ARTICLES

REFLECTIONS ON JUDICIAL JURISDICTION IN INTERNATIONAL CASES

*Gary B. Born**

United States courts and legal commentators have long wrestled with problems of judicial jurisdiction in disputes between parties from different states of the Union. Far less attention has been devoted to questions of jurisdiction in international controversies. This inattention has produced considerable confusion among lower courts, resulting in a variety of inconsistent approaches to jurisdiction over foreign defendants. This confusion disserves the goals of fairness, sound judicial administration, and friendly international relations.

The most frequent response of United States courts to jurisdictional challenges by foreigners has been to apply Due Process standards developed in domestic cases. Parts I and II of this Article describe this and other approaches taken by United States courts in international cases. Parts III and IV of the Article argue that the domestic Due Process approach taken by most United States courts overlooks important differences between assertions of jurisdiction in the interstate context and those in the international context. These differences, the Article contends, require a modification of domestic Due Process limitations on personal jurisdiction in cases involving foreign defendants. The Article concludes by outlining an appropriate Due Process standard for assertions of personal jurisdiction by United States courts in international cases.

I. Judicial Jurisdiction in Domestic Cases

Existing constitutional limitations on assertions of personal jurisdiction can be briefly summarized.[1] Ironically, constitutional limi-

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* Assistant Professor of Law, University of Arizona. Helpful comments were received from Robert Glennon, Carol Lee, Andreas Lowenfeld, Arthur von Mehren, David Westin, and Winton Woods.

[1] Commentary concerning the constitutional limitations on judicial jurisdiction of United States courts is extensive. *E.g.*, Abrams, *Power, Convenience, and the Elim-*

tations on the judicial jurisdiction of United States courts can be traced to 19th century perceptions about public international law. In *Pennoyer v. Neff*,[2] the Supreme Court relied on two related principles of international law in articulating constitutional limits on state court judicial jurisdiction: (1) "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory;"[3] and (2) "no State can exercise direct jurisdiction and authority over persons and property without its territory."[4] The Court reasoned that these principles of international law were equally applicable to the several states of the Union, and that they significantly limited the judicial jurisdiction of state courts. Under *Pennoyer*'s territorial theory of sovereignty, a state court could exercise personal jurisdiction over any defendant who was served with process within the territory of the state. According to *Pennoyer*, however, the Constitution prohibited a state from exercising personal jurisdiction over persons located outside the state's territory, regardless of that person's connection to the state.[5]

This century's dramatic expansion of interstate commerce increasingly strained *Pennoyer*'s territorial limitations on state court jurisdiction.[6] In 1945, after some equivocation, the Court abandoned its strict territorial view of judicial jurisdiction. In *International Shoe*

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ination of Personal Jurisdiction in the Federal Courts, 58 IND. L.J. 1 (1982) [hereinafter Abrams]; Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); Redish, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 112 (1981) [hereinafter Redish]; Seidelson, *Jurisdiction Over Non-Resident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes*, 6 DUQ. L. REV. 221 (1967-68) [hereinafter Seidelson]; von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) [hereinafter von Mehren & Trautman]; Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485 (1984) [hereinafter Weintraub].

[2] Pennoyer v. Neff, 95 U.S. 714 (1877).

[3] *Id.* at 722.

[4] *Id.* Like many 19th century Supreme Court decisions involving international law questions, *Pennoyer* relied on treatises by Joseph Story and Henry Wheaton as authority for its formulation of the limitations on state judicial jurisdiction. *See* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (8th ed. 1883); H. WHEATON, ELEMENTS OF INTERNATIONAL LAW (8th ed. 1866).

[5] *Pennoyer*, 95 U.S. at 727 ("Process from the tribunals of one state cannot run into another state").

[6] *See* M. ROSENBERG, J. WEINSTEIN, H. SMITH & H. KORN, ELEMENTS OF CIVIL PROCEDURE 273-75 (3d ed. 1976).

Co. v. Washington,[7] the Court fashioned the now-classic rule that the fourteenth amendment allowed a state court to exercise jurisdiction over persons located outside the state's territory, but only if the defendant had "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[8] The minimum contacts test preserved *Pennoyer*'s territorial foundation, but relaxed the territoriality principle to allow suits against out-of-state persons with sufficiently close connections to the forum state.

Deciding when particular contacts are sufficiently close to support state court jurisdiction under *International Shoe* has proved an elusive task. The Court's most recent thorough treatment of the subject came in *World-Wide Volkswagen Corp. v. Woodson*.[9] In *World-Wide Volkswagen*, the Court characterized the minimum contacts test as requiring that "the defendant's conduct and connections with the forum state [be] such that he should reasonably anticipate being haled into court there."[10] In addition to focusing on foreseeability, the Court concluded that other issues play a role in Due Process analysis. According to *World-Wide Volkswagen*, the burden on a defendant of litigating in a foreign forum is the "primary concern" in any Due Process analysis;[11] this burden will often, but not always, be closely related to the defendant's ability to have foreseen litigation in the forum. The Court also enumerated a nonexclusive list of other factors that must be considered in "appropriate" cases:

> the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining

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

[8] *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[9] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). Other important judicial jurisdiction decisions include Kulko v. California Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denkla, 357 U.S. 235 (1958); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957). More recently, the Court considered issues of personal jurisdiction in Phillips Petroleum Co. v. Shutts, 105 S. Ct. 2965 (1985); Burger King v. Rudzewicz, 105 S. Ct. 2174 (1985); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984); Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Ins. Co. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

[10] *World-Wide Volkswagen Corp.*, 444 U.S. at 290.

[11] *Id.* at 297.

> the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies.[12]

Application of the minimum contacts test in the domestic context has provoked substantial criticism. The standard requires fact-intensive examination of individual patterns of conduct and contacts. This case-by-case analysis inevitably produces a degree of uncertainty resulting from dissimilar views of when it is "reasonable," or consistent with "fair play and substantial justice," to require a defendant to appear in the forum's courts.[13] In addition, some commentators have argued that the minimum contacts test reflects archaic notions of territorial sovereignty derived from international law that do not properly apply in the interstate context.[14] Critics also argue that the existing Due Process standard unduly elevates the interests of defendants over those of plaintiffs. These commentators suggest confining Due Process analysis solely to the balance of convenience and hardships between the parties.[15]

Despite these criticisms, *International Shoe*'s minimum contacts test generally appears to function adequately in interstate cases. First, by focusing on the defendant's purposeful or foreseeable contacts with the forum, the test provides a measure of certainty and predictability.[16]

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[12] *Id.* (citations omitted). More recently, the Supreme Court has distinguished between "specific jurisdiction" and "general jurisdiction." *Hall*, 466 U.S. at 408. The terms were first coined by Professors von Mehren and Trautman. *See* von Mehren & Trautman, *supra* note 1, at 1136-37. Specific jurisdiction involves adjudication of a controversy that relates to the defendant's contacts with the forum. *Hall*, 466 U.S. at 414 n.8; von Mehren & Trautman, *supra* note 1, at 1144-45. General jurisdiction involves a court's adjudication of a claim that does not arise out of the defendant's conduct within the forum. The exercise of general jurisdiction ordinarily requires that the defendant have "continuous and systematic general business contacts" with the forum. *Hall*, 466 U.S. at 414 n.9; von Mehren & Trautman, *supra* note 1, at 1136-37. It is not yet clear what role these notions of specific and general jurisdiction will play in the Court's Due Process analysis.

[13] Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 445 U.S. 907 (1980) (White, J., dissenting from denial of certiorari) ("The disarray among federal and state courts . . . may well have a disruptive effect on commercial relations in which certainty of result is a prime objective").

[14] Redish, *supra* note 1, at 115-32; Weintraub, *supra* note 1, at 503-05.

[15] Packel, *Congressional Power to Reduce Personal Jurisdiction Litigation*, 59 TEMP. L.Q. 919 (1986); Redish, *supra* note 1, at 1104; Seidelson, *supra* note 1; Weintraub, *supra* note 1.

[16] *World-Wide Volkswagen Corp.*, 444 U.S. at 297. In the Court's words the minimum contacts test gives "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum

Second, by ensuring that the defendant, as well as the plaintiff, has some relation to the forum state, the minimum contacts test seeks to reduce the risk that a party will unwillingly have its legal rights determined by a tribunal with which it has no relation. Third, the test plays an important role in equalizing significant litigation advantages enjoyed by many plaintiffs.[17] Finally, by allowing for consideration of the relative litigation burdens a particular forum places on the parties, the minimum contacts test seeks to avoid seriously inconveniencing either party. For these reasons, the Court has shown little inclination to follow suggestions that it radically revise its Due Process analysis of judicial jurisdiction questions. The remainder of this Article assumes the minimum contacts test will remain the constitutional test for personal jurisdiction in domestic cases and considers whether the same standard should apply in international cases.

II. JUDICIAL JURISDICTION OF UNITED STATES COURTS IN INTERNATIONAL CASES

The post-War era's expansion of international trade fueled a dramatic increase in legal disputes between United States citizens and foreign persons. In many cases United States litigants choose to prefer United States courts, rather than foreign courts, to resolve their disputes. Conversely, most foreign litigants are anxious to avoid United States courts.[18] As a result, international cases in United States

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assurance as to where that conduct will and will not render them liable to suit." *Id. See also* von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279, 313 (1983).

[17] "The defendant's jurisdictional preference rests on the advantages that a plaintiff typically enjoys in selecting among several forums and on the proposition that, other things being equal, burdens that must rest on either the challenger or the challenged are to be borne by him who seeks to change the status quo." von Mehren, *supra* note 16, at 321-22. Plaintiffs have much greater ability to select a forum than defendants, which serves to protect a plaintiff's interests. *Cf. World-Wide Volkswagen Corp.*, 444 U.S. at 292.

Other commentators invoke "the old rule in *dubrio prop reo*: the fault of the defendant has still to be proved," as a justification for the defendant's preferred status. De Winter, *Excessive Jurisdiction in Private International Law*, 17 INT'L & COMP. L.Q. 706, 717 (1968); *Cf.* von Mehren, *supra* note 16, at 307.

