In any event, Part II.B shows that the term "person" is best understood to apply to foreign states. That analysis suggests that the Court's reasoning in *Katzenbach* about domestic states was incorrect—at least to the extent that it relies upon the meaning of the word "person."[95]

2. Foreign State-Owned Enterprises

Cases against agencies and instrumentalities initially followed much the same pattern as cases against states themselves. Most involved foreign ships owned by "state trading agencies" and a few were quasi in rem personal injury cases.[96] Instrumentalities raised some distinctive immunity issues, however. Beginning in 1952, the U.S. government took the position that immunity for government instrumentalities should depend upon whether the instrumentality was "governmental" or "proprietary."[97] A propriety instrumentality was not entitled to immunity and neither were separately incorporated entities.[98] Courts and commentators both in the United States and abroad struggled to draw the distinction between "governmental" and "proprietary" based on the purposes of immunity, on the economic system of the government in question, or on the needs of the instrumentality in terms of administering government policy.[99] Eventually, the FSIA provided immunity for separately incorporated agencies and instrumentalities of foreign states if a majority of their shares are owned by a foreign sovereign or if they are an "organ" of a foreign state.[100]

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94. *Katzenbach*, 383 U.S. at 324.

95. Note that the Continental Congress criticized British acts of Parliament in terms that could suggest that Massachusetts and Boston should themselves have legal protections against judicial acts of the legislature. *See* Chapman & McConnell, *supra* note 26, at 1700, 1702–03 (quoting from sources that refer to efforts to "punish Boston" and to actions that "condemn a whole province without a hearing" and that take away rights "from a great body corporate").

96. *See* Comment, *supra* note 33, at 178 n.6 (collecting cases).

97. *Id.* at 177 n.3 (citing Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State to Philip B. Perlman, Acting Attorney Gen. (May 19, 1952), *in* 26 DEPT. ST. BULL. 984 (1952)).

98. *See, e.g.*, United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199, 202 (S.D.N.Y. 1929) (citing many domestic cases).

99. *See* Comment, *supra* note 33, at 178–80.

100. 28 U.S.C. § 1603(b) (2012) (defining "agency or instrumentality" for the purposes of the FSIA). The term SOE is generally broader and may include corporate entities that do not

The FSIA resolved the issue of immunity for SOEs. It did not address questions of substantive liability involving states and their instrumentalities, including the circumstances under which a state could be held liable for the actions of its instrumentalities or vice versa. Shortly after the FSIA was enacted, the Supreme Court held in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*[101] (*Bancec*) that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."[102] Litigants may overcome the presumption of separateness for the purposes of substantive liability only by showing that a foreign "corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or that separate treatment of the entities "would work fraud or injustice."[103]

Turning to the constitutional status of SOEs, questions about their due process rights arose infrequently. As long as foreign states presumptively enjoyed the same constitutionally based personal jurisdiction protections as foreign private corporations, there was no need to distinguish between foreign private corporations and foreign corporations controlled by foreign states. After *Weltover*, however, the distinction became very important. Lower courts held that foreign states lacked the due process protections to which foreign corporations are entitled. But how to distinguish the two for constitutional purposes? Although the rule announced in *Bancec* is a federal common law rule based upon public international law, comity, and domestic corporate law,[104] courts of appeals have used the *Bancec* analysis to determine whether a state agency is a "person" within the meaning of the Fifth Amendment Due Process Clause.[105]

The *Bancec* test has been constitutionalized by the lower courts with no analysis of *why* common law regarding corporate and public international law principles should govern the due process issue. The Second Circuit has said that the constitutional distinction between foreign states and corporations "rests on the principle that due process rights can only be exercised by persons, including corporations, which are persons at law."[106] Straightforward application of this reasoning would apply due process protections to *any* entity with corporate form. And if some corporations should be denied constitutional protections because they are too closely related to the foreign state itself, why not apply the factors used in other areas

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qualify as agencies or instrumentalities under the FSIA. The FSIA does not use the term SOE. International law and practice generally confer immunity on SOEs to the extent that they are exercising sovereign authority. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: SELECTED TOPICS IN TREATIES, JURISDICTION, AND SOVEREIGN IMMUNITY § 454 reporters' note 12 (AM. LAW INST. 2018).

101. 462 U.S. 611 (1983).

102. *Id.* at 626–27.

103. *Id.* at 629 (quoting Taylor v. Standard Gas & Elec. Co., 306 U.S. 307, 322 (1939)).

104. *See* Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 GEO. L.J. 1825, 1835 (2018).

105. *See, e.g.*, cases cited *supra* note 30.

106. Corporacíon Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92, 103 (2d Cir. 2016) (citation omitted).

of constitutional law that distinguish between governmental and private conduct, such as the state action doctrine? We might, for example, ask whether the corporation is performing a government function or whether the government jointly participated in the conduct.[107] As well, a key reason for applying *Bancec* to substantive liability issues does not apply to the constitutional inquiry. The *Bancec* test was adopted in part based on the FSIA's legislative history.[108] But using *Bancec*'s strong presumption of juridical separation to protect foreign state-owned corporations may thwart efforts by Congress to regulate their conduct by providing them with constitutional protections that are unavailable to states themselves.[109]

Part II of this Article argues that *Bancec* should not be applied to the issue of constitutional due process because foreign states and foreign corporations are both entitled to due process protections. Under current case law from the courts of appeals, that would mean that both types of entities are entitled to "minimum contacts" protections. Arguably, however, "minimum contacts" is the wrong test for both kinds of defendants; perhaps they are entitled only to what Congress or the "general law" provides, as discussed in Part III. In either case, applying *Bancec* to questions of constitutional law lacks any constitutional basis and is at odds with the purposes of the *Bancec* test itself.

B. Separation of Powers and Foreign States

Do separation of powers principles protect foreign states? The arguments canvassed above, that foreign states stand outside the constitutional order and that relationships with foreign states are regulated only by international law and comity, both suggest that separation of powers principles do not protect foreign states.[110] Separation of powers principles include the nondelegation doctrine and other constitutional limitations on the powers of each branch of government.[111] The Supreme Court has reasoned that "the principle of the separation of powers" only protects "individual persons and private groups, those who are peculiarly vulnerable to non-judicial determinations of guilt,"[112] further suggesting that foreign states are excluded. Yet in *Bank*

107. *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1412 (2003).

108. *Bancec*, 462 U.S. at 630.

109. *See* GSS Grp. Ltd. v. Nat'l Port Auth., 680 F.3d 805, 819 (D.C. Cir. 2012) (Williams, J., concurring).

110. *See* Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 49–50 (D.D.C. 2000); *see also* Owens v. Republic of Sudan, 174 F. Supp. 3d 242, 289–90 (D.D.C. 2016), *aff'd*, 864 F.3d 751 (D.C. Cir. 2017) ("On the one hand, the D.C. Circuit has held that a foreign sovereign is not a 'person' protected by the Fifth Amendment, observing along the way that 'legal disputes between the United States and foreign governments are not mediated through the Constitution. On the other hand, the D.C. Circuit has at least once—in this litigation, no less—addressed on the merits an Article I argument by a foreign sovereign, never suggesting the sovereign had no right to make it." (citations omitted)).

111. *See, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2087–94 (2015); INS v. Chadha, 462 U.S. 919, 957–58 (1983); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584–89 (1952).

112. South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

Markazi v. Peterson,[113] the entire Supreme Court assumed without discussion that the Central Bank of Iran was protected by separation of powers principles limiting congressional power, and Chief Justice Roberts and Justice Sotomayor would have held in favor of Bank Markazi.[114] Perhaps the Court viewed Bank Markazi as a "private group" rather than a foreign state and therefore entitled to constitutional protections. However, the facts point the other way: the U.S. government concluded that the Bank Markazi is owned and controlled by Iran.[115]

The *Bank Markazi* case also illustrates the overlap between separation of powers and due process protections.[116] Consider Bank Markazi's core argument: that Congress directed the outcome of litigation in a pending case.[117] The parties, as well as the entire Court, agreed that a statute "directing that in 'Smith v. Jones,' 'Smith wins'" would be unconstitutional.[118] Although Bank Markazi styled the argument in separation of powers terms, which is how the Court evaluated it, the argument could also have sounded in due process. As Nathan Chapman and Michael McConnell have shown, by the time the Fifth Amendment was adopted, legislative acts violated due process if they exercised "judicial power" by depriving "specific individuals of rights or property."[119] In other words, a law directing that "Smith" wins would violate both due process and the vesting of the judicial power in the federal courts.

Current lower-court doctrine holds that if the target were Spain instead of "Smith," then due process protections would not apply because Spain is not a "person." Even a cursory glance at Article III suggests that the vesting of the judicial power in federal courts *does* protect foreign states, as the judicial power explicitly extends to cases involving foreign states. Styled as a due

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113. 136 S. Ct. 1310 (2016).

114. *Id.* at 1329–38 (Roberts, C.J., dissenting).

115. *See* Central Bank of Iran, 31 C.F.R. § 535.433 (2019) ("The Central Bank of Iran (Bank Markazi Iran) is an agency, instrumentality and controlled entity of the Government of Iran for all purposes under this part."). *But cf.* Certain Iranian Assets (Iran v. U.S.), Application Instituting Proceedings, ¶ 6 (June 14, 2016), https://www.icj-cij.org/files/case-related/164/164-20160614-APP-01-00-EN.pdf [https://perma.cc/6VN5-UWF6] (arguing that the United States violated the 1955 Treaty of Amity with Iran by disregarding the separate juridical status of Bank Markazi by attaching assets to satisfy a judgment against Iran).

116. In other areas, too, the relationship between separation of powers and due process protections is not clear. *See, e.g.*, Sessions v. Dimaya, 138 S. Ct. 1204, 1248 (2018); Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring).

117. *Bank Markazi*, 136 S. Ct. at 1330 ("The question we confront today is whether § 8772 violates Article III by invading the judicial power.").

118. *Id.* at 1323 n.17.

119. Chapman & McConnell, *supra* note 26, at 1677, 1679, 1694. Ryan Williams argues that during the nineteenth century, due process was understood to prohibit the legislature from "transferring person A's property to person B" and thus acting "as if it were a court adjudicating a dispute between private parties." Williams, *supra* note 20, at 423–24. As he notes, this understanding of due process "is closely related to structural principles regarding the separation of legislative and judicial powers." *Id.* at 424; *see also* JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 48–49 (2003) (noting that an exercise of judicial power "by another branch of government could be described as a procedural violation" and that "one who was not a judge could not make judicial rulings").

process violation, therefore, foreign states are not protected under current doctrine. Styled as a separation of powers violation, however, foreign states may be protected—or at least the Court assumed as much in *Bank Markazi* and the text of Article III suggests as much. Yet it is not clear that the constitutionality of government actions should hinge on whether the challenge is framed in separation of powers rather than due process terms. As Chapman and McConnell argue, in other contexts, due process and separation of powers have significant overlap. More broadly, it is not clear if and why Bank Markazi (and Iran) should be protected against the legislative exercise of judicial power but not against other separation of powers violations such as the nondelegation doctrine or the limits on executive power.

II. THE CONSTITUTION FROM A DIFFERENT VANTAGE POINT

The Constitution protects foreign states through both Article III and the Fifth Amendment Due Process Clause, providing a straightforward resolution for most issues identified in Part I. Some of the protections to which foreign states are entitled also apply to other litigants in ways that modern doctrine does not recognize. These observations change our basic understanding of Article III—it not only confers subject matter jurisdiction, it also provides procedural protections that we today associate only with "due process."

A. Foreign States

Article III extends the federal judicial power to cases involving "foreign states." The history of foreign-state diversity jurisdiction shows that foreign states have a right to the original jurisdiction of the Supreme Court in certain cases. That right does not depend upon the actions of Congress, demonstrating that foreign states are not categorically excluded from the constitutional order and that they are protected by separation of powers. Article III also provides procedural protections to all litigants in federal court, including foreign states. The terms "judicial power" and "case" conferred only limited power on federal courts; those limitations included requirements of personal jurisdiction and notice. Early litigation against foreign sovereigns underscores these points and also shows that "process" was limited both by geography and by the power of the sovereign.

1. Foreign-State Diversity Jurisdiction

Article III of the Constitution extends the judicial power of the United States to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[120] In so doing, it confers a benefit or a right

120. "Cases" refer to civil or criminal actions, while "controversies" are civil cases. *See* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 265–67 (1990). *But cf.* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious*

upon foreign states. That right is not self-executing, at least not with respect to the lower federal courts. Instead, lower federal courts only have the subject matter jurisdiction that Congress chooses to confer upon them, within the outer limits set by Article III.[121] If—and to the extent that—Congress chooses to confer such jurisdiction on the federal courts, foreign states have a constitutionally based statutory entitlement to that jurisdiction.[122] Placing foreign states in Article III's grant of diversity jurisdiction did signal a particular focus upon the relationship between courts and foreign sovereigns. Federal courts would, the framers hoped, minimize conflict that might arise in cases involving foreign states.

The specifics of federal court jurisdiction were worked out in the Committee of Detail at the Constitutional Convention of 1787. The Wilson-Rutledge draft from the Committee of Detail contains the first recorded mention of jurisdiction over "foreign states."[123] The earlier plans instead included language about cases that might generate conflict with foreign countries. The Virginia Plan, for example, extended jurisdiction of the "supreme tribunal" to piracy; capture of enemy; "cases in which foreigners, or citizens of other States, applying to such jurisdictions, may be interested"; and "questions which involve the national peace or harmony."[124] William Paterson's New Jersey Plan would have conferred federal court jurisdiction over cases of capture, piracy, felonies on the high seas, the construction of treaties, and all cases in which foreigners might be interested.[125] After only minor debate, the Convention adopted a resolution similar to the Virginia Plan's language that extended jurisdiction "to all cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony."[126] This language was then sent to the Committee of Detail.[127] It provided the basis for foreign-state diversity jurisdiction, underscoring the connection between "Natl. peace & harmony" and this form of subject matter jurisdiction.

Jurisdiction, 124 YALE L.J. 1346, 1424 (2015) (arguing that controversies, but not cases, required a "dispute between designated opponents and exclude original petitions for the performance of the administrative functions associated with non-contentious jurisdiction").

121. *See* Verlinden B. V. v. Cent. Bank of Nigeria, 461 U.S. 480, 491, 497 (1982).

122. *See, e.g.*, 28 U.S.C. § 1332 (2012) (conferring jurisdiction on federal district courts in civil cases in which the matter in controversy exceeds $75,000 and is between "a foreign state . . . as plaintiff and citizens of a State or of different States"). Note that federal district courts have jurisdiction over cases in which the foreign state is a defendant under the FSIA, so long as a statutory exception applies.

123. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 172–73 (Max Farrand ed., 1911).

124. 1 *id.* at 21–22 (Madison's notes). Charles Pinckney of South Carolina presented a plan that called for the creation of federal courts without describing their jurisdiction. 3 *id.* at 600.

125. 1 *id.* at 244 (Madison's notes); *see also* 3 *id.* at 626 (Alexander Hamilton's plan).

126. 2 *id.* at 46 (Madison's notes).

127. *Id.* at 128.

Though records from the Committee of Detail are limited, the first reference to "foreign states" appears in the Wilson-Rutledge draft[128] and then in the committee's final report.[129] The Committee of Style's report was similar to the version presented by the Committee of Detail and to the final language of Article III. Subject matter jurisdiction extended to controversies between "a State or the Citizens thereof" and "foreign states, Citizens or Subjects."[130]

The various kinds of diversity jurisdiction generated little controversy as the Constitution was drafted.[131] As the Constitution was debated at the state ratifying conventions, diversity jurisdiction for citizens of different states and alienage jurisdiction (the extension of diversity jurisdiction to cases involving *citizens* of foreign states) both came under fire, although alienage jurisdiction was less controversial.[132] The relative (but not total) agreement on alienage jurisdiction was based upon the widely acknowledged problems that the British creditors experienced in recovering from U.S. debtors in state courts.[133] Those problems generated by state courts put the United States as a whole in violation of its treaty obligation and gave rise not only to alienage jurisdiction in Article III but also to the Supremacy Clause of the U.S. Constitution.[134] The goals were to give the United States more negotiating power on the world stage, to insure the availability of credit to U.S. borrowers, and to reduce conflict with foreign nations.[135]

Diversity jurisdiction involving *foreign states* generated little specific discussion. Even anti-federalists who proposed language narrowing the jurisdiction of the federal courts generally agreed that jurisdiction over cases involving foreign states was appropriate.[136] Three fleeting criticisms were

128. *Id.* at 173 ("[T]o Controversies between (States,—except those wh. regard Jurisdn or Territory, —betwn) a State and a Citizen or Citizens of another State, between Citizens of different States and between (a State or the) Citizens (of any of the States) (thereof) and foreign States . . . .").

129. *Id.* at 186–87.

130. *See id.* at 576, 580 (Committee of Style).

131. Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1466.

132. *See, e.g.*, The Virginia Convention Friday 20 June 1788, *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA 1412, 1422 (John P. Kaminski et al. eds., 1993); *cf.* Holt, *supra* note 131, at 1466 n.170 ("From the history I have recited it must be clear, although perhaps startling, that alienage jurisdiction was the most important head of jurisdiction in [A]rticle III.").

133. Holt, *supra* note 131, at 1473.

134. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 158–59 (Jonathan Elliot ed., J.B. Lippincott Co. 2d ed. 1941) (1836) (William Davie of North Carolina); THE FEDERALIST NO. 80 (Alexander Hamilton).

135. The Virginia Convention Friday 20 June 1788, *supra* note 132, at 1413–14 (James Madison). Madison gave similar reasons to extend federal judicial power over other foreign relations issues. *Id.*

136. *See, e.g.*, Agrippa X, MASS. GAZETTE, Jan. 1, 1788, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: MASSACHUSETTS 576, 578 (John P. Kaminski et al. eds., 1998); *see also* Agrippa XII, MASS. GAZETTE, Jan. 15, 1788, *reprinted in id.* at 720, 725; Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION 193, 204 (John P. Kaminski et al. eds., 1983); The Political Club of

leveled at foreign-state diversity jurisdiction, all focusing on cases between U.S. states and foreign states: such jurisdiction was novel,[137] states might be sued by foreign states without their consent, and any judgment against a foreign state could not be enforced.[138] Both James Madison and John Marshall stated that the consent of the foreign state and of the "American state" would be necessary and both emphasized the need to avoid controversies with foreign nations that could arise from state court decision-making.[139] Marshall also countered the argument that such jurisdiction was useless because there would be no way to enforce a judgment between a state and a foreign state. He suggested in response that the parties to such a suit would acquiesce in its enforcement—following perhaps from the premise that foreign states would only be subject to suit if they consented to it.[140]

Danville, Kentucky Debates over the Constitution, 23 February–17 May, *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA 408, 412 (John P. Kaminski et al. eds., 1988).

137. The Virginia Convention Friday 20 June 1788, *supra* note 132, at 1423 (statement of Patrick Henry) ("Is it not the first time, among civilized mankind, that there was a tribunal to try disputes between the aggregate society, and foreign nations?—Is there any precedent for a tribunal to try disputes between foreign nations, and the States of America? The Honorable Gentleman said, that the consent of the parties was necessary: I say, that a previous consent might leave it to arbitration.—It is but a kind of arbitration at best."); The Virginia Convention Saturday 21 June 1788, *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA, *supra* note 132, at 1440, 1447–48 (statement of William Grayson) ("A State may sue a foreign State, or a foreign State may sue one of our States. This may form a new American law of nations. Whence the idea could have originated, I cannot determine, unless from the idea that predominated in the time of Henry the IVth, and Queen Elizabeth. They took it into their heads to consolidate all the States in the world into one great political body. Many ridiculous projects were imagined to reduce that absurd idea into practice. But they were all given up at last.").

138. The Virginia Convention Saturday 21 June 1788, *supra* note 137, at 1448 (statement of William Grayson) ("My honorable friend [James Madison], whom I much respect, said that the consent of the parties must be previously obtained. I agree that the consent of foreign States must be had before they become parties: But it is not so with our States. It is fixed in the Constitution that they shall become parties. This is not reciprocal. If the Congress cannot make a law against the Constitution, I apprehend they cannot make a law to abridge it. The Judges are to defend it. They can neither abridge nor extend it. There is no reciprocity in this, that a foreign State should have a right to sue one of our States, whereas a foreign State cannot be sued without its own consent. The idea to me is monstrous and extravagant. It cannot be reduced to practice. Suppose one of our States objects to the decision, arms must be recurred to. How can a foreign State be compelled to submit to a decision?").

139. The Virginia Convention Friday 20 June 1788, *supra* note 132, at 1414–15 (statement of James Madison) ("I do not conceive that any controversy can ever be decided in these Courts, between an American State and a foreign State, without the consent of the parties. If they consent, provision is here made. The disputes ought to be tried by the national tribunal. This is consonant to the law of nations. Could there be a more favourable or eligible provision to avoid controversies with foreign powers? Ought it to be put in the power of a member of the Union to drag the whole community into war? As the national tribunal is to decide, justice will be done.").

140. *Id.* at 1435 (statement of John Marshall) ("Suppose, says he, in such a suit, a foreign State is cast, will she be bound by the decision? If a foreign State brought a suit against the Commonwealth of Virginia, would she not be barred from the claim if the Federal Judiciary thought it unjust? The previous consent of the parties is necessary. And, as the Federal Judiciary will decide, each party will acquiesce. It will be the means of preventing disputes with foreign nations.").

2. The Supreme Court's Appellate and Original Jurisdiction

Moving beyond the lower federal courts, the Supreme Court has appellate jurisdiction over "all other Cases before mentioned," which include cases "between a State, or the Citizens thereof, and foreign States."[141] To the extent that cases involving foreign states come within the Court's appellate jurisdiction, recourse to the Supreme Court may be limited by such "Regulations as the Congress shall make."[142] Congress' power to limit or abolish the appellate jurisdiction of the Supreme Court has been subject to much debate,[143] but I will assume that Congress may do both.[144] Therefore, with respect to the Court's appellate jurisdiction, although some cases involving foreign states are included within it, the exercise of a "right" to such jurisdiction is dependent upon Congress.

Turning to the Court's original jurisdiction, Article III provides that "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction."[145] The phrase "those in which a State shall be Party" refers back to Article III, Section 2, Clause 1 of the Constitution, which extends the judicial power of the United States to, among others, controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[146] Thus cases between states and foreign states come within the Court's original jurisdiction because they are cases "in which a State shall be a party." The argument is not that the word "state" refers to foreign states but instead that "cases in which a State shall be a party" includes cases between a domestic and a foreign state.

Section 13 of the Judiciary Act of 1789[147] even included cases between a state and a foreign state in the Supreme Court's *exclusive* jurisdiction by providing that

> the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.[148]

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141. U.S. CONST. art. III, § 2.

142. *Id.* § 3.

143. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 314–22 (7th ed. 2015).

144. Congress may also give lower federal courts (and even state courts) concurrent jurisdiction over cases within the original jurisdiction of the Supreme Court. Ames v. Kansas *ex rel.* Johnston, 111 U.S. 449, 465–66 (1884). I assume that concurrent jurisdiction without the possibility of review by the Supreme Court is constitutional. FALLON ET AL., *supra* note 143, at 271. If it is not, then foreign states also have a constitutionally conferred benefit of access to the Supreme Court in cases between states and foreign states (which fall within the Court's original jurisdiction) when such cases are heard originally by state or lower federal courts.

145. U.S. CONST. art. III, § 2.

146. California v. S. Pac. Co., 157 U.S. 229, 257 (1895).

147. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

148. *Id.* § 13, 1 Stat. at 80.

Although this language does not explicitly mention foreign states, the phrase "where a state is a party" includes cases between foreign states and domestic states because Article III, Section 2, Clause 1 explicitly includes controversies between states and foreign states.[149] Because the text does not explicitly reference foreign states, one might argue that section 13 of the Judiciary Act of 1789—and perhaps the Constitution itself in Article III, Section 2, Clause 2—did not contemplate suits between states and foreign states within the Court's original jurisdiction. Perhaps lending support to this view, the Judiciary Act of 1789 nowhere mentions foreign states explicitly.[150]

Not only is that argument belied by the text of Article III itself, which refers—in Section 2, Clause 1—to cases between states and foreign states, it is also undercut by the original Senate version of the Judiciary Act of 1789 drafted by Oliver Ellsworth.[151] The Senate version provided that "the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where any of the United States *or a foreign state is a party*."[152] Thus, the drafters of the Judiciary Act of 1789 were well aware of cases involving foreign states when they drafted section 13. The revised version puts only cases between foreign states and domestic states within the exclusive jurisdiction of the Court but not cases between the citizens of a state and a foreign state. The broad language of the Senate draft is intriguing as it appears to confer jurisdiction beyond what Article III permits. Article III puts cases "in which a State shall be a party" within the original jurisdiction of the Court but does not include cases between a citizen of a state and a foreign state. This Article III problem likely explains why the final version was narrower in scope. In any event, the phrase "[cases] in which a State shall be a party" includes, as a straightforward reading of the text, cases between states and foreign states.

Other evidence also shows that the phrase "[cases] in which a State shall be a party" in Article III included cases between foreign states and U.S. states. Attorney General Edmund Randolph issued a report on the federal judiciary in 1790, at the request of the House of Representatives, in which he proposed an entirely new judiciary act.[153] It, too, put cases "in which a State

149. James Pfander has argued that the "all Cases" in the Original Jurisdiction Clause refers not only to the "controversies" to which states are parties but also to the "cases" identified in Article III, including those that arise under the Constitution, laws, and treaties of the United States. James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 605 (1994). His interpretation is consistent with the Supreme Court having original jurisdiction over cases between states and foreign states.

150. *See generally* Judiciary Act of 1789, ch. 20, 1 Stat. 73.

151. *See* Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1793 (2004).

152. *Id.* at 1792 (emphasis added) (quoting Judiciary Act of 1789, S. 1, 1st Cong. § 13 (1789)).

153. *See generally* Edmund Randolph, Report, *in* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 127 (Maeva Marcus et al. eds., 1992) [hereinafter Randolph Report].

shall be a party" within the original jurisdiction of the Supreme Court (although without any exclusions), but unlike the Judiciary Act of 1789, Randolph's version did explicitly mention cases between states and foreign states.[154] It would have given circuit courts original jurisdiction over cases "between a state, being a plaintiff, or the citizens thereof, and foreign states, citizens or subjects."[155] Note that the original jurisdiction of the Supreme Court does not, however, include another class of cases to which the judicial power of the United States extends: cases between *citizens* of a state and a foreign state.[156] That exclusion from the Court's original jurisdiction is consistent with the ratification debates, which evinced particular concern for cases between domestic and foreign states.[157] The Court has twice assumed that cases between "states" and "foreign states" come within the Court's original jurisdiction.[158]

What kinds of cases might arise between states and foreign states, to which the original jurisdiction of the Supreme Court would extend? There are several possibilities. During the Revolutionary War, individual states borrowed from foreign creditors, including from foreign nations.[159] North Carolina, South Carolina, and Virginia, for example, all borrowed from France;[160] the failure of North and South Carolina to retire those debts apparently remained a diplomatic irritant through the 1780s as the Constitution was drafted and enacted.[161] The Principality of Monaco invoked the Court's original jurisdiction in a 1934 case against Mississippi involving a state debt.[162] Second, state laws permitted the confiscation of British and loyalist property during the Revolutionary War. Although high-profile efforts to provide compensation were negotiated between the United

154. *See generally id.*

155. *Id.* at 148.

156. U.S. CONST. art III, § 2, cl. 1.

157. *See* THE FEDERALIST NO. 81 (Alexander Hamilton); *supra* notes 136–40 and accompanying text.

158. Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 14 (1831).

159. MIRA WILKINS, THE HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES TO 1914, at 29, 32 (1989); *see also* PIETER J. VAN WINTER, AMERICAN FINANCE AND DUTCH INVESTMENT, 1780–1805, at 36–37 (1977) (noting the efforts of Virginia, Massachusetts, Connecticut, Pennsylvania, Maryland, and South Carolina to borrow money in Amsterdam). Maryland resolved in 1781 to "get a loan from a European government or, failing that, from private individuals" and secured a loan from a private Dutch firm in 1782. VAN WINTER, *supra*, at 94–95. That debt was discussed at various times by the Maryland House of Delegates until it was retired in 1793. WILKINS, *supra*, at 29, 47.

160. ALLAN NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775–1789, at 506–07 (1969); B. U. RATCHFORD, AMERICAN STATE DEBTS 41–42 (1941).

161. *See* NEVINS, *supra* note 160, at 507 n.51 (noting that the "French Government grew urgent in pressing for the repayment" of South Carolina's debt); B. U. Ratchford, *An International Debt Settlement: The North Carolina Debt to France*, 40 AM. HIST. REV. 63, 65–68 (1934) (describing the negotiations and efforts to repay North Carolina's debt through the 1780s); *Southern Mails*, MASS. CENTINEL, Jan. 24, 1789 (describing a demand by the King of France that South Carolina repay its debt). *See generally* Hulsebosch, *supra* note 1, at 1249 (noting that the "European audiences for American constitution-making" were all "concerned about debt").