[18] This is not always the case. Foreign litigants may sometimes wish to take advantage of liberal United States discovery opportunities, more favorable substantive laws, or a perceived tendency of United States courts to make larger damage awards than their foreign counterparts. *See, e.g.*, Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984) (English plaintiff brings suit in United States court against English and other European defendants). Conversely, United

courts frequently involve jurisdictional challenges by foreign defendants. As in domestic cases, these challenges typically are grounded, at least in part, on the Due Process Clause.

The Supreme Court has been unable to provide significant guidance to lower courts for resolving Due Process challenges by foreigners. Only two Supreme Court decisions, *Helicopteros Nacionales de Columbia, S.A. v. Hall*,[19] and *Perkins v. Benquet Consolidated Mining Co.*,[20] have involved Due Process challenges to a state court's jurisdiction over a foreign person. In neither case did the defendant question the applicability of the *International Shoe* minimum contacts test to foreigners. Thus, both cases routinely applied the minimum contacts test developed in domestic cases, without addressing whether the standard was appropriate in the international context.

Not surprisingly, lower courts uniformly have not read *Helicopteros* or *Perkins* as deciding what Due Process standard applies to assertions of personal jurisdiction over foreigners.[21] Lacking express guidance from the Supreme Court, lower courts have responded to jurisdictional challenges by foreign defendants in a variety of ways. As described below, these various approaches treat foreign persons in very different ways and involve markedly different jurisdictional claims over foreign persons.[22]

A. Judicial Jurisdiction in State Law Cases

State and lower federal courts have frequently considered Due Process challenges to assertions of long-arm jurisdiction over foreigners.[23] Most courts have applied the same standards to resolve

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States litigants sometimes perceive advantages in foreign forums. *E.g., In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986) (United States defendant seeks dismissal of foreign plaintiff's suit in United States court on grounds of *forum non conveniens*). For a discussion of the Bhopal case, see Note, *International Mass Tort Litigation: Forum Non Conveniens and the Adequate Alternative Forum in Light of the Bhopal Disaster*, 16 GA. J. INT'L & COMP. L. 109 (1986).

[19] *Hall*, 466 U.S. at 408.

[20] Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952).

[21] *See* cases cited in notes 26-30 *infra*.

[22] The Supreme Court recently granted certiorari and heard oral argument in a case involving Due Process limitations on the assertion of personal jurisdiction over foreign defendants. Asahi Metal Indus. Co. v. Superior Court of California, 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985), *cert. granted*, 54 U.S.L.W. 2103 (U.S. Mar. 3, 1986). *See also infra* note 157.

[23] Due Process challenges arise in both state and federal courts. Most challenges in state courts occur in state law actions and are grounded on the fourteenth

personal jurisdiction challenges by foreigners as they apply to challenges by United States nationals. As the American Law Institute's (ALI) Revised Restatement of Foreign Relations Law describes: "the criteria for exercise of judicial jurisdiction are basically the same for claims arising out of *international* transactions or involving a nonresident alien as a party," as the criteria for *domestic* cases.[24] Some courts have explicitly taken the Revised Restatement's position, usually reasoning that "there are no equitable or practical reasons for treating alien manufacturers in products liability actions differently than domestic corporations."[25] Other courts have simply applied domestic Due Process formulae to international cases without expressly considering whether a different approach is appropriate for claims against foreign defendants.[26]

A number of lower courts have rejected this majority approach and have applied different personal jurisdiction standards to foreign defendants. Some courts have required foreign defendants to have

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amendment. Due Process challenges in federal courts occur both in diversity cases involving state law claims and in federal question cases. It is generally accepted that a federal court exercising diversity jurisdiction is obliged by Federal Rule of Civil Procedure 4(e) to apply state jurisdictional statutes to determine the extent of its own personal jurisdiction. Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963); 2 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 4.22[1], at 4-193 and 4.32[2] (2d ed. 1981). In addition, federal courts sitting in diversity actions will apply the Due Process Clause of the fourteenth amendment, *Arrowsmith*, 320 F.2d at 231-33, presumably on the grounds that it, like state statutory law, is incorporated by Rule 4. The response of federal courts to jurisdictional challenges in federal question cases is discussed below. *See infra* notes 34-41 and accompanying text.

[24] RESTATEMENT (REVISED) FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 note 1 (Tent. Draft No. 6, Apr. 12, 1985) (emphasis added). *Id.* at comment f.

[25] Note, *Civil Procedure — Long Arm Statutes — Jurisdiction Over Alien Manufacturers in Product Liability Actions*, 18 WAYNE L. REV. 1585, 1588 (1972) (citing authorities). *See also* Velandra v. Regie Nationale des Usines Renault, 336 F.2d 292 (6th Cir. 1964); Cherun v. Frishman, 236 F. Supp. 292, 298 (D.D.C. 1964); von Mehren and Trautman, *supra* note 1, at 1136.

[26] Thos. P. Gonzales Corp. v. Consejo Nacional, 614 F.2d 1247 (9th Cir. 1980); Davis H. Elliott Co. v. Carribbean Util. Co., 513 F.2d 1176 (6th Cir. 1975); Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137 (7th Cir. 1975); Elefteriou v. Tanker Archontissa, 443 F.2d 185 (4th Cir. 1971); Sousa v. Ocean Sunflower Shipping Co., 608 F. Supp. 1309 (N.D. Cal. 1984); Eastman Kodak Co. v. Studiengesellschaft Kohle mbH, 392 F. Supp. 1152 (D. Del. 1975); Marshall Exports, Inc. v. C.A. Phillips, 385 F. Supp. 1250 (E.D.N.C. 1974). A few courts have applied domestic Due Process standards in international cases, but have further reasoned that particular cases could implicate foreign sovereign interests demanding special treatment. Ins. Co. of North Am. v. Marina Salina Cruz, 649 F.2d 1266, 1272 (9th Cir. 1981); Copiers, Typewriters, Calculators Inc. v. Toshiba Corp., 576 F. Supp. 312, 321 (D. Md. 1983).

closer contacts with the forum state than would be necessary for jurisdiction over a United States defendant.[27] "[W]hen we are dealing with a manufacturer in a foreign country, we should consider additional factors" that may require foregoing jurisdiction.[28]

Other courts have expressly required *less close* contacts with the forum state from foreign defendants than from domestic persons.[29] Some courts have reached this result without acknowledging that a different standard exists for non-United States defendants:[30] "the courts have been willing to interpret the jurisdictional requirement generously where alien defendants are involved."[31] In one case a French crane manufacturer sold one of its products to an unrelated French company, which in turn sold the crane to an unrelated United States distributor. The crane eventually found its way to Pennsylvania where it malfunctioned. Personal jurisdiction over the French manufacturer was upheld in a subsequent tort suit, notwithstanding the manufacturer's lack of knowledge as to the crane's destination, its lack of any other connection to the forum, and the fact that the crane was apparently the only product manufactured by the defendant

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[27] Kramer Motors, Inc. v. British Leyland Ltd., 628 F.2d 1175, 1178 (9th Cir. 1980), quoting Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1341 (2d Cir. 1972); Omstead v. Brader Heaters, Inc., 5 Wash. App. 258, 487 P.2d 234, 241 (1971). *See* 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 113 (2d ed. 1981) ("more substantial activity within the United States should be required to bring a foreign national into an American court than to bring a citizen of one of the United States into the court of a sister state").

[28] *Omstead*, 5 Wash. App. at 270, 487 P.2d at 241.

[29] *See* Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir. 1969); Engineered Sports Prods. v. Brunswick Corp., 362 F. Supp. 722 (D. Utah 1973). *See also* Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913, 931-32, 939, 945 (1985) [hereinafter Weinberg].

[30] Behagen v. Amateur Basketball Ass'n of U.S.A., 744 F.2d 731 (10th Cir. 1984); Hedrick v. Daiko Shoji Co., 715 F.2d 1355 (9th Cir. 1983); Poyner v. Erma Werke Gmbh, 618 F.2d 1186 (6th Cir. 1980); Hetrick v. Am. Honda Motor Co., 429 F. Supp. 116 (D. Neb. 1976); Reilly v. P.J. Wolff & Sohne, 374 F. Supp. 775 (D.N.J. 1974); Gorso v. Bell Equip. Corp., 330 F. Supp. 834 (W.D. Pa. 1971); Benn v. Linden Crane Co., 326 F. Supp. 995 (E.D. Pa. 1971); Charles Gendler & Co. v. Telecom Equip. Corp., 102 N.J. 460, 508 A.2d 1127 (1986); Le Manufacture Francaise Des Pneumatiques Michelin v. District Court, 620 P.2d 1040 (Colo. 1980); Ross v. Spiegel, Inc., 43 Ohio App. 2d 297, 373 N.E.2d 1288 (1977) ("The forum state has an interest in opening its courts to Ohio residents seeking redress from nonresidents who have set in motion activities which ultimately result in an injury in Ohio"); Bryant v. Finnish National Airline, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

[31] Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 126 (1983) [hereinafter Lilly].

ever to have been purchased in the United States.[32] The court concluded that the safety of local residents justified exercising jurisdiction over "these French corporations which placed an allegedly dangerous and defective product into the channels of commerce."[33]

B. Judicial Jurisdiction in Federal Question Cases

The treatment of judicial jurisdiction by lower courts in federal question cases also is marked by confusion. Federal courts have taken two markedly different approaches to personal jurisdiction in federal question cases. Under the majority approach, federal courts examine the defendant's contacts with the state of the Union in which the court sits:[34] "[T]he overwhelming consensus among federal courts is to analyze questions of *in personam* jurisdiction over alien defendants by examining the relationship of the defendant, the litigation and the forum under traditional *International Shoe* principles."[35]

Other courts have taken a different approach in federal question cases, applying what is sometimes referred to as an "aggregate contacts" or "national contacts" test.[36] Courts adopted the national contacts test in reaction to "the 'anomaly' of using state guidelines to restrict federal jurisdiction, and the practical difficulties the practice has created."[37] To meet these objections, some federal courts have

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[32] *Gorso*, 330 F. Supp. at 834. The French corporations had given Bell exclusive rights to distribute their cranes in the United States and Puerto Rico, but no other relationships existed between the companies, and Bell "distributed" only one crane in the United States. *Id.*

[33] *Id.* at 836.