162. *Principality of Monaco*, 292 U.S. at 330.

States and Britain,[163] cases between states and foreign states might have been understood to include future situations in which state laws affected property owned by foreigners and foreign governments sued on behalf of their nationals.[164] Third, the Constitution permits states to make an "Agreement or Compact" with "a foreign power" if Congress so permits; conflicts related to such agreements could be brought under the original jurisdiction of the Supreme Court.[165] Fourth, the colonies had had various conflicts with Indian nations, which might have been understood as "foreign states" within the meaning of Article III. The Court held to the contrary in 1831 in a 5–2 decision.[166]

The foregoing discussion establishes that cases between states and foreign states are within the original jurisdiction of the Supreme Court. The original jurisdiction of the Supreme Court is self-executing, unlike the jurisdiction of the lower federal courts. Nor is the Supreme Court's original jurisdiction subject to regulation by Congress, unlike its appellate jurisdiction.[167] Cases between a state and a foreign state are therefore within the original jurisdiction of the Supreme Court, whether or not Congress so designates. It does not matter that the current federal statute conferring original jurisdiction does not include cases between states and foreign states.[168]

Using Article III to benefit foreign states in a certain class of cases is entirely consistent with the general concern about conflict with foreign states and with the specific reasons for creating a federal judiciary. It is also consistent with other textual commitments of Article III, which reflect the same concerns by extending the judicial power of the United States and the Supreme Court's original jurisdiction to "Cases affecting Ambassadors, other public Ministers and Consuls."[169]

To be clear, the argument that the Supreme Court has original jurisdiction over cases between states and foreign states accepts that the Court may decline to exercise its original jurisdiction.[170] It is also consistent with the claim that the parties must in some sense give their "consent" in order to be sued. James Madison and John Marshall used this language, as we have seen.[171] A century and a half later, the Court held that a state cannot be sued by a foreign state absent consent and it suggested that states may not sue

163. *See, e.g.*, Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, 8 Stat. 116 (Jay Treaty).

164. *Cf.* The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 285 (1822) (libel filed by the Spanish consul on behalf of Spanish property owners).

165. *Cf.* Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570–73 (1840). In terms of recent practice, U.S. states have entered into at least 340 agreements with foreign states since 1955. *See* Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 750 (2010). Note that cases based upon such agreements would not "arise under" a "treaty" because agreements and compacts are constitutionally distinct from Article II treaties.

166. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 14 (1831).

167. California v. Arizona, 440 U.S. 59, 65 (1979); Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1860).

168. *See* 28 U.S.C. § 1251 (2012).

169. U.S. CONST. art. III, § 2, cl. 1.

170. Louisiana v. Mississippi, 488 U.S. 990, 990 (1988).

171. *See supra* notes 137–39 and accompanying text.

foreign states without their consent.[172] As explained in Part III.A, "consent" in this context plausibly refers to satisfying the conditions for the exercise of personal jurisdiction over a defendant.[173] Whether or not that is correct, however, the point here is that should a state and a foreign state consent, if (and in whatever manner) consent is constitutionally required, then the Supreme Court has original jurisdiction over the case.

3. Personal Jurisdiction and Notice

The Constitution explicitly contemplates litigation involving foreign states in federal courts. To what litigation-related constitutional rights, such as notice and personal jurisdiction, are they entitled? We have already seen that federal courts were created in part to provide a fair forum for litigating disputes in which foreign countries had an interest so as to avoid conflict with foreign nations. Having created a federal forum for this purpose, it would be odd for those who enacted the Constitution to provide structural disadvantages to foreign sovereigns by creating litigation-related constitutional rights that benefitted only private parties. Today's prevailing understanding of the Fifth Amendment does exactly that: it constitutionally disadvantages foreign sovereigns as compared to private parties. Prior to the adoption of the Fourteenth Amendment, foreign states and private parties would have been on equal footing in state court (neither type of party protected by due process), but in federal court, foreign states would have had fewer protections than private litigants. Disadvantaging foreign sovereigns in this way seems contrary to the purpose of Article III as articulated during the founding period. It is also wrong in ways that change our understanding of the rights of both foreign sovereigns *and* of private parties, as well as those of SOEs.

Procedural protections are usually understood as a function of the Due Process Clause of the Fourteenth or, here, the Fifth Amendment. Focusing on foreign sovereigns uncovers an additional, largely unexplored source of litigation-related constitutional rights in federal courts: Article III's grant of "judicial power," which extends only to "cases" and "controversies." The term "controversy" likely refers to a subset of "cases," thus the term "case" is used here to refer to both cases and controversies.[174] The terms "cases" and "judicial power" in Article III are limiting. They mean that the subject matter jurisdiction of the federal courts is triggered only when certain

172. Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

173. *See infra* notes 326–27 and accompanying text.

174. *See supra* notes 120, 149 and accompanying text; *see also* Randolph Report, *supra* note 153, at 129, 131, 140 (repeatedly using the word "cases" to refer to all ten classes of jurisdiction named in Article III). Scholars have argued that the terms "case" and "controversy" differed in various ways that are not relevant here. *See* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 450 (1993). Pushaw notes that controversies, like cases "had to be brought according to proper judicial procedure," consistent with the argument advanced here. *Id.* at 483 n.183.

procedural prerequisites are met.[175] Those prerequisites include personal jurisdiction and notice for all defendants.

The text of Article III extends federal "judicial power" only to "cases in law and equity." Not surprisingly, the subject matter jurisdiction of the federal courts has always been limited to "cases."[176] In *Osborn v. Bank of the United States*,[177] Chief Justice John Marshall explained that Article III's "judicial power" is "capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case . . . ."[178] Justice Joseph Story echoed this language in his *Commentaries on the Constitution of the United States*.[179] When a question has assumed "such a form, that the judicial power is capable of acting upon it," Story wrote, "it then becomes a case; and then, and not till then, the judicial power attaches to it."[180]

The term "case" as used in the Constitution referred to a dispute or question submitted in the proper procedural posture.[181] The basic idea is a familiar one in the context of standing: cases and controversies limit Article III courts to hearing disputes that take a particular form.[182] But Justice Marshall's words "form prescribed by law"[183] link the terms "case" and "judicial power" to proper "form" or procedure.[184] Justice Story made the same point using slightly different language in which he described a case as "a suit in law or equity, instituted according to the regular course of judicial proceedings."[185] Federal courts have no constitutional power to act outside of "cases" instituted through regular "judicial proceedings."

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175. The Supreme Court has reasoned with respect to the Due Process Clause of the Fourteenth Amendment that "the requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause." Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). The reasoning about Article III was not explained, however, and it is incorrect for the reasons set out here. To the extent the Court meant that Article III does not *itself* impose the rules of personal jurisdiction, as opposed to requiring that personal jurisdiction exist under whatever rules are applicable, the statement is consistent with the argument advanced here. *See infra* Part III.A.

176. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

177. 22 U.S. (9 Wheat.) 738 (1824).

178. *Id.* at 819.

179. *See generally* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston, Billiard, Gray & Co. 1833).

180. *Id.* § 1640; *see also Osborn*, 22 U.S. (9 Wheat.) at 819 (noting that "the judicial department" can "receive jurisdiction" when questions "assume such a form that the judicial power is capable of acting on it").

181. *See* Pushaw, *supra* note 174, at 473 (arguing that an Article III "'case' arose only if a plaintiff's claim fit within a recognized form of action and the parties complied with procedural rules").

182. *Osborn*, 22 U.S. (9 Wheat.) at 819.

183. *Id.*; *see also* Marshall, *supra* note 24, at 95 ("A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision.").

184. Wilson v. Mason, 5 U.S. (1 Cranch) 45, 84–85, 103 (1801) (linking notice to the term "in the form prescribed by law").

185. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 405 (1821) ("If the question cannot be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article."); STORY, *supra* note 179, § 1640.

The word "case" does not appear to have had a precise, technical meaning, however.[186] It was a very commonly used legal term in the late eighteenth century and had a number of definitions.[187] In particular, the word "case" overlapped in meaning with the words "suit" and "cause." Article III uses "case";[188] the Judiciary Act of 1789 sometimes used "case" but often used the word "suit" and sometimes the word "cause";[189] Randolph's report on the judiciary sometimes used the word "case" in contexts in which the First Judiciary Act used the word "suit";[190] and the Eleventh Amendment uses "suit" not "case."[191] The comparison among these three documents is instructive because they choose different terms to refer to the same or very similar concepts relating to the jurisdiction of the federal courts under Article III. Their language reveals overlaps in meaning, but the terms "suit" and "case" were not used entirely interchangeably. The word "suit" was associated with the initiation or beginning of an action, as in the Eleventh Amendment in which the word "suit" is coupled with the terms "commenced" or "prosecuted."[192] Cases, by contrast, included "cause[s]"

186. *See* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 231 (1990).

187. For example, the term "case" referred to an "action upon the case" which meant a "universal remedy given for all personal wrongs and injuries with force; so called, because the plaintiff's whole case or cause of complaint is set forth at length in the original writ." 1 RICHARD BURN, A NEW LAW DICTIONARY 143–45 (London, T. Cadell 1791); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *122.

188. U.S. CONST. art. III.

189. For example, the Constitution extends the judicial power to "all Cases of admiralty and maritime Jurisdiction." *Id.* § 2. Whereas, the Judiciary Act of 1789 gave the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. The Randolph Report proposed conferring upon the district courts "original jurisdiction" of "all civil cases of admiralty and maritime jurisdiction." Randolph Report, *supra* note 153, at 141. Section 11 of the Judiciary Act of 1789 begins: "*And be it further enacted*, That the circuit courts shall have original cognizance" of all suits of a civil nature where "the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State." Judiciary Act of 1789 § 11.

190. For example, the Randolph Report would have given district courts original jurisdiction over "controversies to which the United States shall be a party plaintiff." Randolph Report, *supra* note 153, at 141. But the Judiciary Act of 1789 granted district courts concurrent jurisdiction "of all suits at common law where the United States sue." Judiciary Act of 1789 § 9; *see also id.* § 11 ("[T]he circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where . . . the United States are plaintiffs.").

191. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

192. *Id.*; *see also* Judiciary Act of 1789 § 11 ("And no civil suit shall be brought . . . against an inhabitant of the United States . . . nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note . . . ."); § 12 ("[I]f a suit be commenced in any state court against an alien . . . ."); § 13 ("[J]urisdiction of suits or proceedings against ambassadors" and "of all suits brought by ambassadors"); BLACKSTONE, *supra* note 187, at *23 ("[W]here there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."); 2 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (London, S. Crowder 1765) (unpaginated) (noting that "suit" signifies "a suit in law, and is divided into *real* and *personal*, and is all one with *action real and personal*."); Randolph Report, *supra* note 153, at 142 ("No civil suit . . . shall be brought against an

which "ha[d] been decided"[193] and generally referred to suits or actions that had already commenced.[194] That general distinction supports the claim that the word "case" referred not to the legal demand or cause of action but only to a demand or cause correctly presented to the court.

A "case" required that a dispute be submitted in proper form, a requirement that included bringing the defendant before the court. As John Marshall explained in 1800, to have a "case" there "must be parties to come into court, who can be reached by its process."[195] An attempt to exercise personal or in rem jurisdiction that exceeded the authority of the court was "against the form of the laws"—the language linked to the word "case"—and such a dispute did not come within the subject matter jurisdiction of the federal courts.[196] James Madison made the same point at the Virginia Ratifying Convention when he argued that subject matter jurisdiction over cases involving "citizens of different States" will not "go beyond the cases where they may be parties."[197] In this sense, subject matter jurisdiction is limited by personal jurisdiction, as Caleb Nelson has argued in the context of cases against U.S. states.[198] The term "judicial power" shared this meaning, providing additional support for Nelson's argument that the immunity of U.S. states was understood as an aspect of personal jurisdiction that was preserved by Article III.

The "judicial power" conferred by Article III extended only to "cases" (and controversies), suggesting, as described above, a power that was limited to regular or lawful proceedings. The vesting of "judicial power" itself—arguably the "only *explicit* constitutional source of the federal judiciary's

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inhabitant of the United States . . . . No district court shall have cognizance of any suit, to recover the contents of any promissory note . . . .").

193. *Case*, OXFORD ENG. DICTIONARY, http://www.oed.com/view/Entry/28393?p=emailAkGB4tVK4aci.&d=28393 [https://perma.cc/N4FS-5K6A] (last visited Oct. 6, 2019) (referring to a 1710 work, H. Prideaux's *The Original and Right of Tithes*, which included this sentence: "[p]recedents and judged Cases have ever had the like authority").

194. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 819 (1824) (noting that the suit exists before the "case" and that the suit does not become a case unless properly submitted so that the court has jurisdiction); Randolph Report, *supra* note 153, at 142 ("[I]f it shall appear to the said court that due notice and sufficient time have been given to the officers of the United States concerned, to prepare for the hearing, and that the circuit courts herein after mentioned, have not already had possession of the case . . . .").

195. Marshall, *supra* note 24, at 95–96; *see also* Nathan v. Virginia, 1 U.S. (1 Dall.) 77, 77, 79–80 (Pa. Ct. Com. Pl. 1781) (linking "process" with personal jurisdiction over ambassadors, U.S. states, and foreign states and stating, "[h]ence this inference was drawn, that the court having no jurisdiction over Virginia, all its process against that state, must be *coram non judice*, and consequently void"); *infra* Part II.B.1.

196. United States v. Peters, 3 U.S. (3 Dall.) 121, 124 (1795) (argument of counsel) (describing counsel's argument regarding invalid exercise of personal and in rem jurisdiction as "against the form of the laws of the *United States*" and ordering the case dismissed for lack of subject matter jurisdiction); *see also* Kempe's Lessee v. Kennedy, 9 U.S. (5 Cranch) 173, 186 (1809) (linking "in the form prescribed by law" to an accused "amenable to its jurisdiction," in contrast to proceedings against someone the court has "no power to try" which are "*coram non judice*").

197. The Virginia Convention Friday 20 June 1788, *supra* note 132, at 1414.

198. *See generally* Nelson, *supra* note 23.

authority to act"[199]—also brings with it personal jurisdiction-based limitations. A "judicial" decision presupposed a question that took legal form or shape,[200] which included parties who could be reached by the court's process.[201]

Judicial power was, at least for much of English history, part of the executive power. The king had the "coercive power" to punish and also the "power to compel the parties to come to judgment and to execute the judgment given."[202] As Coke's influential commentary on Thomas de Littleton put it: "The law is the rule, but it is mute. The king judgeth by his judges, and they are the speaking law, *lex loquens*. The process and the execution, which is the life of the law, consisteth in the king's writs."[203]

Coke thus equates "process and the execution" with the "life of the law" and the "king's writ," but he equates judging with "speaking the law."[204] Both were aspects of executive authority. Even as the English function of judging or "speaking the law" became increasingly independent from executive power—a much slower process than the separation of legislative and executive power[205]—judicial authority remained dependent upon the distinct power to summon parties through "process." A century later, William Blackstone would describe courts as having three "constituent parts": the actor (or plaintiff), "reus" or the defendant, and "the judex, or judicial power, which is to examine the truth of the fact, to determine the law

199. Steven G. Calabresi, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1176–77 (1992).

200. *See cf.* Case of Hayburn, 2 U.S. (2 Dall.) 409, 410 (1792) (opinion of Jay, C.J.); Marshall, *supra* note 24, at 95–96 ("[A] question must assume legal form, for forensic litigation, and judicial decision."). *But see* Hart v. Massanari, 266 F.3d 1155, 1160 (9th Cir. 2001) ("The judicial power clause, by contrast, has never before been thought to encompass a constitutional limitation on how courts conduct their business.").

201. *See, e.g.*, Stearns v. United States, 22 F. Cas. 1188, 1190 (C.C.D. Vt. 1835) (No. 13,341) ("And no court can, in the ordinary administration of justice in common law proceedings, exercise jurisdiction over a party, unless he shall voluntarily appear, or is found within the jurisdiction of the court so as to be served with process. Such process cannot reach the party beyond the territorial jurisdiction.").

202. SIR MATTHEW HALE, THE PREROGATIVES OF THE KING 179, 191 (D.E.C. Yale ed., 1976) ("Coercion is that whereby the judicative power is acted and without which there can be no jurisdiction, and whereby the king upon complaint either of a particular man or of a country, as by indictment, or of his attorney, may enforce the person complained of to come to judgment and to execute it."). On the general influence of Coke, Hale, and Blackstone on the American founders, see Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1252–53 (2016).

203. 3 J. H. THOMAS, SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE ON THE LAWS OF ENGLAND 308 (Philadelphia, Alexander Towar 1836).

204. *See also* Craig A. Stern, *What's a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1053–54 (1998) ("The very word 'judicial' derives ultimately from *jus dicere*, Latin for 'to speak the law.' The judicial power is an official 'speaking of the law' to other parties so as to resolve a dispute between them.").

205. Blackstone describes government as having two parts: legislative and executive. BLACKSTONE, *supra* note 187, at *122.

arising upon that fact."[206] Here, too, the judicial power speaks the law but only once the "reus" is there to listen.[207]

The distinction between an "original" writ and a "judicial" writ is illustrative. An original writ was sent out to summon the defendant in order to "begin the suit," while judicial writs were sent out only "after the suit begun."[208] A "judicial" writ was used after the defendant had been properly summoned. The issuance of the original writ and summons based upon it were necessary to compel the defendant to appear.[209] The summons, based upon the original writ, did not, however, itself provide the basis for a default judgment. A variety of writs developed over time to compel the appearance of the defendant, such as the mesne writs of attachment, distringas, and capias ad respondendum.[210] These writs, called writs of process,[211] were judicial.[212] The point is thus not that judicial writs could only be exercised after a defendant was otherwise properly before the court but instead that the exercise of judicial power required that particular procedures be followed prior to its invocation (the issuance of the original writ and summons) and that those procedures were in theory necessary[213] (if not sufficient) to obtain the personal jurisdiction needed for a valid judgment.

The connection between "judicial power" and personal jurisdiction is made clear in a 1799 opinion of Attorney General Charles Lee on whether process could be served upon a person on board a British warship docked in New York Harbor. The attorney general reasoned that

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206. *Id.* at *25.

207. *See* The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 352–53 (1822) (linking "judicial process" to those who can "be compelled to appear in our Courts"); JOHN AYLIFFE, PARERGON JURIS CANONICI ANGLICANI 176 (London, Thomas Osborne 2d ed. 1734) (describing a citation as a form of summons and then noting that "a Citation is the Beginning and Foundation of every Law-Suit or Judicial Proceeding: so that every Judicial Act exercised against a Person not cited, is null and void . . . ."). The citation itself was not, however, a judicial act. AYLIFFE, *supra*, at 181; *see also* Kirk v. Williams' Ex'x, 18 Ky. (2 T.B. Mon.) 135, 136 (1825) (describing the exercise of "judicial functions" as dependent upon parties "brought before the court by appropriate process, or [who] voluntarily submit to its cognizance").

208. CUNNINGHAM, *supra* note 192 (unpaginated); *see also* GILES JACOB, A NEW LAW-DICTIONARY (London, Henry Lintot 6th ed. 1750) (unpaginated) (providing a similar definition of "Writ").

209. *Cf.* 2 ARTHUR BROWN, A COMPENDIOUS VIEW OF THE ECCLESIASTICAL LAW OF IRELAND 11 (Dublin, R. E. Mercier 1803) (distinguishing between "*voluntary* jurisdiction" which was exercised "in matters which require no judicial proceeding" and "*contentious* jurisdiction" in which there is "an action or judicial process"); *see also* BURN, *supra* note 187, at 205–06 (drawing the same distinction in ecclesiastical cases); DOROTHEA DU BOIS, THE CASE OF ANN COUNTESS OF ANGLESEY 26 (London, 1766) (noting that an attorney general is "vested with no judicial Power, and could not, by any compulsive Process, compel Witnesses to appear before him . . .").

210. *See* Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 58–60 (1968).

211. *See* HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 24 (Cambridge, Harvard Law Review Publ'g Ass'n 1895).

212. Levy, *supra* note 210, at 58–60; *see also* BLACKSTONE, *supra* note 187, at *281–82.

213. The original writs involved "expense and delay" and a variety of methods were developed that permitted the issuance of certain judicial writs without the need for an original writ. H. A. Hollond, *Writs and Bills*, 8 CAMBRIDGE L.J. 15, 26 (1942). Many of these methods depend upon the fiction that an original writ had issued. *Id.* at 22, 26.

> [i]t may be assumed, as a doctrine perfectly and incontrovertibly established, that the judicial power of a nation extends to every person and every thing in its territory, excepting only such foreigners as enjoy the right of extraterritoriality, and who, consequently, are not looked upon as temporary subjects of the State.[214]

The judicial power extends to persons and things in the territory of the state—that is, to persons and things over which the court has jurisdiction. The attorney general returns to the "judiciary power" later in the opinion, describing it as "one of the most essential rights in the hands of the sovereign" and noting that it "extends indiscriminately to all who are in the territory, and the sovereign is only the source of it; but it must be remembered that there are *persons* whose extraterritoriality exempts them from this jurisdiction, such as foreign princes and their ministers."[215] The judicial power extends as far as personal jurisdiction and no farther. The "exception" to jurisdiction mentioned by the attorney general would soon be given a name: immunity.[216]

Another way to see the overlooked connection between judicial power and personal jurisdiction is to consider the term coram non judice. As the Supreme Court has reasoned in a modern personal jurisdiction case:

> The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books and was made settled law by Lord Coke in *Case of the Marshalsea*. Traditionally that proposition was embodied in the phrase *coram non judice*, "before a person not a judge"—meaning, in effect, that the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present, and could therefore not yield a *judgment*. American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted.[217]

A decision issued by a court that lacks personal jurisdiction is coram non judice,[218] meaning that the proceeding was not a *judicial* proceeding at all.[219] As the Supreme Court's reasoning in *Burnham v. Superior Court*[220] makes clear, the idea that the exercise of *judicial* power depended upon the parties properly before the Court is an ancient one. Coram non judice was used

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214. Serv. of Process on a British Ship-of-War, 1 Op. Att'y Gen. 87, 88 (1799); *see also infra* notes 277–79 and accompanying text.

215. *Serv. of Process*, 1 Op. Att'y Gen. at 88 (quoting Georg Friedrich von Martens).

216. *See* The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 138–40 (1812); *infra* notes 252–59 and accompanying text.

217. Burnham v. Superior Court, 495 U.S. 604, 608–09 (1990) (plurality opinion) (citations omitted); *see also* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011) (plurality opinion).

218. Pennoyer v. Neff, 95 U.S. 714, 732 (1878); Stearns v. United States, 22 F. Cas. 1188, 1190 (C.C.D. Vt. 1835) (No. 13,341); Evans v. Instine, 7 Ohio 273, 274–75 (1835).

219. *See* Decatur v. Paulding, 39 U.S. (14 Pet.) 599, 600–01 (1840) ("Did then the petition, affidavit, & c., present a case for the exercise of the judicial power of the Circuit Court, or was it a matter coram non judice, is the question . . . ."); A LETTER FROM A MEMBER OF THE HOUSE OF COMMONS IN IRELAND TO A GENTLEMAN OF THE LONG-ROBE IN ENGLAND 24 (London, J. Roberts 1720) (equating the term "coram non judice" with lack of "judicial power").

220. 495 U.S. 604 (1990).

interchangeably to refer *both* to lack of subject matter jurisdiction and to lack of personal jurisdiction because either defect left courts with no "judicial" power.[221] Note that the actual rules of personal jurisdiction might be external to Article III (and the Constitution as a whole) and supplied by general law or international law but that Article III might nevertheless require that those rules be satisfied.[222]

Notice was often described as a fundamental aspect of "judicial" power, suggesting that notice, like jurisdiction, is a condition of the exercise of the "judicial power of the United States" under Article III.[223] A variety of sources link notice and "judicial" authority or power. Chief Justice Marshall reasoned, for example, that "it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him."[224] Justice Story described an in rem seizure and condemnation made without notice of the proceedings as "not so much a judicial sentence, as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding."[225] These sources link notice to "judicial" power and suggest that the exercise of judicial power presupposed notice. As with personal jurisdiction, if Article III requires notice, it might be that other laws—statutes, general law, natural law—determined the kind of notice that was required.[226] In any event, the service of process requirements generally ensured that defendants were notified of the suit, and early cases did not draw sharp distinctions between notice and personal jurisdiction.[227]

The exercise of judicial power—the power to "speak the law"—was dependent upon parties who could be brought before the court. There needed to be someone to speak to, and the power that compelled people to appear was not necessarily a "judicial" power. Stated another way, without process that could bring the defendant before the court, the entire event was not judicial at all—it was coram non judice. The judicial power vested by Article

221. Harrison v. Nixon, 34 U.S. (9 Pet.) 483, 539 (1835) ("As to these persons, there was no case in this court, it could have no appellate jurisdiction to hear and determine on any thing, and the proceeding was wholly *coram non judice*, unless it could exercise original jurisdiction over the parties and the subject matter, as a case originating in this court."); Nathan v. Virginia, 1 U.S. (1 Dall.) 77, 78 (Pa. Ct. Com. Pl. 1781) ("[T]he court having no jurisdiction over Virginia, all its process against that state must be *coram non judice*, and consequently void.").

222. *See infra* Part III.A.

223. U.S. CONST. art. III, § 1; Hamilton v. Blackwood *(1761) (Scot.)*, *in* 3 DECISIONS OF THE COURT OF SESSION 101, 102 (Edinburgh, Elphingston Balfour 1792) (noting that "[in] Scotland, our ancestors were particularly careful, that full time and repeated notice should be given to the defender to bring him[self] into court before any judicial proceeding could go on against him").

224. The Mary, 13 U.S. (9 Cranch) 126, 144 (1815); *see* Woodruff v. Taylor, 20 Vt. 65, 76 (1847) ("A proceeding professing to determine the right of property, where no notice, actual, or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding."); *see also* T.B. Young & Co. v. Steamboat Va., 12 Ohio Dec. Reprint 77, 78 (Super. Ct. 1854) (similar).

225. Bradstreet v. Neptune Ins. Co., 3 F. Cas. 1184, 1187 (C.C.D. Mass. 1839) (No. 1793).

226. *See infra* Part III.A.

227. *See* Effron, *supra* note 27, at 34 (arguing that "pre-*Pennoyer* cases had not taken care to erect a strong or formal distinction between personal jurisdiction and notice").

III had personal jurisdiction and notice defenses baked into it. If the defendant could not be reached, there was no case and no occasion for the exercise of judicial power. Although today we associate notice and personal jurisdiction with due process, recall that Alexander Hamilton and others insisted that the Bill of Rights was unnecessary because it duplicated the Constitution's structural limitations on federal power.[228] Article III already required personal jurisdiction and notice.

4. Litigation Against Sovereigns—Domestic and Foreign

Cases against both domestic and foreign states during the founding period illustrate the relationship between personal and subject matter jurisdiction.[229] They also illustrate that the foreign states raised personal jurisdiction defenses, understood as defects in *process* (to use the term that Coke and many others did), which left the court without judicial power and without a "case." The use of the term "process" in these cases illustrates the relationship between "due process" and personal jurisdiction, an argument developed below in Part II.B.

Before the enactment of the Constitution, a Pennsylvania state court, in *Nathan v. Virginia*,[230] considered whether Virginia could be sued based upon a "foreign attachment" in Philadelphia of a "quantity of cloathing, imported from France, belonging to that state."[231] The suit was in personam; "the goods were attached merely to compel the party's appearance to answer the plaintiff's demand."[232] Virginia argued that "no sovereign would submit to the indignity of doing this."[233] The court agreed and discharged the writ against Virginia. The argument of counsel described the Pennsylvania court's lack of "jurisdiction over Virginia" as meaning that "all its process against that state, must be *coram non judice*, and consequently void,"[234] underscoring the relationship between process and judicial power. The arguments in *Nathan* also sounded other themes that have remained salient for the two and a half centuries since: whether foreign states and U.S. states should be treated in similar ways for personal jurisdiction purposes (although today we use the term immunity);[235] whether a state becomes amenable to

228. THE FEDERALIST NO. 84 (Alexander Hamilton) ("[W]hy declare that things shall not be done which there is no power to do?"); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 5 THE WRITINGS OF JAMES MADISON 271 (Gaillard Hunt ed., 1900) ("[I]n a certain degree . . . the rights in question are reserved by the manner in which the federal powers are granted.").

229. For a general overview of early foreign affairs cases before the Supreme Court, see Ariel N. Lavinbuk, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855, 903 tbl.14 (2005).

230. 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781).

231. *Id.* at 77–78.

232. *Id.* at 79.