[34] *See* De James v. Magnificence Carriers, Inc., 491 F. Supp. 1276, 1279 (D.N.J. 1980), *aff'd*, 654 F.2d 280 (3d Cir. 1981) (requiring sufficient contacts with New Jersey when applying New Jersey's long-arm statute); Superior Coal Co. v. Ruhrkohle, A.G., 83 F.R.D. 414 (W.D. Pa. 1979) (citing authorities); Note, *Alien Corporations and Aggregate Contracts: A Genuinely Federal Standard*, 95 HARV. L. REV. 470, 478 (1981) [hereinafter *Alien Corporations*].

[35] *Superior Coal Co.*, 83 F.R.D. at 419.

[36] *See, e.g.*, Paulson Inv. Co. v. Norbay Sec., Inc., 603 F. Supp. 615 (D. Ore. 1984); Coats Co. v. Vulcan Equip. Co., 459 F. Supp. 654, 659-60 (N.D. Ill. 1978); Eng'g Equip. Co. v. S.S. Selene, 446 F. Supp. 706, 709-10 (S.D.N.Y. 1978); Centronics Data Computer Corp. v. Mannesmann A.G., 432 F. Supp. 659 (D.N.H. 1977); Cyromedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287, 290-92 (D. Conn. 1975); Holt v. Klosters Rederi A/S, 355 F. Supp. 354, 356-58 (W.D. Mich. 1973); Scriptomatic, Inc. v. Agfa-Gevaert, Inc., 1973-1 Trade Cas. (CCH) 74,594; Alco Standard Corp. v. Benalal, 345 F. Supp. 14 (E.D. Pa. 1972). National contacts tests also have been applied in purely domestic cases involving jurisdiction of federal courts under certain federal statutes. *See infra* note 160.

[37] *Alien Corporations*, *supra* note 34, at 474. *See also* Note, *National Contacts*

looked to the foreign defendants' contacts with the United States as a whole, rather than to contacts with particular states.[38] As one court explained:

> where, as here, suit is brought against alien defendants, the court properly may consider the aggregate presence of the defendant's apparatus in the United States as a whole. Due process or traditional notions of fair play should not immunize an alien defendant from suit in the United States simply because each state makes up only a fraction of the substantial market for the offending product.[39]

As noted earlier, however, most federal courts have refused to adopt a national contacts test. These decisions often have approved a national contacts test as a constitutional standard in federal question cases, but have reasoned that neither federal rules nor congressional legislation authorize federal courts to apply a national contacts test.[40] Courts have been more willing to adopt a national contacts test in cases involving federal statutes that authorize nationwide service of process. These statutes frequently have been interpreted as authorizing use of a national contacts test, which has uniformly been held consistent with the Due Process Clause.[41]

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as a Basis For In Personam Jurisdiction Over Aliens In Federal Question Suits, 70 CALIF. L. REV. 686 (1982); Note, *Personal Jurisdiction Over Alien Corporations In Antitrust Actions: Towards A More Uniform Approach*, 54 ST. JOHN'S L. REV. 330 (1980).

[38] For a discussion of the consistency of a national contacts test with the objectives of the Due Process Clause, *see infra* notes 149-72 and accompanying text. *Cf.* Brunette Mach. Works v. Kockum Ind., 406 U.S. 706 (1972).

[39] *Engineered Sports Prods.*, 362 F. Supp. at 728.

[40] *See, e.g.*, Fitzsimmons v. Barton, 589 F.2d 330 (7th Cir. 1979); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir. 1977); *Honeywell, Inc.*, 509 F.2d at 1143 n.2; *De James*, 491 F. Supp. at 1282-83; AG - Tronic, Inc., v. Frank Pavilour, Ltd., 70 F.R.D. 393, 400-01 (D. Neb. 1976); Edward J. Moriarity & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 389-90 (S.D. Ohio 1967). As noted earlier, Federal Rule of Civil Procedure 4(e) is interpreted as requiring federal courts to apply state long-arm statutes and jurisdictional standards. *See supra* note 23. There is no general federal personal jurisdiction statute, and most specific federal statutes are silent on the question of personal jurisdiction. For a list of federal statutes that do address issues of personal jurisdiction, see 2 J. MOORE, J. LUCAS, H. FINK & C. THOMPSON, MOORE'S FEDERAL PRACTICE ¶ 4.33 (2d ed. 1986).

[41] *E.g.*, Leasco Data Processing v. Maxwell, 468 F.2d 1326 (2d Cir. 1972) (Securities Exchange Act of 1934); *Paulson Inv. Co.*, 603 F. Supp. at 615 (Securities Exchange Act of 1934); *Eng'g Equip. Co.*, 446 F. Supp. at 706 (admiralty); Garmer v. Enright, 71 F.R.D. 656 (E.D.N.Y. 1976) (Securities Exchange Act of 1934); *Alcoa Standard Corp.*, 345 F. Supp. at 14 (Securities Exchange Act of 1934); Note, *Personal Jurisdiction Over Alien Corporations in Antitrust Actions: Toward a More Uniform Approach*, 54 ST. JOHN'S L. REV. 330 (1980) (Clayton Act). Other federal statutes expressly call for application of a national contacts test to foreign entities. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605 (1982).

C. *Need for a Single Constitutional Standard for Judicial Jurisdiction in International Cases*

Whatever the merits of any one of the various approaches to judicial jurisdiction in international cases, the proliferation of different Due Process standards is plainly undesirable. Uniform treatment of federal constitutional questions is important in all fields, but it is particularly important where other nations' interests and United States foreign relations are implicated.[42] Moreover, there is a special need for uniform treatment of jurisdictional issues. Foreigners often will come from legal, cultural, and economic environments that differ significantly from their United States counterparts. As a result, clear, uniform jurisdictional rules in United States courts are necessary to prevent surprise and permit effective business planning.[43] For all these reasons, the adage that the nation "must speak with one voice when regulating commercial relations with foreign governments"[44] is particularly applicable in the jurisdictional context. Under existing law, however, the United States speaks with many inconsistent voices about the reach of United States judicial jurisdiction in international cases. This disparity of treatment, and the uncertainty it creates, is unsatisfactory and should be remedied.

III. JUDICIAL JURISDICTION IN FOREIGN COURTS AND UNDER INTERNATIONAL LAW

A. *Judicial Jurisdiction in Foreign Courts*

Limitations in foreign states on assertions of judicial jurisdiction in international cases vary considerably. In general, there is some recognition that assertions of jurisdiction should be tied to an affiliating relationship between the defendant and the forum state. Nevertheless, particular jurisdictional devices in a number of foreign states depart from this ideal.

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[42] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423-25 (1964); Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939).

[43] *See infra* note 136 and accompanying text.

[44] Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976). *See also* Zschernig v. Miller, 389 U.S. 429, 436, 440 (1968); Hines v. Davidowitz, 312 U.S. 52, 63-64 (1941) ("The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibilities for the conduct of affairs with foreign sovereignties").

Not surprisingly, English rules of judicial jurisdiction are broadly similar to United States principles.[45] English courts, like their United States counterparts, assert personal jurisdiction over defendants served with process within England.[46] Corporations and other legal entities are deemed present if they "carry on business" within the jurisdiction.[47]

English courts also have the power, similar to that granted by long-arm statutes in the United States, to order service of process on persons located outside English territory.[48] In contractual disputes English courts exercise broad personal jurisdiction over foreigners. English law permits service outside England on parties to contracts: (i) if the parties entered into the contract in England;[49] (ii) if a party breaches a contract through conduct in England;[50] or (iii) if the contract is governed by English law.[51] In the field of torts, English law permits service outside of England when the tort is "committed within the jurisdiction."[52] Early English decisions held that the negligent manufacture of a product in a foreign state, and the subsequent shipment of that product to England, did not constitute a tort com-

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[45] As discussed below, significant modifications of English rules of judicial jurisdiction will occur when the Civil Jurisdiction and Judgments Act 1982 comes into force. The Act implements the European Communities' 1968 Convention on the Jurisdiction of Courts and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, as amended, 21 O.J. EUR. COMM. (No. L 304) 77 (1978), *reprinted in* 18 INT'L LEG. MAT. 8, 21 (1979) [hereinafter Brussels Convention]. *See* COLLINS, THE CIVIL JURISDICTION AND JUDGMENTS ACT 1982 (1983) and *infra* notes 71-73 and accompanying text.

[46] Maharanee of Baroda v. Wilderstein [1972] 2 All E.R. 689; Colt Indus. v. Sarlie [1966] 1 All E.R. 673. The rationale of these decisions permits jurisdiction even if a defendant's presence within the forum is only "fleeting."

[47] Okura & Co. v. Forsbacka Jernverks Aktiebolag [1914] 1 K.B. 715 (C.A.); Saccharin Corp. v. Chemische Fabrik von Heyden, A.G. [1911] 2 K.B. 516.

[48] R.S.C. (Eng.), O.11, r.1. Unlike service under United States long-arm statutes, in England, process may not be served outside the jurisdiction without the prior approval of the court. In deciding whether to grant leave to serve outside the jurisdiction, English courts enjoy broad discretion to withhold approval because of potential inconvenience to the defendant or because of doubts about the merits of the plaintiff's case. Cordova Land Co. v. Victor Bros. [1966] 1 W.L.R. 793; Gibbon v. Commerz and Creditbank, A.G. [1958] 2 Lloyd's Rep. 113; George Monro, Ltd. v. Am. Cyanamid and Chem. Corp. [1944] K.B. 432; The Hagen [1908] P. 189 (C.A.).