233. *Id.*

234. *Id.* The parties agreed that a suit against the property itself, had it been imported contrary to law, could go forward, "the sovereignty of Virginia notwithstanding." *Id.*

235. *See, e.g.*, California v. Deep Sea Research, Inc., 523 U.S. 491, 507 (1998) (noting that the actual possession rule for sovereign immunity in admiralty cases applies whether the

the personal jurisdiction of another state if it "turns merchant";[236] and, the extent to which sovereign property located in the territory of another sovereign provides the basis for personal jurisdiction.[237]

Just over a decade later, the Supreme Court considered whether, after the enactment of the Constitution, suits against states could go forward in federal courts. In other words, did Article III change the outcome of *Nathan* so that federal courts do have personal jurisdiction over domestic states? In *Chisholm v. Georgia*,[238] the Court said yes. In one sense, the outcome was not surprising. By creating a federal judiciary, the Constitution changed the relationship between judicial power and territory. As U.S. Attorney General Randolph argued:

> [W]here the *effects*, or property, of one *Prince* are rested in the dominions of another, the proprietor *Prince* may be summoned before a tribunal of that other. Now, although, each State has its separate territory, in one sense, the whole is that of the *United States*, in another. The jurisdiction of this Court reaches to *Georgia*, as well as to *Philadelphia*. If therefore, the process could be commenced in *rem*, the authority of *Bynkershoek* would justify us; and whether it be commenced in *rem*, or in *personam*, the principle of amenability is equally avowed.[239]

Another reason for subjecting Georgia to the jurisdiction of the federal courts, as Justice James Wilson reasoned, is that dishonest states, like dishonest merchants, ought to be "amenable to a Court of Justice."[240] This reasoning, also raised in *Nathan v. Virginia*, eventually led to a significant change in the international law governing state-to-state relations in the area of what would come to be known as the law of immunity. More specifically, Justice Wilson's point that states should sometimes be treated like merchants provided the basis for the shift from absolute to restrictive immunity in the twentieth century.

Domestic states could unquestionably be plaintiffs in federal courts. The defendant in *Chisholm v. Georgia* argued that the text of Article III that extended jurisdiction in controversies between "a state" and certain other parties did not extend to situations in which the state was a defendant.[241] This argument was rejected, in part because

> [i]t is extended also, to controversies between a State and foreign States; and if the argument taken from the order of designation were good, it would be meant here, that this Court might have cognizance of a suit, where a State is Plaintiff, and some foreign State a Defendant, but not where a

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sovereign is a U.S. state, a foreign state, or the U.S. government); *see also* David J. Bederman, *The "Common-Law Regime" of Foreign Sovereign Immunity: The Actual Possession Rule in Admiralty*, 44 VAND. J. TRANSNAT'L L. 853, 860–62 (2011).

236. *See Nathan*, 1 U.S. (1 Dall.) at 79; HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 532–39 (2008) (discussing the historical development of the commercial-activity exception to foreign sovereign immunity).

237. *See, e.g.*, 28 U.S.C. § 1605(a)(3)–(4) (2012).

238. 2 U.S. (2 Dall.) 419 (1793).

239. *Id.* at 425–26 (argument of counsel).

240. *Id.* at 456 (opinion of Wilson, J.).

241. *Id.* at 420–21 (argument of counsel).

> foreign State brings a suit against a State. This . . . seems to lose sight of the policy which, no doubt, suggested this provision, viz. That no State in the *Union* should, by withholding justice, have it in its power to embroil the whole confederacy in disputes of another nature.[242]

In other words, "the policy" which "suggested" putting cases involving foreign states within federal judicial power was a policy that should not *disadvantage* foreign states when they appear in federal court.[243]

The critical reaction to *Chisholm v. Georgia* focused on whether Georgia (and other states) could be reached by process.[244] Article III, critics said, did not override personal jurisdiction defenses available to domestic states.[245] A stronger version of the same argument applied to foreign states because, unlike domestic states, foreign states had not relinquished any aspects of sovereignty to the federal government.

As the Eleventh Amendment was being ratified to overrule *Chisholm v. Georgia*, the Supreme Court in *United States v. Peters*[246] considered the fate of the *Cassius*, "an armed *Corvette* belonging to the *French Republic*," which had been attached based on allegations that it had unlawfully taken an American vessel as prize.[247] The Supreme Court ordered the release of the vessel and its master, a French naval lieutenant, because the validity of prizes made by the French Republic fell within the exclusive jurisdiction of the "tribunals and judiciary establishments" of France.[248] The law of nations and treaties provided that "the vessels of war belonging to the said French Republic, and the officers commanding the same" cannot "be arrested, seized, attached, or detained, in the ports of the United States, by process of law, at the suit or instance of individuals, to answer for" captures made on the high seas. International law, in other words, created an exemption from personal jurisdiction.[249] Litigants described this limitation as an "exemption of sovereigns" from "process," one that prevented the attachment of the sovereign's property and rendered the "process out of the District Court" "against the form of the laws of the United States."[250] Article III, counsel argued, kept in place the personal jurisdiction limitations that prevented courts from resolving cases against foreign nations.[251] The Court agreed.

The foregoing cases laid the groundwork for the Supreme Court's more famous decision in *The Schooner Exchange v. McFaddon*,[252] in which the

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242. *Id.* at 451 (opinion of Blair, J.).
243. *Id.* at 467 (opinion of Cushing, J.).
244. *See* Nelson, *supra* note 23, at 1599 (arguing, based on extensive evidence, that "[t]he states' reactions to *Chisholm* confirm the link between sovereign immunity and compulsory process").
245. *See id.* at 1601.
246. 3 U.S. (3 Dall.) 121 (1795).
247. *Id.* at 121–22. *See generally* Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. REV. 704, 733 (2012).
248. *Peters*, 3 U.S. (3 Dall.) at 129–30 (opinion of Rutledge, C.J.).
249. *Id.*
250. *Id.* at 124, 127.
251. *Id.* at 127.
252. 11 U.S. (7 Cranch) 116 (1812).

Court considered whether it had jurisdiction to hear a case brought by an American asserting title to a French public warship located in Philadelphia.[253] Just as in *Peters* (the case involving the *Cassius*), the plaintiff argued that Article III expressly gave the courts of the United States subject matter jurisdiction in cases between citizens and foreign states and that the conferral of subject matter jurisdiction lifted personal jurisdiction defenses.[254] The plaintiff's argument was answered by the U.S. attorney general in this way: "[t]he constitution of the United States, decides nothing—it only provides, a tribunal, if a case can possibly exist."[255] The response makes clear that by conferring subject matter on the federal courts, the Constitution did not override personal jurisdiction defenses of foreign states. It also makes clear that a "case" exists only if there is personal jurisdiction. Although the scope of personal jurisdiction was different for private defendants than it was for sovereign defendants, the underlying relationship applies equally to individual defendants: if the court cannot compel the defendant's presence, there is no Article III "case."[256] Like *The Schooner Exchange* itself, other cases involving the authority of the federal courts used the term "jurisdiction" to refer to both personal and subject matter jurisdiction, and they often did not distinguish between the two.[257] Ultimately, the Supreme Court reached the same conclusion that the state court had reached in *Nathan v. Virginia*: the sovereign was not amenable to process in the foreign forum, although the sovereign's property was located there.[258]

The Schooner Exchange opinion spoke in broad terms about the "immunity" of foreign vessels, using terminology that would quickly become a core doctrine of public international law.[259] Not surprisingly, it also generated cases designed to test the limits of its broad language. In *La Nereyda*,[260] for example, the Spanish consul alleged that the vessel in question was a Spanish public armed vessel that had been captured by a Venezuelan privateer in violation of U.S. neutrality.[261] The prize was

253. *See id.*
254. *Id.* at 130.
255. *Id.* at 133.
256. *See supra* Part II.A.3.
257. *See, e.g.*, Picquet v. Swan, 19 F. Cas. 609, 611, 612 (C.C.D. Mass. 1828) (No. 11,134) (discussing both subject matter and personal jurisdiction using only the word "jurisdiction" and without distinguishing between the two); *see also* United States v. Nourse, 34 U.S. (9 Pet.) 8, 13 (1835) (similar). *See generally* Pennoyer v. Neff, 95 U.S. 714 (1878).
258. *See, e.g.*, *The Schooner Exch.*, 11 U.S. (7 Cranch) at 142 (asking whether a private vessel not attempting to trade "would become amenable to the local jurisdiction"); *id.* at 144 ("[N]ations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign . . . ."); *id.* at 145 ("A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction . . . ."); *see also id.* at 130 (argument of counsel) ("You cannot draw to your jurisdiction those who owe you neither a local nor an absolute allegiance, but you may enquire into the validity of every claim to a thing within your jurisdiction.").
259. *See generally* FOX & WEBB, *supra* note 237.
260. 21 U.S. (8 Wheat.) 108 (1823).
261. *See generally id.*

condemned by the Venezuelan government, given to its captors, outfitted as a privateer on behalf of Venezuela, and sailed to Baltimore where it was libeled by the Spanish consul. The prize master argued that privateers—licensed as they were by a sovereign—should be immune from suit just like public war vessels.[262] The Court held the vessel amenable to suit because the capture allegedly violated U.S. neutrality.

Questions also arose about the immunity of cargo, rather than of the vessel itself. The Court held in *The Santissima Trinidad*[263] that the exemption of the vessel from jurisdiction notwithstanding, "the prize property which she brings into our ports is liable to the jurisdiction of our Courts."[264] The Court also considered whether a condemnation of the prize property by a court in Buenos Aires while the suit was pending deprived the court of jurisdiction. The Court reasoned that, "[b]y the seizure and possession of the property, under the process of the District Court, the possession of the captors was devested, and the property was emphatically placed in the custody of the law."[265] Thus, no other court can, "by its adjudication, rightfully take away its jurisdiction, or forestall and defeat its judgment. It would be an attempt to exercise a sovereign authority over the Court having possession of the thing, and take from the nation the right of vindicating its own justice and neutrality."[266] Notice the link between the *process* that brings the property within the "custody of the law" and the power to *adjudicate*, i.e., exercise its judicial power. The language draws the same distinction made by Coke almost three centuries earlier.

Finally, consider a case brought pursuant to an 1819 treaty between the United States and Spain. Although not brought by Spain itself, the case involved claimants who benefited from U.S. obligations to Spain under the treaty. Congress designated a commissioner to resolve such claims and gave the power of review to the secretary of the treasury. The Supreme Court described the work of the commissioners as "judicial in . . . nature" because "judgment and discretion must be exercised." But it is not "judicial" in the sense in which "judicial power" is "granted by the Constitution to the courts of the United States" because "there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case."[267] Once again, judicial power presupposed "parties," meaning those who could be reached by process.

B. Foreign States and the Fifth Amendment Due Process Clause

Article III's conferral of "judicial power" over "cases" means that federal courts must have personal jurisdiction and must give notice to all defendants,

262. *Id.* at 129–30.
263. 20 U.S. (7 Wheat.) 283 (1822).
264. *Id.* at 354.
265. *Id.* at 355.
266. *Id.*
267. United States v. Ferreira, 54 U.S. (13 How.) 40, 46–48 (1851).

whether or not they are protected by due process. The Fifth Amendment Due Process Clause also protects foreign states, however. Early cases against foreign states show that they were entitled to "process" and that they were understood as "persons." The historical analysis of cases against foreign states connects the term "process" to personal jurisdiction limitations for all defendants and clarifies the general relationship between due process and personal jurisdiction.

1. "Process" and Personal Jurisdiction

The Fifth Amendment protects a "person" from deprivations of "property" without "due process of law."[268] The "process" to which a defendant was "due" in federal court included (but was not necessarily limited to) that centuries-old prerequisite for judicial power: the literal issuance of "process." As Blackstone described it, "process" is the means of compelling the defendant to appear in court.[269] The word "process" "referred to those writs which summoned parties to appear in court as well as those by which execution of judgments was carried out."[270] Not surprisingly, "due process" entitled one to "process," which meant that one had to be properly summoned to appear.[271]

An early English statute which includes the phrase used in the Fifth Amendment, "due process of law," is illustrative: "[t]hat no man of what Estate or Condition that he be, shall be put out of land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law."[272]

The "due process of law" must bring the defendant in to "answer," which is required before a man loses his liberty or property. The term "due process" is specified later in the same statute to mean "by Attachment and Distress, and by Exigent, if need be."[273] These terms referred to particular writs,[274] which, like process itself, were limited by the territorial reach of sovereign power. Because "process" was limited by territory and because defendants sometimes did not appear, English law developed creative ways to coerce

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268. U.S. CONST. amend. V.

269. Blackstone's influential *Commentaries on the Laws of England* identifies "process" as "the method taken by the law to compel a compliance with the original writ, of which the primary step is by giving the party notice to obey it." BLACKSTONE, *supra* note 187, at *279. The notice was given "by *Summons* . . . to the defendant by two of the sheriff's messengers called *Summoners*." *Id.*

270. Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 272 (1975).

271. *See New York Assembly. Remarks on an Act for Regulating Elections*, DAILY ADVERTISER, Feb. 8, 1787, *in* 4 THE PAPERS OF ALEXANDER HAMILTON 34, 35 (Harold C. Syrett & Jacob E. Cooke eds., 1962) ("The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice . . . ."). *See generally* Nelson, *supra* note 23, at 1568–74 (describing the various forms of "process" used to obtain jurisdiction and to compel a defendant to appear, a necessary prerequisite for the issuance of a judgment).

272. Jurow, *supra* note 270, at 266 (quoting Liberty of Subject 1354, 28 Edw. 3 c. 3 (Eng.)).

273. *Id.* at 267.

274. *Id.*

defendants to appear by, for example, acting upon their property or through outlawry.[275] Judgment depended upon "process," which was limited by the territorial limits on sovereign power, or by what we now call "personal jurisdiction," clarifying the now-obscure relationship between the two.[276]

The connections between "process," personal jurisdiction, and the territorial limits of sovereign power are clear from the 1799 opinion of the U.S. attorney general in the case involving service of process on an individual aboard a British public war vessel docked in New York Harbor.[277] The attorney general linked "judicial power" and personal jurisdiction,[278] and he also explained that "process" only extends as far as territory and that "[a]ccording to the general rule established by these citations, every ship, even a public ship-of-war of a foreign nation, at anchor in the harbor of New York, is within the territory of the State of New York, and subject to the service of judicial process."[279]

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275. *See* Levy, *supra* note 210, at 84–87 (describing "outlawry" and other methods to reach the defendants who were "beyond the reach of process"); *see also* An Act for Making Process in Courts of Equity Effectual Against Persons Who Abscond 1732, 5 Geo. 2 c. 25 (Gr. Brit.) (stating that, if a defendant against whom "process" shall issue does not enter an appearance and could not be found because he absconded to avoid being "served with such process," courts may take the bill *pro confesso*); 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 193 (Windham, John Byrne 1795) (observing England's "very lengthy and circuitous mode of process, to compel the appearance of the defendant," contrasted with the Connecticut practice of issuing "writ" and "declaration" simultaneously, making default judgments possible without a first appearance).