[49] R.S.C., (Eng.), O.11, r. 1(d)(i).

[50] R.S.C., (Eng.), O.11, r. 1(e).

[51] R.S.C., (Eng.), O.11, r. 1(d)(iii).

[52] R.S.C., (Eng.), O.11, r. 1(h).

mitted within the jurisdiction.[53] In contrast, subsequent decisions have held that actively marketing a defective foreign-manufactured product within England, without adequate warnings to English consumers, constitutes a tort committed within the jurisdiction.[54] It is unclear whether active marketing or other purposeful conduct within England is necessary for jurisdiction under these more recent decisions. When pending legislation dealing with jurisdictional issues comes into force in England, however, judicial jurisdiction will extend to foreign defendants in any tort claim in which "the damage was sustained, *or* resulted from any act committed" in England.[55]

Judicial jurisdiction principles in civil law jurisdictions have fewer similarities to United States rules.[56] Judicial jurisdiction in many civil law nations, including Germany, France, Italy and the Benelux Countries, starts with the principle that the defendant may be sued in his domicile.[57] While definitions of domicile vary, they typically refer to the state where an individual habitually resides, or the state where a company or other legal person has its "seat" or center of management.[58]

Moreover, judicial jurisdiction in civil law countries typically extends to persons who commit torts within the jurisdiction.[59] National

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[53] *George Monro, Ltd.*, [1944] K.B. at 432. Draper v. Trist and Trisbestos Brake Linings, Ltd., [1939] 56 R.P.C. 429; *The Hagen*, [1908] P. 189; Societe Generale de Paris v. Dreyfus Bro., [1885] 29 Ch.D. 239.

[54] Castree v. Squibb, Ltd., [1980] 1 W.L.R. 1248 (C.A.).

[55] R.S.C. (Eng.), amend. (No. 2) 1983; S.I. 1983 No. 1181 (L. 21). This amendment presumably will extend English judicial jurisdiction to foreign defendants who have not engaged in any sort of purposeful conduct within England. *See* Bier BV v. Mines de Totasse d'Alsace, [1976] E.C.R. 1735 (E.C.J.).

[56] G. DELAUME, II TRANSNATIONAL CONTRACTS § 8.01, at 1 (1986) ("There are fundamental differences between civil and common law countries in matters regarding international adjudicatory jurisdiction"); de Vries & Lowenfeld, *Jurisdiction in Personal Actions — A Comparison on Civil Law Views*, 44 IOWA L. REV. 306, 306-07, 344 (1959) [hereinafter de Vries & Lowenfeld]. The summary of judicial jurisdiction in civil law states that follows in the text draws on these two sources, as well as on Smit, *Common and Civil Law Rules of In Personam Adjudicatory Authority: An Analysis of Underlying Policies*, 21 INT'L & COMP. L.Q. 335 (1972); von Mehren, *Recognition and Enforcement of Foreign Judgments*, 167 Rec. des Cours 13, 62-65 (1981); and Weser, *Bases of Judicial Jurisdiction in the Common Law Countries*, 10 AM. J. COMP. L. 323 (1961).

[57] G. DELAUME, II TRANSNATIONAL CONTRACTS § 8.12 (1986); de Vries & Lowenfeld, *supra* note 56, at 306-07. *See* ZIVILPROZESSORDNUNG [ZPO] art. 16 (W. Ger.); U. DROBNIG, AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW 321 (2d ed. 1972); CODE DE PROCEDURE CIVILE [C. PR. CIV.] arts. 42, 43 (Fr.); CODICE DI PROCEDURA CIVILE [C.P.C.] art. 4(1) (Italy).

[58] G. DELAUME, II TRANSNATIONAL CONTRACTS § 8.12 (1986).

[59] C. PR. CIV. art. 46; ZPO art. 32.

laws differ, however, on whether a defendant has committed a tort within the jurisdiction if the plaintiff merely sustained injury within the jurisdiction.[60] Similarly, most civil law states claim jurisdiction over parties to contracts concluded or performed within the jurisdiction.[61]

In addition to these comparatively unexceptional jurisdictional bases, several civil law nations permit more expansive and controversial assertions of judicial jurisdiction. Articles 14 and 15 of the French Civil Code grant French courts jurisdiction over virtually any case in which the plaintiff or defendant is a French citizen;[62] no other relationship is required to vest a French court with jurisdiction if one of the parties is a French citizen. Similarly, the courts of Luxembourg and the Netherlands exercise jurisdiction over almost all cases involving nationals or residents.[63]

Reliance on a party's nationality is not the only way civil law nations make broad claims of judicial jurisdiction. German courts, for example, exercise judicial jurisdiction over non-German domiciliaries or residents that own property in Germany.[64] This jurisdictional base does not depend on the value or nature of the property and permits issuance of *in personam* judgments in any amount, even exceeding the value of the defendant's property in Germany.[65] Under this rule, "a Russian may leave his galoshes in a hotel in Berlin and

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[60] *Id.*

[61] ZPO art. 29; C. PR. CIV. art. 46; JUDICIAL CODE art. 635(3) (Belg.); C.P.C. arts. 4(2), 20.

[62] Article 14 of the French Civil Code provides: "An alien, even not residing in France, may be summoned before the French courts for the fulfillment of obligations contracted by him in France toward a French person; he may be brought before the French courts for obligations contracted by him in a foreign country toward French persons." C. PR. CIV. art. 14.

Article 15 of the French Civil Code provides: "A French citizen may be brought before a French court in respect of obligations contracted by him in a foreign country, even towards an alien." C. PR. CIV. art. 15. Articles 14 and 15 have been broadly construed by the French courts to reach virtually all "obligations," including those based on contract, quasi-contract, tort, and domestic relations. Cass. May 27, 1979, *Weiss v. Soc. Atlantic Electric*, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE [R.C.D.I.P] 113 (1971); Cass. Oct. 9, 1968, *Gagnepain v. Bourgier*, R.C.D.I.P. 316 (1969).

[63] LUXEMBOURG CIVIL CODE art. 14; DUTCH CODE OF CIVIL PROCEDURE art. 126(3).

[64] ZPO art. 23; U. DROBNIG, AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW 322-23 (2d ed. 1972); von Dryander, *Jurisdiction in Civil and Commercial Matters Under the German Code of Civil Procedure*, 16 INT'L LAW. 671 (1982).

[65] Nadelmann, *Jurisdictionally Improper Fora*, XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 321, 328-29 (1961).

may be sued in Berlin for a debt of 100,000 Marks because of presence of assets within the jurisdiction."[66] Danish, Swiss, and Swedish courts apply similar jurisdictional rules.[67]

Finally, several civil law countries have enacted "retaliatory" jurisdictional provisions. These provisions empower national courts to exercise jurisdiction over foreign persons in circumstances where the courts of the foreigner's home state would have asserted jurisdiction. For example, Belgian domiciliaries can bring actions in Belgian courts against foreign defendants if they can demonstrate that the courts of the foreigner's domicile would entertain a comparable action against a Belgian defendant.[68] Likewise, Italian courts will exercise jurisdiction over actions by Italian nationals against foreigners, provided that the foreigner's courts would entertain claims against Italians in like circumstances.[69] Austria and Portugal also have comparable retaliatory statutes.[70]

The judicial jurisdiction of many civil law members of the European Communities has been significantly affected by the Brussels Convention on the Jurisdiction of Courts and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.[71] The Convention sets out permissible bases of personal jurisdiction and, in addition, obliges member states to refrain from utilizing "exorbitant" jurisdictional devices against persons domiciled in other states belonging to the Convention.[72] The Convention's jurisdictional lim-

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[66] *Id.* at 329, paraphrasing Breit, *Ueber das Auslaenderforum*, 40 JURISTISCHE WOCHENSCHRIFT 636, 639 (1911). *See* RG Apr. 7, 1902, 51 RGZ 163; RG Jan. 19, 1911, 75 RGZ 147, 152; RG June 20, 1982, RGZ 322.

[67] LAW ON CIVIL PROCEDURE, art. 248 (Den.); Swiss Debt Collection Statute, SCHKG, SSBGV § 271. R. GINSBURG & A. BRUZELIUS, CIVIL PROCEDURE IN SWEDEN § 4.21.6 (1965).

[68] JUDICIAL CODE arts. 636, 638 (Belg.); G. DELAUME, II TRANSNATIONAL CONTRACTS § 8.08 (1986).

[69] C.P.C. art. 4(4). G. DELAUME, II TRANSNATIONAL CONTRACTS § 8.09 (1986).

[70] *See* Nadelmann, *supra* note 65, at 330-31.

[71] Brussels Convention, *supra* note 45. *See* Bartlett, *Full Faith and Credit Comes to the Common Market*, 24 INT'L & COMP. L.Q. 44 (1975); Herzog, *The Common Market Convention on Jurisdiction and the Enforcement of Judgments: An Interim Update*, 17 VA. J. INT'L L. 417 (1977) [hereinafter Herzog]; Kohler, *Practical Experience of the Brussels Jurisdiction and Judgments Convention in the Six Original Contracting States*, 34 INT'L & COMP. L.Q. 563 (1985).

[72] Brussels Convention, *supra* note 45, at art. 3. Article 3 specifically enumerates several improper jurisdictional bases, including those set forth in the following national codes: arts. 14 and 15 of the French Civil Code (giving French courts jurisdiction over any case involving a French national); § 23 of the German Code of Civil Procedure (giving German courts jurisdiction over any person owning any property in Germany); and art. 638 of the Belgian Code of Civil Procedure (giving Belgian courts jurisdiction over suits by domiciliaries against non-domiciliaries).

itations are inapplicable to persons domiciled in countries not party to the Convention, and non-domiciliaries continue to be subject solely to the national laws of Convention parties, including those containing exorbitant jurisdictional claims.[73]

The Convention also requires its members to recognize and enforce judgments rendered by the courts of other parties to the Convention.[74] To the chagrin of nations outside the European Communities, this obligation extends to judgments against non-EC-domicilaries, even if such judgments were based on exorbitant jurisdictional devices. Thus, German courts would be obliged to recognize and enforce a French judgment rendered against a United States citizen, even where the French judgment was based solely on an assertion of exorbitant jurisdiction under articles 14 and 15 of the French Civil Code. Commentators and government representatives from outside the European Communities have vigorously criticized this result.[75]

B. Judicial Jurisdiction Under International Law

During the 19th century international law was widely understood to limit assertions of judicial jurisdiction by national courts. As the discussion of international law in *Pennoyer v. Neff* illustrates, these limitations were stringent, sometimes purporting to restrict judicial jurisdiction to claims against persons or property located within national territory.[76] In the frequently quoted words of Joseph Story:

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[73] Brussels Convention, *supra* note 45, at arts. 3 & 4. Herzog, *supra* note 71, at 423.

[74] Brussels Convention, *supra* note 45, at arts. 5-30. The Convention contains narrow exceptions to the recognition and enforcement obligation which are based on public policy. Notwithstanding these exceptions, the Convention's recognition and enforcement requirements are at least as demanding as those of the Full Faith and Credit Clause.

[75] Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995, 1001 (1967) ("challenge[s] the friendly relations between nations built on respect for due process of law"); Pryles & Trindade, *The Common Market (E.E.C.) Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters — Possible Impact Upon Australian Citizens*, 48 AUS. L.J. 185 (1974); Smit, *The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?*, 17 VA. J. INT'L L. 443, 468 (1977) ("this discrimination is indefensible on any ground"); von Mehren, *Recognition and Enforcement of Foreign Judgments*, 167 Rec. des Cours 13, 101 (1981) ("single most regressive step that has occurred in international recognition and enforcement practice in this century").

[76] *See supra* notes 1-6 and accompanying text.

> Considered in an international point of view, jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory or upon the thing being within the territory; for otherwise there can be no sovereignty exerted. . . . no sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions.[77]

Numerous 19th century commentators endorsed Story's view that international law imposed restrictions on assertions of judicial jurisdiction.[78] Even more significantly, judicial decisions, especially in the United States and England, repeatedly embraced Story's view of international law, either in limiting their own jurisdiction, or in refusing to give effect to foreign judgments.[79] Likewise, a number of 19th century diplomatic protests were grounded on the notion that

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[77] J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 539 (7th ed. 1872).

[78] *E.g.*, F. SAVIGNY, PRIVATE INTERNATIONAL LAW §§ 355, 369-71 (W. Guthrie trans. 2d ed. 1880); E. VATTEL, THE LAW OF NATIONS 144-45 (C. Fenwick trans. 1758); G. VON MARTENS, LAW OF NATIONS 102-04, 105-06 (T. Bradford trans. 1795); F. WHARTON, CONFLICT OF LAWS §§ 646, 649, 715 (3d ed. 1905); H. WHEATON, ELEMENTS OF INTERNATIONAL LAW §§ 77, 111-14, 134-51 (1866). Story drew heavily from the work of the Dutch international law scholar Ulrich Huber and other continental sources. Nadelmann, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL HIST. 230 (1961); Yntema, *The Historical Bases of Private International Law*, 2 AM. J. COMP. L. 297 (1953) [hereinafter Yntema]. Huber's best-known work, *De Conflictu Legum*, articulated strict territorial views of both legislative and judicial jurisdiction. Lorenzen, *Huber's de conflictu legum*, 13 ILL. L. REV. 375, 390-91 (1919); Yntema, *supra*, at 306-07.

[79] Gurdyal Singh v. Rajah of Faridkote, [1894] A.C. 670 ("a decree pronounced in absentem by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity"); Schibsby v. Westenholz (1870), 6 Q.B. 155; D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 174 (1850) ("the well-established rules of international law regulating governments foreign to each other" restrict the exercise of judicial jurisdiction); Piquet v. Swan, 5 Mason 35 (1828) (Story, J.); De Witt v. Burnett, 3 Barb. 96 (N.Y. 1848); Wood v. Watkinson, 17 Conn. 500 (1846); Whittier v. Wendell, 7 N.H. 257 (1834); Hall v. Williams, 10 Me. 278, 287 (1833); Shumway v. Stillman, 6 Wend. 447, 453 (1831 N.Y.); Bissell v. Briggs, 9 Mass. 462, 468 (1813); Fenton v. Garlick, 8 Johns. 194, 197 (1811 N.Y.). It is clear from these decisions that many 19th century United States and English courts understood international law as imposing binding limitations upon the exercise of judicial jurisdiction by municipal courts. It is true that "international comity" or "private international law" was sometimes invoked as the justification for these rules, *see* Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 174-77 (1972-73) [hereinafter Akehurst], and that in some contexts the mandatory character of comity or private international law was different from that of public international law. *Id.* at 212-14, 226-27. In the specific field of judicial jurisdiction, however, 19th century courts in the United States and England clearly saw international law as imposing binding limitations on the exercise of judicial jurisdiction.

international law limited assertions of judicial jurisdiction by foreign courts.[80]

For much of this century, however, international law has devoted comparatively little attention to questions of judicial jurisdiction.[81] As a general rule, "the jurisdiction of courts in private controversies was not an important concern of public international law, even when its exercise had transnational implications."[82] More recently, this perspective has been questioned. Many authorities argue that today nations treat "assertions of jurisdiction that [are] considered extravagant as violations of international law."[83] The emergence of limitations derived from international law on exercises of judicial jurisdiction is best reflected in the ALI's Revised Restatement of Foreign Relations Law: "A state may, through its courts or administrative tribunals, exercise jurisdiction to adjudicate with respect to a person or thing, *if the relationship of the person or thing to the*

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[80] Jacob Idler v. Venezuela (1885), *reprinted in* J. MOORE, INTERNATIONAL ARBITRATIONS 3491, 3511-12 (1898) (citing with approval United States and English decisions recognizing international law limits on judicial jurisdiction); Case of Lund v. Ogden, 6 Op. Att'y Gen. 75, 76-77 (1853) (holding that exercise of judicial jurisdiction over United States resident by Texas would be "in violation of international comity, and a usurpation of general sovereignty, in derogation of the rights of co-equal States"); Letter Concerning the Schooner Daylight from Secretary of State Frelinghuyser to Mr. Morgan, dated May 17, 1884, *reprinted in* FOREIGN RELATIONS OF THE UNITED STATES 358 (1884) (quoting "uniform declaration of writers on public law" that "in an international point of view, either the thing or the person made the subject of jurisdiction must be within the territory, for no sovereignty can extend its process beyond its own territorial limits"); Letters from Secretary of State Fish to General Schenck, dated Nov. 8, 1873 and Mar. 12, 1875, *reprinted in* FOREIGN RELATIONS TO THE UNITED STATES 490 (1874) and *id.* at 592, 633 (1875) (protesting that exercise of judicial jurisdiction by British courts over civil disputes arising on high seas between sailors on United States vessels violates "rules of comity between nations and the principles of international law"). It was, of course, widely thought during the 19th century that international law limited both judicial and legislative jurisdiction in criminal cases, as well as legislative jurisdiction in civil cases. Akehurst, *supra* note 79, at 152-69. J. Moore, *Review of Principles, Legislations, Authorities, and Precedents Relating to Jurisdiction Over Offenses Committed by Foreigners Abroad, reprinted in* FOREIGN RELATIONS OF THE UNITED STATES 770 (1887).

[81] RESTATEMENT (REVISED) FOREIGN RELATIONS LAW part IV, chap. 2, Intro. Note (Tent. Draft. No. 6, Apr. 12, 1985) ("Until recently, public international law dealt with judicial jurisdiction only when exercised on government initiative"). *See also* De Winter, *Excessive Jurisdiction in Private International Law*, 17 INT'L & COMP. L.Q. 706, 706 (1968).

[82] RESTATEMENT (REVISED) FOREIGN RELATIONS LAW chap. 2, Intro. Note (Tent. Draft No. 6, Apr. 12, 1985).

[83] *Id. See also infra* note 86.

state is such as to make the exercise of such jurisdiction reasonable."[84]

The proposition that international law presently imposes a "reasonableness" requirement on the exercise of judicial jurisdiction is arguably somewhat overstated. No universal international agreement purports to limit assertions of personal jurisdiction by national courts. Likewise, assertions of exorbitant jurisdiction by national courts undercut suggestions that state practice clearly reflects a rule prohibiting such claims.[85] Nonetheless, the Revised Restatement's "reasonableness" test probably reflects an emerging consensus on international law in this field. State representatives, as well as commentators, have increasingly protested the exorbitant jurisdictional claims of other nations, and have sometimes articulated notions of jurisdictional restraint similar to the ALI's "reasonableness" rule.[86] National courts cite international law in refusing to recognize or enforce foreign judgments based on exorbitant jurisdictional claims.[87] Moreover, the

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[84] RESTATEMENT (REVISED) FOREIGN RELATIONS LAW § 421 (Tent. Draft No. 6, Apr. 12, 1985) (emphasis added). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24 (1971).

[85] *See supra* notes 62-67 and accompanying text.

[86] J. BEALE, CONFLICT OF LAWS § 1.10 (1935); De Winter, *Excessive Jurisdiction in Private International Law*, 17 INT'L & COMP. L.Q. 706, 712-13 (1968); Nadelmann, *Jurisdictionally Improper Fora*, in K. NADELMANN, A. VON MEHREN, & J. HAZARD, XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 321 (1961); Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561, 579-80 (1952) [hereinafter Stevenson]; Smit, *Common and Civil Law Rules of In Personam Adjudicatory Authority: An Analysis of Underlying Policies*, 21 INT'L & COMP. L.Q. 335, 344 (1972). In the words of one noted European commentator: "From the viewpoint of international law, is there any justification for all these rules of exceptional jurisdiction? The answer must be in the negative, considering that these provisions, arbitrarily based on either the nationality or the domicile of the plaintiff, lack valid legal foundation." Weser, *Bases of Judicial Jurisdiction in the Common Market Countries*, 10 AM. J. COMP. L. 323, 328 (1961). Foreign government protests over assertions of judicial jurisdiction are especially likely when courts would apply public-policy based statutes like the antitrust laws. *See In re* Westinghouse Uranium Contracts Antitrust Litig., 617 F.2d 1248 (7th Cir. 1980); Midland Bank plc. v. Laker Airways, slip op. (C.A. July 30, 1985) (Eng.); British Nylon Spinners Ltd. v. Imperial Chem. Indus. Ltd. [1953] 1 Ch. 19. Protests also occur in more ordinary commercial disputes. *See infra* note 87.