276. One scholar has described the connection in this way: "English and American law, unlike continental law, made jurisdiction contingent on service of process—in particular, on personal delivery to the defendant." Conison, *supra* note 27, at 1111. But the relationship went in both directions: process was contingent upon jurisdiction. As the cases against foreign sovereigns made clear, if the court lacked power or jurisdiction over the defendant, process could not be served.

277. *See supra* text accompanying notes 214–16. *See generally* Serv. of Process on a British Ship-of-War, 1 Op. Att'y Gen. 87, 88 (1799).

278. The attorney general used the term "jurisdiction" to refer to personal jurisdiction, which was territorial and was limited to where process could be served. He wrote:

> One of the most essential rights in the hands of the sovereign, is the judiciary power. It extends indiscriminately to all who are in the territory, and the sovereign only is the source of it; but it must be remembered that there are *persons* whose extraterritoriality exempts them from this jurisdiction, such as foreign princes and their ministers, with their retinue.

Serv. of Process, 1 Op. Att'y Gen. at 88 (citation omitted); *see also* Picquet v. Swan, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828) (No. 11,134) ("[N]o sovereignty can extend its process beyond its territorial limits, to subject persons or property to its judicial decisions."); M'Connell v. Johnston (1801) 102 Eng. Rep. 167, 167 (allowing an assumpsit action to proceed because "one of the plaintiffs [was] within the jurisdiction of the Court, and within reach of its process"); Penn v. Lord Baltimore (1750) 27 Eng. Rep. 1132, 1139 ("[T]hough impossible to inforce the decree *in rem*, but the party being in *England*, I could inforce it by process of contempt *in personam* and sequestration, which is the proper jurisdiction of this court."); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 281–82 (London, R. Gosling 1721) (discussing territorial limits on process in criminal cases).

279. *Serv. of Process*, 1 Op. Att'y Gen. at 88–89; *see also* Camp v. Lockwood, 1 U.S. (1 Dall.) 393, 394 (Pa. Ct. Com. Pl. 1788) (noting that the Defendant was amenable to suit in Connecticut because he "remained an inhabitant of Connecticut, and has always had property there," making him "liable to legal process").

2. Foreign States as "Persons"

Having made the connection between the word "process" in the Due Process Clause of the Fifth Amendment and jurisdiction over the defendant, the next steps are to show that those "process" protections extended to foreign states and that foreign states would have been understood as "persons." The language from the 1799 opinion of the attorney general quoted above asks whether "process" reached foreign states or their property. Other sources used similar language.[280] These sources also reaffirm that process only reached those defendants over whom the court had power or, in other words, jurisdiction. That connection is especially clear in cases involving foreign sovereigns because they or their property might be located in the United States, but nevertheless "process" could not reach them because the sovereign (the United States) lacked power or jurisdiction over them. "Process" was not just about physically finding or reaching the defendant, it also depended upon sovereign power—personal jurisdiction—over the defendant.

In a case involving the *Cassius*, a vessel owned by the French government, the district attorney in Philadelphia reasoned that "process of information and seizure" against the vessel "brings the sovereign to submit to the tribunal"[281] and thus there was no jurisdiction over the vessel.[282] Similarly, the term "process" was used in a 1781 case against the state of Virginia (discussed above) to describe Pennsylvania's lack of personal jurisdiction over

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280. *See, e.g.*, United States v. Peters, 3 U.S. (3 Dall.) 121, 123 (1795) (argument of counsel); United States v. Wilder, 28 F. Cas. 601, 604 (C.C.D. Mass. 1838) (No. 16,694) ("[I]t was considered by the court, that the ground of exemption of the ships of war of a foreign sovereign, coming into our ports, from all process, was founded upon the implied assent of our government."); The Invincible, 13 F. Cas. 72, 74 (C.C.D. Mass. 1814) (No. 7054) ("The reason that public ships are not subject to a process of this nature is, that the injury is a matter for discussion between the two governments."), *aff'd sub nom.* The L'Invincible, 14 U.S. (1 Wheat.) 238 (1816); Letter from Mr. Pickering to Mr. Adet, Minister Plenipotentiary of the French Republic (Aug. 25, 1795), *in* 1 AMERICAN STATE PAPERS 631, 632 (Washington, Gales & Seaton 1833) (arguing that the armed French public vessel *Le Cassius* "should be subjected to the course of legal process before the courts of the United States"); *see also* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 677 (1838) ("If the constitution authorizes the government of the United States to subject a state to judicial process and judgment, the government of the United States may pass the laws necessary for the purpose."); Wadsworth v. Queen of Spain (1851) 117 Eng. Rep. 1246, 1246 ("Property in England, belonging to a foreign sovereign prince in his public capacity, cannot be seized under process in a suit").

281. *Case of Le Cassius*, *in* AMERICAN STATE PAPERS, *supra* note 280, at 637; *see also supra* notes 244–47 and accompanying text. The document also quotes the district attorney as saying:

> [I]f the French Government had made a fair and unsuspecting acquisition of the property of a vessel, then lying in their own ports, and out of the reach of the jurisdiction of the United States, a cause of forfeiture previously existing . . . could not, at a future day, revive, so as to subject the same vessel, still remaining property of a sovereign nation, to the process of our courts.

Case of Le Cassius, *supra*, at 637.

282. Not surprisingly, the argument against jurisdiction was based upon *Nathan v. Virginia* and upon citations to Emer de Vattel and Jean-Jacques Burlamaqi, with Georg Friedrich von Martens and Cornelius van Bynkershoek cited as "slightly opposed." *Case of Le Cassius*, *supra* note 281, at 637.

Virginia.[283] With a citation to international law treatises on sovereignty and jurisdiction, Pennsylvania's lack of jurisdiction over Virginia was described in terms of process: "all its process against that state, must be coram non judice, and consequently void."[284] Process applied to foreign states just as it did to other states. These sources show that Fifth Amendment "due process" would have been understood as applying to foreign states.

Recent cases have reasoned that foreign sovereigns are not "persons" and for that reason are not protected by Fifth Amendment due process. That conclusion is not based on any historical analysis. In fact, foreign nations were often described as "persons." Consider the argument of counsel in *The Santissima Trinidad*:

> [A] foreign sovereign cannot be compelled to appear in our Courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits. If, however, he comes personally within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation.[285]

Here, "process" is used in part to refer to personal jurisdiction over a foreign sovereign if he comes *personally* into our territory. Although this quotation refers to an individual who embodies the state (e.g., the king) as enjoying "a personal immunity," it also makes clear that judicial "process" might extend to public vessels.[286] Process against the property of a foreign sovereign was often considered equivalent to process against the sovereign itself, although the property itself was not a person.[287]

One might argue that due process protects foreign sovereigns but only those that are monarchies or dictatorships, so that the sovereign is actually a person. That would lead to anomalous modern results, with hostile dictatorships entitled to constitutional protections. The distinction is also unwarranted as a historical matter. Personal jurisdiction over both U.S. and foreign states was discussed in terms of sovereignty, with citations to international law scholars such as Vattel, whose work was extremely well

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283. Nathan v. Virginia, 1 U.S. (1 Dall.) 77, 77–79 (Pa. Ct. Com. Pl. 1781); Letter from the Virginia Delegates to the Pennsylvania Council (July 9–10, 1781), *in* 17 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 389–90 (Paul H. Smith ed., 1990) (discussing the same dispute); *see also supra* text accompanying notes 230–37.

284. *Nathan*, 1 U.S. (1 Dall.) at 78.

285. The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 353 (1822); *see also id.* at 306–07 (argument of counsel).

286. *See* United States v. Peters, 3 U.S. (3 Dall.) 121, 123 (1795) (argument of counsel) ("And whereas by the said laws of nations and treaties aforesaid, the vessels of war belonging to the said *French* Republic, and the officers commanding the same, cannot, and ought not to be arrested, seized, attached, or detained, in the ports of the *United States*, by process of law . . . .").

287. *See, e.g.*, The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 130 (1812); *Nathan*, 1 U.S. (1 Dall.) at 77–78; *Case of Le Cassius*, *supra* note 281, at 637. *See generally* The Parlement Belge [1880] 5 PD 197 (Eng.) (repeatedly referring to lack of jurisdiction as an exemption from "process" or as a lack of "process to compel him to appear" and describing in rem jurisdiction as a method of establishing jurisdiction over the person).

known during the founding era.[288] Vattel describes nations as persons, without regard to their form of government. He notes that "the body of the nation, the State, remains absolutely free" and refers to nation states as "moral persons" and as "free persons."[289] Vattel therefore reasons that a nation is "considered by foreign nations as constituting only one whole, one single person."[290] The law of nations itself was based in part on ideas drawn from, and analogies made to, the philosophical understanding of individuals.[291]

States as collective entities were even equated with persons in a variety of ways specifically related to whether they could be reached by process.[292] Justice Wilson wrote in *Chisholm v. Georgia* that "[b]y a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an *artificial* person."[293] Chief Justice John Jay in the same case reasoned that "[s]overeignty is the right to govern; a nation or State-sovereign is the person or persons in whom that resides."[294] Both justices concluded that states could be reached through the process of the U.S. courts.[295]

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288. *See* Michael D. Ramsey, *Executive Agreements and the (Non)treaty Power*, 77 N.C. L. REV. 133, 169–70 (1998).

289. EMER DE VATTEL, THE LAW OF NATIONS, at lv, 2, 164 (Philadelphia, T. & J. W. Johnson 1854).

290. *Id.* at 164; *see also* JAMES KENT, DISSERTATIONS 52 (New York, George Forman 1795) (referring to states as "moral persons"); James Madison, Essay on Sovereignty, *in* 9 THE WRITINGS OF JAMES MADISON, *supra* note 228, at 572 ("Now all Sovereigns are equal; the Sovereignty of the State is equal to that of the Union; for the Sovereignty of each is but a *moral person*. That of the State and that of the Union are each a moral person; and in that respect precisely equal.").

291. *See* Golove & Hulsebosch, *supra* note 25, at 974–78.

292. *See, e.g.*, The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 130 (1812) (argument of counsel) ("The cases cited on the other side refer only to suits brought directly against a sovereign, or to compel his appearance. But such cases are wholly inapplicable, because not brought in consequence of your jurisdiction over *the thing* within your territory, but to create a jurisdiction over the person which is without it."); Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 802–03 (1824) ("But [the state of Ohio] cannot be made a party, because she cannot be sued. The inevitable consequence is, that the Court below cannot take jurisdiction of the cause . . . . [H]ere the party omitted is a sovereign State, who is within reach of process, but is not subject to the jurisdiction, and cannot be brought before the Court.").

293. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 455 (1793) (opinion of Wilson, J.); *see also id.* at 456 (referring to "the person, natural or artificial"); *id.* at 460 ("The law continued to be the same for some centuries after the conquest. Until the time of *Edward I.* the *King* might have been sued as a common person. The form of the process was even imperative.").

294. *Id.* at 472 (opinion of Jay, C.J.); VATTEL, *supra* note 289, at lvi ("[T]he body of the nation, the State, remains absolutely free . . . ."); VATTEL, *supra* note 289, at 2 (referring to all forms of nation states as "moral persons"); VATTEL, *supra* note 289, at 164 ("All those who form a society, a nation being considered by foreign nations as constituting only one whole, one single person . . . .").

295. The issue in *Chisholm v. Georgia* was framed as whether Georgia was amenable to process. 2 U.S. (2 Dall.) at 425–26 (argument of counsel) ("The jurisdiction of this Court reaches to *Georgia*, as well as to *Philadelphia*. If therefore, the process could be commenced in *rem*, the authority of *Bynkershoek* would justify us; and whether it be commenced in *rem*, or in *personam*, the principle of amenability is equally avowed."); *see also* JAMES SULLIVAN, OBSERVATIONS UPON THE GOVERNMENT OF THE UNITED STATES OF AMERICA vi, vii, 30

Corporations, like states, were often described as "persons." Just as Vattel referred to the "body" of the nation, corporations were, for centuries, described as bodies. Saru Matambanadzo has traced the early history of the corporation and concludes that "in its earliest incarnations in England and the United States," the "recognition of corporations as persons" was justified because "the corporation was imagined to resemble a body."[296] Just as Justice Wilson referred to states as "artificial" persons, corporations were understood first as "artificial bodies" and then, beginning in the eighteenth century, as artificial persons.[297] The connection between states and corporations as "bodies" was sometimes made explicit; the corporation as a body was described as a "body politic" like a state.[298]

The historical association of the term "person" with artificial entities such as corporations, U.S. states, and nation states is clear, as the foregoing discussion has shown. Foreign states were not only referred to as "persons" but were also identified with the term "process," as were other artificial entities. On textual and historical grounds, application of Fifth Amendment due process protections to foreign states is straightforward.

That foreign states are protected by due process does not tell us what the content of those protections are, however. As described in Part III.A, when it comes to personal jurisdiction, due process limitations may be largely coextensive with the process that Congress chooses to provide. Readers might assume that if foreign states are entitled to due process, the actions of Congress will be constrained. Instead, under the argument advanced in Part III.A, Congress is not limited by "minimum contacts" in determining the jurisdiction of the federal courts over any kind of defendant, whether private or public.

3. Due Process and Separation of Powers

Nathan Chapman and Michael McConnell have argued that due process is best understood in separation of powers terms and that it constrains Congress just as it limits executive and judicial power.[299] Other scholars argue that due process is not applicable to legislative acts.[300] The foreign-state analysis supports due process limitations on legislative power in two ways. First, it connects, for the first time, the litigation-related protections afforded by

(Boston, Samuel Hall 1791) (asking whether "the separate states, as states, are liable to be called to answer before any tribunal by civil process" and arguing that "states, as states, were not liable to the civil process of the supreme judicial of the Union").

296. Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 487–88 (2013).

297. *Id.* at 490–91. *See generally* Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231, 1239 (1992) (describing very broad conceptions of legal "persons").

298. *See* Matambanadzo, *supra* note 296, at 488; *see also infra* notes 343–46 and accompanying text. *See generally* Nikolas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 HARV. L. REV. 2009 (2019) (emphasizing the close historical relationship between corporations and governmental entities such as states).