[87] Report of the European Advisory Committee Under the Chairmanship of Lord McNair on the Draft Restatement Relating to Jurisdiction, *reprinted in* International Law Association, *Report of the Fifty-First Conference (Tokyo)* 537, 542 (1965); Note from United States Department of State to Embassy of Greece, dated June 18, 1973, *reprinted in* Department of State, *Digest of United States Practice in International Law* 197-98 (1973); G. HACKWORTH, II DIGEST OF INTERNATIONAL LAW 172-73 (1941) (United States protest that Panama's exercise of judicial jurisdiction over Canal Zone residents violates United States sovereignty). *See* Stevenson, *supra*

European Communities' members have entered into an international agreement restricting assertions of judicial jurisdiction over domiciliaries of other member states.[88] Other countries have made efforts, sometimes successful, to draft international agreements codifying international jurisdictional principles.[89] These developments testify to an emerging principle of international law requiring assertions of judicial jurisdiction to be reasonable.

IV. FASHIONING A STANDARD OF JUDICIAL JURISDICTION FOR INTERNATIONAL CASES

As we saw in Part II, United States courts have failed to articulate a consistent standard of judicial jurisdiction in international cases. This Part addresses this failure and proposes a Due Process standard for application by United States courts in international cases.

The most frequent response of United States courts to jurisdictional challenges in international cases has been to apply Due Process standards developed in domestic cases.[90] The following section considers whether international cases possess special characteristics requiring application of a different Due Process standard. The section concludes that international assertions of jurisdiction do implicate special concerns that call for modification of traditional Due Process standards. The second section of this Part provides a sketch of an appropriate Due Process standard for judicial jurisdiction in international cases.

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note 86, at 579-80; von Mehren, *Enforcement of Foreign Judgments in the United States*, 17 VA. J. INT'L L. 401, 408-09 (1977). One English court has enjoined prosecution of a United States lawsuit, partially on the grounds that the United States court could not properly exercise jurisdiction over the defendant. Midland Bank plc v. Laker Airways, slip op. (C.A. July 30, 1985).

[88] *See supra* notes 45, 71-75 and accompanying text.

[89] Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, (adopted Apr. 25, 1966, effective Feb. 1, 1971). CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE, ACTES ET DOCUMENTS DE LA SESSION EXTRAORDINAIRE (1966); Proposed U.S. - U.K. Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, *reprinted in* 16 INT'L LEG. MAT. 71 (1977) (not ratified). In addition to the Brussels Convention, several bilateral and multilateral treaties limit the permissible bases of judicial jurisdiction that may be relied on by states party to the treaties. *E.g.*, Franco-Swiss Convention on Jurisdiction and Execution of Judgments of June 15, 1809; Convention Between the United States and the Swiss Confederation, art. VI, II Stat. 587, 591; Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), art. 28, 49 Stat. 3000, 3020 (1929).

[90] *See supra* notes 23-41 and accompanying text.

A. Special Considerations in International Cases

Assertions of judicial jurisdiction in international cases raise a number of concerns that are absent from purely domestic cases. This section first discusses three differences between domestic and international cases that, upon analysis, do not provide a legitimate basis for modifying traditional Due Process standards. The section then discusses two other differences that do provide sound justifications for treating judicial jurisdiction in international cases differently from domestic cases.

1. Inappropriate Reasons for Treating International Cases Differently From Domestic Cases

First, and most obviously, international cases involve defendants who are not citizens or residents of the United States. Arguably, United States constitutional limitations on the exercise of judicial jurisdiction over nonresident aliens should be less restrictive than the limits on jurisdiction over United States citizens or residents. This result might seek support in the diminished constitutional protections that nonresident aliens receive in various other contexts. For example, several decisions have held that nonresident aliens seeking admittance to the United States may not invoke the procedural protections of the Due Process Clause.[91] Similarly, other decisions have refused to subject the substantive requirements imposed on immigration by nonresident aliens to constitutional review.[92] Finally, reduced Due Process protection also might seek support in notions that the Constitution has no extraterritorial effect, at least for noncitizens.[93]

Although reduced constitutional protection may be appropriate for nonresident foreigners in some instances, it is plainly inappropriate when determining limits on the exercise of judicial jurisdiction. As most courts have concluded,[94] the full protection of the Due Process

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[91] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Nishimura Ekiu v. United States, 142 U.S. 651 (1892).

[92] Fiallo v. Bell, 430 U.S. 787 (1977); Galvan v. Press, 347 U.S. 522 (1954); United States *ex rel.* Knauf v. Shaughnessy, 338 U.S. 537 (1950); Bugajewitz v. Adams, 228 U.S. 585 (1913).

[93] *Fong Yue Ting*, 149 U.S. at 738. *See* RESTATEMENT (REVISED) FOREIGN RELATIONS LAW § 721 and comment b, § 722 (Tent. Draft No. 6, Apr. 12, 1985).

[94] *E.g.*, *Wells Fargo & Co.*, 556 F.2d at 416 n.7; Velandra v. Regie Nationale Des Usines Renault, 336 F.2d 292, 294 n.7 (6th Cir. 1964). *See also* Russian Volunteer Fleet v. United States, 282 U.S. 481, 489, 491-92 (1931) (aliens entitled to protection

Clause should be available to foreign citizens summoned to defend themselves in United States courts. It would be unfair and ironic to hale an alien into an unfamiliar United States court, forcing him to litigate according to our procedures and laws, yet deny him the protections of the Due Process Clause on the grounds that he is an alien.[95]

A second difference between international and domestic cases that may bear on judicial jurisdiction involves the recognition and enforcement of United States judgments by foreign courts. In the domestic context the Constitution's Full Faith and Credit Clause generally compels recognition of judgments issued in the courts of sister states.[96] In the international context judgments rendered by United States courts are given considerably less deference than provided by the Full Faith and Credit Clause. While practice varies between countries, foreign courts often recognize United States judgments only in limited circumstances.[97] Most important, many foreign courts will refuse to

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of fifth amendment); Watts, Watts & Co. v. Unione Austriaca de Navigazione, 248 U.S. 9 (1918) ("The respondent, although an alien enemy, is, of course, entitled to defend before a judgment is entered"); Sardino v. Federal Reserve Bank, 361 F.2d 106, 111 (2d Cir. 1966).

[95] Cases involving constitutional limits on assertions of jurisdiction *requiring* foreigners to appear in the United States are fundamentally different from those involving refusals to admit foreigners *seeking* entry into the country. Foreigners who are required to defend themselves in our courts are better analogized to resident aliens, who do enjoy significant constitutional protections. Abel v. United States, 362 U.S. 217 (1960); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Carlson v. Landon, 342 U.S. 524 (1952). *See also* RESTATEMENT (REVISED) FOREIGN RELATIONS LAW § 722 (Tent. Draft No. 6, Apr. 12, 1985) ("An alien *in the United States* is entitled to the guarantees of the Constitution of the United States, other than those expressly reserved for citizens") (emphasis added). Indeed, resident aliens have sometimes been treated as a suspect class for purposes of the Equal Protection Clause. Examining Bd. of Eng'rs. v. Flores de Otero, 426 U.S. 572 (1976) (invalidating state exclusion of resident aliens from practice as licensed civil engineers); *In re* Griffiths, 413 U.S. 717 (1973) (invalidating state exclusion of resident aliens from law practice); Sugarman v. Dougall, 413 U.S. 634 (1973) (invalidating state statute barring resident aliens from state civil service); Graham v. Richardson, 403 U.S. 365 (1971) (invalidating state statute denying welfare benefits to resident aliens).

[96] Estin v. Estin, 334 U.S. 541 (1948); Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813). The Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, does not compel states to recognize or enforce judgments rendered by a court that lacked jurisdiction; the clause does, however, compel states to give res judicata effect to the jurisdictional determinations of sister-state's courts, provided that the defendant appeared in the sister state's proceedings. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931).

[97] N.Y. State Bar Ass'n, Report and Proposed Resolution of Committee on

recognize United States judgments based on assertions of jurisdiction under long-arm statutes.[98]

Some commentators have reasoned that the difficulties United States plaintiffs face in enforcing United States judgments against foreign defendants argues for more restrictive limits on judicial jurisdiction in international cases.[99] The better view, however, is that foreign non-recognition of United States judgments does not point decisively towards any special Due Process treatment of judicial jurisdiction in international cases. It is unclear how frequently foreign recognition of judgments is necessary, even in international cases. Some foreign defendants may voluntarily pay judgments rendered against them, perhaps because they wish to continue or expand their United States business activities. Other defendants may have assets in the United States, may bring assets here in the future, or may have assets in countries that will liberally enforce United States judgments, even if rendered on the basis of long-arm jurisdiction.[100] For these reasons, there is no way to predict accurately whether a particular plaintiff will actually need to enforce a long-arm judgment rendered in a United States court, and if so whether he will be successful. Without these determinations, however, a rule restricting judicial jurisdiction in international cases on the ground that resulting judgments may be unenforceable, would have unjustifiable effects. Such a rule would foreclose litigation in the United States by some plaintiffs who could collect on judgments they obtained.[101] In addition, the rule would

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International Law (1972) ("non-recognition of United States' judgments abroad is the rule rather than the exception"); Bertram-Nothnagel, *Enforcement of Foreign Judgments and Arbitral Awards in West Germany*, 17 VA. J. INT'L L. 385 (1977); Blom, *The Enforcement of Foreign Judgments in Canada*, 57 OR. L. REV. 399, 409-17 (1978); Carl, *Recognition of Texas Judgments in Courts of Foreign Nations — And Vice Versa*, 13 HOUS. L. REV. 680, 686-87 (1976). *See generally* Council of Europe, *The Practical Guide to the Recognition and Enforcement of Foreign Judicial Decisions in Civil and Commercial Law* (1975).

[98] von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and Suggested Approach*, 81 HARV. L. REV. 1601, 1610-29 (1968).

[99] *See, e.g.*, von Mehren & Trautman, *supra* note 1, at 1126-27; Note, *Obtaining Personal Jurisdiction Over Alien Corporations — A Survey of U.S. Practice*, 9 VAND. J. TRANS. L. 345, 372-73 (1976).

[100] This will become even more likely if the United States concludes enforcement of judgments treaties with its trading partners. *See* H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 77-78 (1986) and *infra* note 122.

[101] A United States plaintiff's decision that he will not need to enforce a United States judgment against a foreign defendant, or if so, that he will be successful in doing so, would probably be fairly accurate in many cases. Both United States

encourage foreign states to limit recognition of United States judgments, and penalize nationals of countries with liberal recognition policies. Finally, if a particular assertion of United States long-arm judicial jurisdiction over foreigners is regarded as fair and reasonable by United States courts and legislatures, it would be anomalous to forego such assertions *solely* because foreign states took a different view.

A third way in which assertions of judicial jurisdiction in international cases differ from those in domestic cases involves the burden of litigation. In general, litigation by a foreign defendant in international cases involves comparatively greater hardships than litigation by a United States resident in another state or region of the United States. In many international cases one party will be required to follow procedural rules that differ markedly from those in its home jurisdiction.[102] In addition, one litigant will generally be a significantly

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plaintiffs and their counsel have substantial incentives to avoid wasting resources obtaining unenforceable judgments against foreign defendants.

Courts are not limited to ad hoc approaches to the enforcement of judgments problem. One might adopt a general rule requiring an especially close nexus between foreign defendants and the forum on the theory that this would adjust the reach of United States jurisdiction to reflect the uncertainty of foreign enforcement, thus reducing unproductive litigation. This approach, however, would be unworkable. First, foreign states' rules regarding non-enforcement of United States judgments often do not turn solely on whether the judgment was based on an "exorbitant" jurisdictional claim. Because many foreign states will refuse to enforce United States judgments even where United States jurisdiction was plainly proper under international law, restricting United States jurisdiction in international cases would have only a marginal effect on the enforceability of United States judgments. Second, the need for foreign enforcement of United States judgments against foreign defendants will often turn on practical issues, *e.g.*, future presence of assets in the United States, unrelated to the closeness of the defendant's connections to the forum. Third, foreign countries have very different rules regarding enforcement of United States judgments. For these reasons, it would be difficult to devise a general rule of jurisdiction over foreigners that would be well-tailored to deal with the non-enforcement of United States judgments by foreign states. If a number of foreign states, however, only refused to recognize United States judgments when United States courts had exceeded international law limitations on judicial jurisdiction, then a general rule requiring jurisdiction over foreigners to be consistent with international law would be a useful general response to the enforcement of judgments problem. As we have seen, however, the problem is much broader than this.

[102] The procedural differences between United States litigation and that in other countries have been extensively documented. *E.g.*, M. GLENDON, M. GORDON & C. OSAKWE, COMPARATIVE LEGAL TRADITIONS 167-92 (1985); Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985). The most important differences involve broad discovery in the United States, greater reliance on the adversary system, trial by jury, different approaches to fee shifting and contingent fee arrangements, the relatively greater size of United States damage awards, and different choice-of-law rules.

greater distance from the forum than in purely domestic cases, and time differences, language barriers, mail delays, transportation difficulties, and other logistical obstacles which impede efficient communications will create further hardships. Furthermore, while the United States is a relatively homogeneous legal, economic, cultural, social and political unit, the domestic institutions and attitudes within this country often differ markedly from those in foreign states.[103] Litigation in this unfamiliar environment often will create a host of hardships not encountered in the domestic context. Finally, local decision-makers may hold prejudices or parochial biases against foreign litigants not held against persons from other sections of the nation.

In virtually all international cases, an increased litigation burden will exist for the parties regardless of the forum. As a result, resolving personal jurisdiction disputes usually will not involve avoiding litigation burdens, but instead, deciding which party will bear the unavoidable inconvenience of litigating abroad. Moreover, as one court observed, "many of the inconvenience burdens in [international cases] are symmetrical."[104] In general, both parties would suffer roughly the same level of inconvenience if forced to litigate abroad.

The implications of the differences in litigation burdens in international cases are unclear. As we have seen, prevailing Due Process doctrine teaches that the "primary concern" of the Due Process Clause is the "burden on the defendant."[105] The "plaintiff's interest in obtaining convenient and effective relief" is also a "relevant factor,"[106] but current doctrine places greater weight on protecting defendants from burdensome litigation than on ensuring plaintiffs a convenient forum.[107] In the words of one court of appeals, "the law of personal jurisdiction . . . is asymmetrical. The primary concern is for the burden on a defendant."[108]

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[103] United States internal homogeneity, like that of other states, results in part from the absence of domestic barriers to the free movement of persons, goods, services, and information, A. EHRENZWEIG, CONFLICT OF LAWS 3-16 (1962); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 246-48, as well as from our shared linguistic, cultural, religious and political heritages.

[104] *Ins. Co. of North America*, 649 F.2d at 1272.

[105] *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

[106] *Id.*

[107] *See supra* note 17 for a review of the reasons for giving greater weight to the defendant's inconvenience.

[108] *Ins. Co. of North America*, 649 F.2d at 1272.

Under this view of the Due Process Clause, assertions of judicial jurisdiction in international cases generally should be more restrained than such assertions in purely domestic cases. Since litigation burdens are greater in international cases, and since the burden on the defendant is the primary concern of Due Process analysis, assertions of United States jurisdiction will more frequently impose unacceptable burdens on foreign defendants than on domestic defendants.[109] This result does not appear to turn on a special constitutional standard for judicial jurisdiction in international cases. Instead, more restrained jurisdictional claims arguably would follow from the fact that litigation burdens in international cases are, as a factual matter, usually more significant than those in domestic cases, and from the significance that existing Due Process analysis places on burdens imposed on defendants.

On the other hand, it is at least arguable that existing Due Process formulations do not take adequate account of the greater hardships that exist in the international context. Current Due Process analysis generally permits jurisdiction when the defendant's contacts with the forum are "such that he should reasonably anticipate being haled into court there."[110] Because of its focus on foreseeability and prelitigation contacts with the forum, this formulation may not give adequate weight to the greater litigation burdens that exist in international cases. The better view, however, is that current Due Process analysis is sufficiently flexible to take account of the comparatively greater litigation burdens on private parties in international cases. The Supreme Court's *World-Wide Volkswagen* decision, as well as better-reasoned lower court decisions, appear to take the defendant's litigation burdens into account in deciding foreseeability questions.[111] Likewise, the lack of suggestions for a special Due Process standard

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[109] Some lower courts, however, appear to adopt a more symmetrical approach to litigation burdens in Due Process cases. *E.g.*, Neiman v. Rudolf Wolff & Co., Ltd., 619 F.2d 1189, 1195 n.8 (7th Cir. 1980). These courts typically compare the respective litigation burdens that the plaintiff and defendant would bear in different potential forums. Jurisdiction is likely to be found if the plaintiff's inconveniences in litigating in a different forum exceed the defendant's inconvenience in litigating in the plaintiff's chosen forum. Application of this Due Process standard in international cases would probably result in assertions of judicial jurisdiction much like assertions of jurisdiction in purely domestic cases.

[110] *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

[111] *Id. See supra* note 11 and accompanying text. Prelitigation contacts with the forum and foreseeability may often accurately reflect the inconvenience that litigating in the forum will cause the defendant.

for domestic cases involving great litigation inconvenience suggests that existing Due Process formulations are able to deal with varying levels of litigation burdens. In short, although current Due Process analysis suggests that jurisdiction in international cases should be more restrained than in domestic cases because of the increased litigation burdens faced by foreign defendants, existing formulations appear able to produce the requisite degree of restraint.[112]

2. *Reasons for Treating International Cases Differently From Domestic Cases*

There are, however, legitimate reasons for taking different approaches to the exercise of judicial jurisdiction in domestic and international cases. Treating jurisdiction differently in domestic and international cases would be entirely consistent with existing United States constitutional and common law doctrine in a number of other

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[112] There may be situations in which a defendant would suffer significantly less inconvenience litigating in the plaintiff's forum than the plaintiff would in the defendant's forum. It is appropriate to take some account of such differences in litigation burdens. "A jurisdiction analysis resting on the principle of relative party ability to bear litigational burdens considers the ability not of the parties actually involved in the litigation but of the *class* of plaintiffs or defendants to which the parties belong." von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279, 313 (1983). This focus on the parties' class is required by "considerations of administrability, planning and predictability." *Id.* For example, litigation between consumers and some multistate business enterprises may involve asymmetrical litigation burdens. This has led some commentators and courts to suggest permitting more expansive jurisdiction in cases brought by localized consumers against multistate defendants. *Id.* at 313-22; *Copiers, Typewriters, Calculators, Inc.*, 576 F. Supp. at 320-21. This principle should generally apply only when the defendant's multistate activities actually affect the litigation burdens the defendant would bear when litigating in the plaintiff's forum. This usually would be the case only where the defendant's multistate activities include contacts with the forum state. In this class of cases, however, existing Due Process analysis would presumably permit jurisdiction in many situations.