299. *See generally* Chapman & McConnell, *supra* note 26.

300. *See id.* at 1676 n.5 (collecting sources).

Article III to those in the Due Process Clause of the Fifth Amendment. Personal jurisdiction and notice were required by the vesting of "judicial" and *only* "judicial power" with the federal courts. That relationship between Article III and due process supports the argument that due process also prevented actors other than courts (i.e., the legislature) from exercising judicial power. Due process was very much about limiting judicial power, including both the scope of that power (as argued here) and who can exercise it (as Chapman and McConnell have argued). Second, one criticism of their position is the redundancy it tolerates between due process and specific prohibitions on legislative action, such as the Bill of Attainder Clause.[301] The foreign-state analysis in this Article shows that due process was redundant of the procedural protections baked into Article III as well. Overlap and duplication between due process and separation of powers is everywhere.

The redundancy between separation of powers and due process also means that just as due process protects foreign states, so too, does separation of powers. There is no textual basis for concluding that foreign states are protected by the separation of powers limitations in the Fifth Amendment and by the Article III vesting of "judicial power" in the federal courts but not by other separation of powers protections. Indeed, courts have often assumed that foreign states may raise separation of powers arguments.[302] Additional evidence supports this argument. Separation of powers principles were understood to protect entities other than individual "persons." For example, in 1772 the East India Company argued that Parliament could not restrict its charter rights through laws that were "arbitrary" or "partial" and that the proper remedy for the corporate malfeasance in question was a "common law action."[303] Colonists raised similar separation of powers arguments against the Massachusetts Acts, which changed the terms of the Massachusetts Charter as punishment for the Boston Tea Party.[304] The First Continental Congress charged that the Acts violated the "law of the land" (a phrase sometimes used interchangeably with due process) because they changed the "form of government" without "being heard, without being tried, without law, and without justice."[305] Although neither example extended separation of powers protections to foreign states, both illustrate that the separation of powers protections were not limited to *individual* "persons."

III. CONTEMPORARY ISSUES REVISITED

This Article has examined Article III and due process from the perspective of the protections they afford to foreign states. Doing so brings together

301. *Id.* at 1721.
302. *See supra* Part I.B.
303. Chapman & McConnell, *supra* note 26, at 1697–98.
304. *Id.* at 1701.
305. *Id.* at 1701–02 (quoting from Address to the People of Great Britain (Oct. 21, 1774), *in* 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 81, 86, 87 (Worthington Chauncey Ford ed., 1904).

strands of doctrine and scholarship that seem almost entirely unconnected today. If foreign states are not protected by the Fifth Amendment, as lower courts have held, it becomes important to determine the full extent of their protections under Article III, which mentions them specifically. Viewing Article III in this way blurs doctrinal distinctions between subject matter jurisdiction and personal jurisdiction and pulls together historical scholarship on the immunity of U.S. states and the procedural protections due to foreign states. Procedural protections that are today associated with due process were protected by Article III and separation of powers.

Turning to the Fifth Amendment, contemporary historical work on personal jurisdiction generally bears little connection to the historical work on "due process."[306] That disconnect arises in part because modern personal jurisdiction (even in federal court) is mostly a function of the limitations imposed by the Fourteenth Amendment on state court jurisdiction and not those imposed by the Fifth Amendment on federal court jurisdiction.[307] Scholars today struggle to see the relationship between due process and personal jurisdiction at all, an effort that has focused on the meaning of *Pennoyer*.[308] But as we have seen, early cases against foreign states highlight the connection, one that is based on the text of the Fifth Amendment itself: courts asked whether "process" could reach a foreign state as a way of asking whether the foreign state was outside the jurisdiction of the sovereign. Deprivations of property required "process" to be valid, and process reached only as far as jurisdiction.[309] That relationship does not emerge clearly in early case law because the jurisdiction of federal courts was limited,[310] because Article III also required personal jurisdiction, and because the *content* of the personal jurisdiction rules came from general law, not from the Constitution, as the next section describes.

A. Personal Jurisdiction and Other Due Process Protections

An important question remains: the *content* of the due process and Article III protections to which states and other defendants are entitled. The extent to which the outcomes of contemporary cases will change under the analysis developed here depends upon how one answers this question. If due process means that "minimum contacts" analysis applies to cases against foreign states, then those cases will come out differently than under the current approach in which they are not entitled to minimum contacts protections. But

306. Originalist scholarship on due process generally focuses on substantive due process. *See, e.g.*, Williams, *supra* note 20, at 412.

307. *See supra* note 47 and accompanying text.

308. *See, e.g.*, Sachs, *supra* note 27.

309. *Cf.* Nelson, *supra* note 23, at 1568 (noting the use of the word process in his work linking domestic state immunity and personal jurisdiction). Robin Effron has described the confused relationship between service, notice, and personal jurisdiction prior to *Pennoyer v. Neff* without discussing the Fifth Amendment. *See generally* Effron, *supra* note 27.

310. Sachs, *supra* note 27, at 1303 ("The Judiciary Act of 1789 limited federal original jurisdiction to areas that were perfectly safe on general-law principles; anything unusual would lose on statutory grounds first.").

if due process does not entitle defendants to "minimum contacts," then the outcomes for foreign states may not change much and the outcomes for *other* defendants, including SOEs and private corporations, would change very significantly. The discussion here focuses on personal jurisdiction (as a function of both Article III and Fifth Amendment due process) but turns at the end to other due process limitations.

The Supreme Court has held that the Fourteenth Amendment's Due Process Clause limits state court assertions of personal jurisdiction based on minimum contacts and reasonableness.[311] The Court has not, however, held that the Due Process Clause of the Fifth Amendment includes comparable limitations. Lower courts and some commentators have generally concluded that the Fifth Amendment limitations are comparable, except that the relevant sovereign and territory is the United States as a whole, instead of the forum state.[312] There is, however, widespread agreement that the Court's Fourteenth Amendment personal jurisdiction analysis is an incoherent mess.[313] The Court should pause before importing that mess into the Fifth Amendment.

The Fifth and Fourteenth Amendments arguably impose comparable limitations on personal jurisdiction because they use the same language, except for the relevant sovereign.[314] It is possible, however, that the Fifth and the Fourteenth Amendments should be interpreted in different ways because the term "due process" was understood differently in 1868 than it was in 1791.[315] It is also possible that "minimum contacts" is not a convincing interpretation of the original meaning of the Fourteenth Amendment, and for that reason it should not dictate the interpretation of the

311. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

312. *See, e.g.*, Waldman v. Palestine Liberation Org., 835 F.3d 317, 330 (2d Cir. 2016) (finding that precedents "clearly establish the congruence of due process analysis under both the Fourteenth and Fifth Amendments"); *see also* Livnat v. Palestinian Auth., 851 F.3d 45, 57 (D.C. Cir. 2017) (similar); Abelesz v. OTP Bank, 692 F.3d 638, 660 (7th Cir. 2012) (similar); *supra* note 47 and accompanying text. Constitutional scholars who draw a distinction between the Due Processes Clauses of the Fifth and Fourteenth Amendments do not generally discuss personal jurisdiction. *See, e.g.*, Williams, *supra* note 20.

313. *See, e.g.*, Katherine Florey, *What Personal Jurisdiction Doctrine Does—And What It Should Do*, 43 FLA. ST. U. L. REV. 1201, 1202 (2016) ("Commentators have routinely noted the complexity, opacity, and multiple functions of U.S. personal jurisdiction doctrine."); 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, 729 (2012) ("Something about personal jurisdiction seems to bring out the worst in the Supreme Court."); A. Benjamin Spencer, *Nationwide Jurisdiction for Our Federal Courts*, 87 DENV. L. REV. 325, 328 (2010) (stating that the Court's Fourteenth Amendment personal jurisdiction doctrine "is notoriously confusing and imprecise").

314. *See* Jonathan Remy Nash, *National Personal Jurisdiction*, 68 EMORY L.J. 509, 523 (2019); Spencer, *supra* note 47 (manuscript at 16–17).

315. *See* Williams, *supra* note 20, at 408 (arguing that "[b]etween 1791 and the Fourteenth Amendment's enactment in 1868, due process concepts evolved dramatically").

Fifth Amendment.[316] For those who eschew originalism, it bears repeating that "minimum contacts" is extremely widely criticized on policy grounds.

Cases involving foreign states provide no support for extending the Fourteenth Amendment's "minimum contacts" analysis to the Fifth Amendment. Instead, they support the claim made by others that historical due process limitations bear little resemblance to modern personal jurisdiction doctrine.[317] Jurisdictional rules traditionally came from "general law" which included customary international law—not from the Constitution.[318] The general law could be changed through a treaty or a statute. The Supreme Court reasoned during the early nineteenth century that although federal courts lacked personal jurisdiction over foreign states (because they were immune from suit under existing law), Congress could extend personal jurisdiction and abrogate the immunity of foreign states if it wanted to do so.[319]

The cases involving foreign states suggest that the Constitution itself does not dictate the rules governing personal jurisdiction, whether as a function of Article III or of the Fifth Amendment. Other authors, including Wendy Perdue and Stephen Sachs have argued that *Pennoyer v. Neff* is best understood as requiring personal jurisdiction without setting the rules for how far such jurisdiction extends.[320] As an analogy, the Full Faith and Credit Clause requires recognition of a judgment only if the rendering court had subject matter jurisdiction under the rules of the *rendering* court, and the Due Process Clauses are sometimes interpreted as requiring only that judges follow duly enacted law.[321] Even if Article III and the Fifth Amendment do not set out any rules of (or limits on) personal jurisdiction, they do require that whatever those rules are, they must be satisfied. These could be termed "positivist"[322] limitations on judicial power.

By modern ears, such protections are minimal, but they are also not nothing. They prevented arbitrary actions of federal courts, and they comported with the general eighteenth-century views of parliamentary supremacy.[323] Congress may, of course, afford foreign states greater

316. *See* Lawrence Rosenthal, *Does Due Process Have an Original Meaning?: On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 24 (2007).

317. *See, e.g.*, Parrish, *supra* note 46, at 9; *see also* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 40 (1990); Conison, *supra* note 27, at 1104.

318. James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 181 (2004).

319. *See, e.g.*, The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). Treaties could also displace the jurisdictional rules supplied by general law. *See* The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 354–55 (1822).

320. *See* Perdue, *supra* note 313, at 732; Sachs, *supra* note 27, at 1318.

321. *In re* Winship, 397 U.S. 358, 382 (1970) (Black, J., dissenting); *see also* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997).

322. Williams, *supra* note 20, at 420 (describing this view of due process).

323. *See* Julian Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1191–201 (2019).

jurisdictional protections than the Constitution requires. That decision lies with Congress, not the courts, so that international friction results not from shaky constitutional lines drawn by the courts but instead from the actions of Congress. Reading the Article III and Fifth Amendment requirements for personal jurisdiction as "merely" positivist also leaves open the question of how statutory limitations should be interpreted. International law may inform statutory interpretation in many ways. At a minimum, under the *Murray v. Schooner Charming Betsy*[324] canon of interpretation, statutes should be interpreted when possible to avoid conflicts with international law.[325]

One might argue in favor of robust constitutional limits on personal jurisdiction, especially as a function of Article III, based on the statements of John Marshall and James Madison that suits against U.S. states or foreign states could only go forward with the "consent" of the sovereign, which might suggest that their personal jurisdiction defenses were constitutionally entrenched.[326] In other words, on the reading offered here, states and foreign sovereigns do *not* have to "consent" to suit if Congress chooses to subject them to jurisdiction, arguably in tension with the statements by Madison and Marshall when discussing Article III. But at the time Madison and Marshall wrote, Congress was extremely unlikely to subject foreign states to broad personal jurisdiction. As well, the term "consent" was used even when the defendant was unwillingly subjected to the jurisdiction of a court. To "consent" meant to come within the court's jurisdiction—whether or not one formally agreed to, or otherwise welcomed, the suit itself.[327]

Finally, it is possible that by requiring due process *of law*, the Fifth Amendment meant that the process issued to compel defendants to appear must conform to (or provide comparable protections to) traditional forms of process.[328] Abolishing any and all personal jurisdiction (or notice) limitations in federal courts might violate "due process" by eliminating "process" altogether and it might also violate Article III by authorizing a power not linked to sovereignty or territory at all, and therefore one that is not "judicial."[329] These limitations would not, however, support personal jurisdiction doctrine based upon minimum contacts and reasonableness. It is

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324. 6 U.S. (2 Cranch) 64 (1804).

325. *See* David L. Sloss et al., *International Law in the U.S. Supreme Court to 1860*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT 7, 37 (David L. Sloss et al. eds., 2011).

326. *See* Nelson, *supra* note 23, at 1610.

327. *See* Levy, *supra* note 210, at 25–26 (discussing the idea that "recourse to a law court depends upon the consent of the parties" and noting that such consent was frequently obtained through duress); *see also* Neuman, *supra* note 8, at 926 (citing many early modern theorists who "presumed the tacit consent of those defeated in a just war to the government of the conqueror").

328. *See* Nathan S. Chapman, *Due Process of War*, 94 NOTRE DAME L. REV. 639, 655 (2018); Chapman & McConnell, *supra* note 26, at 1721–25 (emphasis added); *cf.* Conison, *supra* note 27, at 1100.

329. *See* Williams, *supra* note 20, at 454 (arguing in favor of a largely positivist approach to the Fifth Amendment but noting that due process "limit[s] the legislature's discretion in prescribing certain modes of judicial procedure").

also possible that the Fifth Amendment and Article III provide different levels or kinds of personal jurisdiction protections. As already noted, courts had little opportunity for direct consideration of constitutional limitations on personal jurisdiction because of other limitations on jurisdiction. Whether or not the two differ in their personal jurisdiction protections, foreign states are protected by both Article III and the Fifth Amendment, both of which required (at a minimum) the satisfaction of the applicable nonconstitutional rules governing personal jurisdiction.

If the Fifth Amendment and Article III afford only "positivist" personal jurisdiction protections, the outcomes of lower court cases holding that due process does not protect foreign states need not be reversed, although they were incorrectly reasoned. That is, if due process protects foreign states but due process only entitles them to what Congress gives them, then cases extending broad personal jurisdiction under the FSIA reach the correct outcome, even if they incorrectly reason that foreign states are not persons and have no due process rights.[330] The cases that *would* come out differently going forward under a positivist approach to personal jurisdiction are those that were dismissed based upon a Fifth Amendment minimum contacts analysis—in other words, cases against SOEs not classified as foreign states and those against private defendants.[331] One might preserve the outcomes of these cases by reasoning that Congress has acted or failed to act under the assumption that private entities and SOEs *are* protected by minimum contacts.[332] Doing so would prevent an abrupt change of doctrine and would allow Congress to set future rules for the exercise of jurisdiction by the federal courts over all defendants. In any event, whatever personal jurisdiction protections are provided by due process and Article III, they apply to foreign states just as they do to private defendants. The *Bancec* test is accordingly irrelevant for due process purposes, contrary to the many lower court cases holding otherwise.

Finally, due process provides protections beyond personal jurisdiction. Article III requires notice as an aspect of judicial power, as discussed in Part II.A.3, and the Fifth Amendment also requires notice. The Article III and the Fifth Amendment notice requirements may differ, but whatever those

330. *See, e.g.*, Corporacíon Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92 (2d Cir. 2016); Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 86 (D.C. Cir. 2002); *In re* Terrorist Attacks on Sept. 11, 2001, 298 F. Supp. 3d 631, 659 n.19 (S.D.N.Y. 2018); Simpson v. Socialist People's Libyan Arab Jamahiriya, 362 F. Supp. 2d 168, 181 (D.D.C. 2005), *aff'd*, 470 F.3d 356 (D.C. Cir. 2006); Wyatt v. Syrian Arab Republic, 362 F. Supp. 2d 103, 115 (D.D.C. 2005).

331. *See, e.g.*, Livnat v. Palestinian Auth., 851 F.3d 45, 52 (D.C. Cir. 2017); Waldman v. Palestine Liberation Org., 835 F.3d 317, 344 (2d Cir. 2016); First Inv. Corp. of Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd., 703 F.3d 742, 744–45 (5th Cir. 2012); Williams v. Romarm S.A., 116 F. Supp. 3d 631, 637 (D. Md. 2015).

332. *Cf.* Crystallex Int'l Corp. v. Petróleos de Venez., S.A., 251 F. Supp. 3d 758, 769 (D. Del. 2017) (using the minimum contacts analysis to interpret the FSIA); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: SELECTED TOPICS IN TREATIES, JURISDICTION, AND SOVEREIGN IMMUNITY § 454 reporters' note 9 (AM. LAW INST. 2018).

requirements are, foreign states are entitled to them. Courts and scholars have worried that affording due process rights to foreign states could hamstring U.S. responses to foreign policy crises because "the power of Congress and the President to freeze the assets of foreign nations, or to impose economic sanctions on them, could be challenged as deprivations of property without due process of law."[333] Fifth Amendment due process rights are limited and flexible, however. Some rights protect "natural, not artificial persons," and they are likely inapplicable to foreign states just as they are to corporations.[334] Due process rights often do not apply extraterritorially, a limitation with obvious importance for the rights of foreign states.[335] Due process is also flexible. In the context of notice, for example, it requires what is "reasonable" "under all the circumstances."[336] Beyond notice, due process generally gives courts adequate room to calibrate the protections to which foreign states might be entitled in particular cases.[337] After all, the leading formulation of procedural due process protections explicitly *requires* courts to consider the U.S. government's interests in the challenged policy[338]—interests with great weight if, for example, the nation were facing a foreign policy or national security crisis.

B. Other Constitutional Rights

Viewing the Constitution from the perspective of foreign states shows that that they have due process rights and that they are protected by separation of powers. It also provides the groundwork for analyzing whether foreign states have additional constitutional rights. That analysis should reject general theories of constitutional exclusion and inclusion, should take a right-by-right approach, and should generally provide to foreign states the same litigation-related rights that other defendants enjoy.

Scholars writing on the rights of aliens and the extraterritorial application of the Constitution ask questions with titles such as "Whose Constitution?"[339] and *Does the Constitution Follow the Flag?*[340] If those are the questions, it is easy to see why courts and commentators have been quick to exclude foreign states. No entity is less like a "citizen"—even an alien can

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333. *Price*, 294 F.3d at 99; *see also* Damrosch, *supra* note 4, at 485–86, 527–30.

334. Nw. Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906).

335. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 693 (2001). *Compare* Nathan S. Chapman, *Due Process Abroad*, 112 NW. U. L. REV. 377, 377 (2017) (arguing that "the founding generation understood due process to apply to any exercise of federal law enforcement, criminal or civil, against any person anywhere in the world"), *with* Andrew Kent, *Piracy and Due Process*, 39 MICH. J. INT'L L. 385, 391 (2018).

336. Dusenbery v. United States, 534 U.S. 161, 167 (2002); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

337. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))).

338. *See id.*; Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004) (plurality opinion).

339. Neuman, *supra* note 8, at 910.

340. *See generally* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009).

give temporary fealty to the United States in a way that a foreign state cannot.[341] No entity is so thoroughly "outside" the territory of the United States and outside "we the people" than a foreign sovereign state itself, which is defined in terms of its own territory and its own people. But the Constitution was not drafted as an answer to these abstract questions. It was drafted instead to address particular problems. Article III, for example, was written in part to address problems of state court bias that generated conflict with other countries. Yet by focusing narrowly on the word "person" in the Fifth Amendment and building a theory of exclusion around it, courts have turned federal judicial power (to which the Fifth Amendment applies) entirely on its head. When it comes to issues of inclusion and exclusion, the Constitution did not demarcate—or even assume as fixed background principles—sharp categories of general applicability.[342]

Consider another constitutional category: corporations. As described above, current doctrine draws a constitutional distinction between foreign corporations and foreign governments. Yet foreign corporations were difficult to separate from foreign nations themselves even in the late eighteenth century, as the East India Company example illustrates. Most corporations at the time were created to serve public purposes such as building infrastructure.[343] Even with respect to purely domestic corporations, efforts to draw sharp constitutional lines broke down quickly.[344] Today, the Court's approach to the constitutional rights of private corporations starts not with a theory of business entities or of the nature of corporations but instead with a right-by-right analysis, focusing upon the significance and nature of the injury to the corporation.[345] A right-by-right approach makes sense for foreign states as well. Without overstating the comparison, some of the Court's reasoning with respect to corporations—for example, that they lack certain rights deemed "personal"—provides strong reasons to deny those same rights to foreign states.[346]

Foreign states share constitutionally significant attributes not just with corporations but also with U.S. states. As originally understood, "process" protected foreign and U.S. states.[347] Both were also afforded special status in Article III. There are, however, important constitutional distinctions. U.S.

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341. *Cf.* AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 55 (2017) (noting that under English law the right of habeas traditionally extended to aliens who had temporary allegiance to the government).

342. *Contra* Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029, 1032 (2015) ("The longstanding form or structure of rights protection was based on categorical rules and boundary-drawing.").

343. ADAM WINKLER, WE THE CORPORATIONS 48 (2018) ("In Blackstone's day . . . corporations more clearly straddled the divide between public and private.").

344. *See, e.g.*, Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 88 (1809).

345. *See* Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 139–40 (2014).

346. *Id.* at 149 (noting that corporations do not have personal rights such as certain privacy rights, the right to marry, serve on juries, or vote).

347. *See supra* Part II.B.2.

states ceded authority to the federal government by ratifying the Constitution, and they are also explicitly protected by it in ways that foreign states are not.[348] Although that reasoning does not support the broad conclusion that foreign states are entitled to no constitutional rights, it may support other distinctions. For example, lower courts have held that U.S. states, but not foreign states, are entitled to sue parens patriae on behalf of their residents. Those cases are correct in reasoning that U.S. states are limited in their ability to engage in diplomatic negotiations with other U.S. states in order to protect their citizens, reasoning that does not fully apply to foreign states.[349]

The constitutional rights of foreign nations are also limited by the constitutional powers of other actors. Consider the right of access to court, a constitutional right with an "unsettled" basis that appears to include the First and Fifth Amendments.[350] Foreign states are entitled to bring suit in state and federal courts, an entitlement usually described as an aspect of international comity rather than a constitutional right,[351] and one that is limited to recognized foreign governments.[352] In practice, the exception for "unrecognized" governments is a narrow one somewhat at odds with the comity rationale, because "recognized" governments with whom the United States has no diplomatic relations are entitled to access courts as plaintiffs.[353] Assuming that access to court is a constitutional right enjoyed by foreign nations, the distinction between recognized and unrecognized states might be preserved as an aspect of the president's exclusive power to recognize foreign governments. That power, recently underscored by the Supreme Court,[354] could at least arguably include the right to decide which state-like entities are entitled to access the courts in the United States and which are not.[355]

Generally applicable limitations on constitutional rights and constitutional redress also curtail the protections to which foreign states are entitled. Territorial limits are an important example, as mentioned above.[356] Relatedly, the First, Second, and Fourth Amendments extend certain protections to "the people." That phrase, the Court has reasoned, "refers to a class of persons who are part of a national community," a classification

348. *See* Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

349. *See, e.g.*, Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332, 337 (1st Cir. 2000).

350. Christopher v. Harbury, 536 U.S. 403, 415 (2002).

351. Pfizer Inc. v. Gov't of India, 434 U.S. 308, 318–19 (1978); *see also* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2116 (2015).

352. *Pfizer*, 434 U.S. at 319–20.

353. *See* Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism,"* 73 WASH. & LEE L. REV. 653, 660–61 (2016).

354. *See generally* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015).

355. *But see* Wuerth, *supra* note 104, at 1837–38 (distinguishing between recognition itself and legal consequences that follow from recognition).

356. Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 943 (2011) ("[I]f the First Amendment speaks at all beyond U.S. borders, it does so with only the faintest voice."); *see also* Ronald J. Krotoszynski, Jr., *Transborder Speech*, 94 NOTRE DAME L. REV. 473, 473 (2018) ("First Amendment law and theory must recognize that the freedom of speech does not end at the water's edge.").

which may exclude foreign states as it does some aliens.[357] The government may limit First Amendment and other constitutional rights when it has a compelling reason to do so,[358] a standard that may be relatively easy to meet when the government regulates foreign nations to protect national security.[359] For example, the Takings Clause was drafted in part to protect those who are vulnerable because they are geographically and, thus politically, excluded from normal legislative decision-making,[360] suggesting that foreign states ought to be presumptively included in, not excluded from, protection.[361] Nevertheless, claims seeking compensation for war or national-security related takings by the government face significant hurdles when brought by any kind of entity.[362] Justiciability doctrines such as standing and the political question doctrine also limit litigation brought by foreign states.[363]

But when foreign states and related entities face suit in the United States (whether a criminal action brought by federal prosecutors or a civil case based on an exception to the FSIA) basic litigation-related constitutional protections should generally apply.[364] That conclusion is supported by the words "person" and "accused" in the Fifth and Sixth Amendments regulating procedure in civil and criminal cases.[365] The term "person" has straightforward application to foreign states, as we have seen, and the word "accused" appears to refer to a person against whom the government brings a criminal action. Foreign states should thus be constitutionally entitled not only to due process protections but also to assistance of counsel, the right to a jury trial, and protection against double jeopardy.[366] The wholesale

357. United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

358. *See* Citizens United v. FEC, 558 U.S. 310, 340 (2010).

359. *Cf.* United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958) (deferring to the government's interest and rejecting a corporations' regulatory takings claim during wartime).

360. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 827–36 (1995).

361. *Cf.* Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931) (reasoning in a Takings Clause case brought by a foreign corporation that the "petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution"). For a discussion of whether the Takings Clause applies to a claim held by a U.S. national against a foreign state, see generally Alan E. Brownstein, *The Takings Clause and the Iranian Claims Settlement*, 29 UCLA L. REV. 984 (1982).

362. *See* ROBERT MELTZ, CONG. RESEARCH SERV., RS21040, INTERNATIONAL CONFLICT AND PROPERTY RIGHTS: FIFTH AMENDMENT "TAKINGS" ISSUES 1–6 (2001).

363. Buxbaum, *supra* note 353, at 661–65.

364. *See* Garrett, *supra* note 345, at 134 ("[W]hen a corporation can sue and be sued . . . we can see why the court would then assume that any litigant should receive the same trial protections.").

365. United States v. Verdugo-Urquidez, 494 U.S. 259, 265–66 (1990). The rights against self-incrimination and some Fourth Amendment rights are currently limited to real persons and might not apply. *See* Christopher Slobogin, Citizens United *&* *Corporate & Human Crime*, 14 GREEN BAG 2D 81, 83 (2010); *see also* Garrett, *supra* note 345, at 122–28 (arguing that corporations have broader Fourth Amendment rights than Slobogin acknowledges).

366. *Cf.* Garrett, *supra* note 345, at 97, 158 (arguing that corporations should have the right to assistance of counsel); Matambanadzo, *supra* note 296, at 471–72 (explaining that corporations are entitled to some of these rights).

exclusion of foreign states from constitutional protections when they face suit in the United States cuts against the grain of Article III, which explicitly brought foreign entities into the federal judicial system with the intention of protecting them. Of more immediate practical significance, those protections apply to state-owned enterprises as they do to private corporations without the need to distinguish SOEs from foreign states.

CONCLUSION

Foreign states were an important audience for the Constitution. The framers sought to minimize conflict with other nations so as to ensure peace, to promote commerce, and to allow the United States to fully join the international community. Certain forms of constitutional inclusion, not categorical exclusion, were ultimately selected as the best way to achieve these aims. Foreign states accordingly benefitted from the extension of federal judicial power to include foreign-state diversity jurisdiction. The vesting of "judicial power" over "cases" also limited what federal courts could do as a matter of process and procedure. Federal courts only have power over defendants to whom notice is provided and over whom the court has jurisdiction, and these limitations apply to all defendants. Foreign states are also entitled to due process under the Fifth Amendment. Contemporary doctrine has lost sight of these basic principles and drawn false constitutional distinctions between foreign states, foreign corporations, and foreign state-owned corporations, putting foreign states at a constitutional disadvantage as compared to private actors, an outcome at odds with the purposes that animated Article III.

Viewing litigation-related constitutional rights from the perspective of foreign states draws together parts of the Constitution in ways that scholars have not yet done. Article III is a source of procedural protections such as personal jurisdiction and notice that today we associate exclusively with Fifth Amendment due process. Cases involving foreign sovereigns illustrate that Fifth Amendment "process" meant a territorially restricted power to compel attendance before the court, linking the term to personal jurisdiction. That power was also limited by the power of the sovereign itself. If a court lacked personal jurisdiction over a defendant, even one located within the territory of the forum court, process could not issue. Absent personal jurisdiction, there was also no Article III "case" and no "judicial power." Due process protections were indeed duplicative of protections already provided to all defendants through separation of powers. These observations resolve modern doctrinal problems in a sensible way, and they also knit together ideas other scholars have advanced to understand domestic state sovereign immunity, personal jurisdiction, and the original meaning of the Fifth Amendment.