In addition, there may be situations in which the increased burdens that a plaintiff would encounter in foreign litigation have the effect of denying him any remedy. As the Supreme Court hinted in *Hall*, 466 U.S. at 408 n.13, the absence of any alternative forum would argue strongly for permitting assertion of United States jurisdiction on the basis of less substantial contacts than would ordinarily be the case. Before accepting claims of this sort, which may have intuitive appeal to United States readers, *cf.* Weinberg, *supra* note 29, at 932-34 (speculating about inadequacy of foreign forums), plaintiffs should be obliged to make a clear showing that suit in a foreign forum would in fact provide no meaningful relief. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981) (only "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight" in *forum non conveniens* analysis).

areas.[113] As Judge Jessup observed in the International Court of Justice's *Barcelona Traction* decision, jurisdictional rules that are "valid enough for interstate conflicts within the constitutional system of the United States, may be improper when placing a burden on international commerce."[114]

The first reason for different treatment of judicial jurisdiction in international cases is that assertions of jurisdiction over foreigners can affect United States foreign relations in ways that domestic claims of jurisdiction cannot.[115] The exercise of judicial jurisdiction over foreign defendants by United States courts plainly implicates the sovereign interests of foreign states. In the words of one English court, "service out of the jurisdiction at the instance of our courts is necessarily *prima facie* an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected."[116] As a result, assertions of United States judicial jurisdiction over foreigners can readily arouse foreign resentment.[117] This risk is heightened because, although United States principles of judicial jurisdiction are generally consistent with international law,[118] they are

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[113] *See, e.g., Piper Aircraft Co.*, 454 U.S. at 255-56. (foreign plaintiff's choice of forum entitled to less deference in *forum non conveniens* analysis than domestic plaintiff's choice); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (interstate choice of law principles require modification in international context); Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CALIF. L. REV. 1599 (1966) (interstate choice of law principles require modification in international context); von Mehren & Trautman, *supra* note 98, at 1607 ("We cannot automatically derive solutions for international practice from decisions respecting recognition of judgments of sister-states"). *See also infra* note 123.

[114] Barcelona Traction, Light & Power Co. (Belg. v. Spain) 1970 I.C.J. 3, 164 (1970) (separate opinion of Jessup, J.). *See also Shaffer*, 433 U.S. at 218 (Stevens J., concurring) (judicial jurisdiction of United States courts in the international context may be different from that in the domestic context).

[115] It is entirely appropriate for courts to take foreign relations concerns into account when considering application of the Due Process Clause to assertions of judicial jurisdiction. The act of state doctrine, which also reflects a constitutional limitation on the jurisdiction of United States courts, is based in part on foreign relations concerns. *Sabbatino*, 376 U.S. at 398. Moreover, the Due Process Clause has long been interpreted as reflecting federalism concerns, *World-Wide Volkswagen Corp.*, 444 U.S. at 286, at least in part. Ins. Co. of Ireland, Ltd. v. Compagnie de Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982). *See also infra* note 123.

[116] *George Monro, Ltd.*, [1944] 1 K.B. at 437 (emphasis added).

[117] Indeed, United States claims of judicial jurisdiction have provoked foreign resentment on a number of occasions in the past. *See supra* notes 86-87.

[118] RESTATEMENT (REVISED) FOREIGN RELATIONS LAW § 421 Reporter's Note 2 (Tent. Draft No. 6, Apr. 12, 1985). *See also* Brussels Convention, *supra* note 45 (enumerating acceptable bases of jurisdiction for use among EC states).

not always so.[119] Moreover, the imprecision of the international law requirement that assertions of judicial jurisdiction be "reasonable" creates further possibilities for dispute.

Because exorbitant assertions of judicial jurisdiction by United States courts may offend foreign sovereigns, these claims can provoke diplomatic protests,[120] trigger commercial or judicial retaliation,[121] and threaten friendly relations in unrelated fields. Equally important, exorbitant jurisdictional claims can frustrate diplomatic initiatives by the United States, particularly in the private international law field. Most significantly, these claims can interfere with United States efforts to conclude international agreements providing for mutual recognition and enforcement of judgments or restricting exorbitant jurisdictional claims by foreign states.[122]

An appropriate way to deal with the risk that assertions of judicial jurisdiction by United States courts will interfere with the nation's foreign relations is to subject these claims to heightened constitutional scrutiny. As discussed in detail below, heightened scrutiny would place a check on exorbitant jurisdictional claims, thereby reducing the risks of offending foreign sovereigns and interfering with United States foreign relations. This approach to judicial jurisdiction finds strong support in constitutional and common law principles in other

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[119] Not all United States bases of personal jurisdiction are consistent with international law. *See infra* notes 145-57 and accompanying text discussing "tag" jurisdiction.

[120] *See supra* notes 80, 86 and 87.

[121] *See infra* notes 137-39.

[122] Indeed, exorbitant claims of personal jurisdiction by United States courts already helped quash one important diplomatic initiative. During the 1970's, the United States initiated negotiations on a proposed U.S.-U.K. Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, *reprinted in* 16 INT'L LEG. MAT. 71 (1977). *See* North, *The Draft U.K./U.S. Judgments Convention: A British Viewpoint*, 1 N.W. J. INT'L L. & BUS. 219 (1979); Smit, *The Proposed United States-United Kingdom Convention on Recognition of Judgments: A Prototype for the Future?*, 17 VA. J. INT'L L. 443 (1977). The Convention would have provided for more liberal recognition and enforcement of United States and United Kingdom judgments in the two countries' courts. Even more important, the Convention would have restricted British courts' enforcement of foreign judgments against United States companies based on exorbitant jurisdictional claims. This would have reduced the potentially serious adverse consequences for United States companies of the Brussels Convention, *see supra* note 75 and accompanying text, which was a principal objective of the United States negotiators. Unfortunately, the United Kingdom broke off consideration of the Convention after British industry protested allegedly exorbitant jurisdictional claims by United States courts and argued that the Convention would require recognition of these claims by British courts. North, *supra*, at 233-38 (discussing United Kingdom opposition to the proposed Convention).

international contexts, where heightened scrutiny is used to minimize the risk that United States courts will infringe foreign sovereign interests or interfere with national foreign relations.[123]

Heightened scrutiny of state court jurisdictional claims also is called for by the Constitution's stringent limitations on the role of individual states in foreign affairs. Put simply, the Constitution prohibits any "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and to Congress."[124] "[I]n respect of our foreign relations generally, state lines disappear. As to such purposes the State . . . does not exist."[125] When state courts assert jurisdiction over foreign nationals residing abroad, the possibility of state interference with the nation's foreign affairs arises; when state courts make, or are perceived abroad to make,[126] exorbitant jurisdictional assertions, the possibility of interference becomes a very real risk. Heightened constitutional scrutiny of jurisdiction over foreigners would reduce the likelihood of exorbitant state court jurisdictional claims, and thus, the risk of state interference in national foreign affairs.

In addition to foreign relations considerations, heightened Due Process scrutiny in international cases also is required by the character

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[123] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 105 S. Ct. 3346 (1985) (enforcing agreement to arbitrate antitrust claims arising from international contract, while assuming unenforceability of same agreement in domestic context); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (enforcing agreement to arbitrate securities law claims arising from international contract, despite unenforceability in domestic context); *Sabbatino*, 376 U.S. at 398 (act of state doctrine bars inquiry into certain foreign public acts); Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959) (using choice of law and comity principles to moderate application of Jones Act to foreigners); Lauritzen v. Larsen, 345 U.S. 571 (1953) (using choice of law and comity principles to moderate application of Jones Act to foreign persons); Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (1982) (providing immunity for certain foreign government conduct); RESTATEMENT (REVISED) FOREIGN RELATIONS LAW § 403 (Tent. Draft No. 6, Apr. 12, 1985) (legislative jurisdiction subject to rule of reason). *See also* Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1333 (9th Cir. 1984) (requiring heightened scrutiny of assertions of judicial jurisdiction in international cases); *Ins. Co. of North America*, 649 F.2d at 1272 (requiring heightened scrutiny of assertions of judicial jurisdiction in international cases).

[124] Zschernig v. Miller, 389 U.S. 429, 432 (1968). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 83 (1971) ("The power of a State of the United States to exercise judicial jurisdiction in violation of international law may be limited by the supremacy clause").

[125] United States v. Belmont, 301 U.S. 324, 331 (1937).

[126] "It is important in the relations of this country with other nations that any possible appearance of injustice or tenable ground for resentment be avoided." ALI, *Study of the Division of Jurisdiction Between State and Federal Courts* 108 (1969).

of federal powers over foreign commerce.[127] Because "[f]oreign commerce is preeminently a matter of national concern,"[128] state legislation affecting foreign commerce is generally subject to more searching constitutional scrutiny than legislation affecting interstate commerce.[129] In *Japan Line, Ltd. v. County of Los Angeles*, for example, the Court struck down a local tax on containers used in foreign commerce, reasoning that the levy "cannot withstand scrutiny under . . . the additional tests that a tax on foreign commerce must satisfy."[130]

Although the Supreme Court has recognized the need for heightened constitutional scrutiny of state legislation affecting foreign commerce, it has not articulated a precise standard for this scrutiny. It has, however, focused attention on several specific aspects of state regulations affecting foreign commerce. By giving special attention to these issues, the Court has sought to reduce the risks of disrupting commercial relations or provoking foreign commercial retaliation, both of which are present in the international, but not the domestic, context.[131]

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[127] "Congress shall have power . . . To regulate Commerce with foreign nations." U.S. CONST. art. I, § 8.

[128] Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979). Federal powers to regulate foreign commerce are broader than the same powers over interstate commerce. In *Japan Line* the Court observed: "Although the Constitution, art. I, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several states' in parallel phrases, there is evidence that *the Founders intended the scope of the foreign commerce power to be the greater.*" *Id.* at 448 n.12 (emphasis added). *See* Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941). The Court's view of the foreign commerce power has not always been so unequivocal. Pittsburgh & S. Coal Co. v. Bates, 156 U.S. 577, 587 (1895); License Cases, 46 U.S. (5 How.) 590, 675 (1847).

[129] Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 185 (1983) ("Given that [appellant's business] is international . . . we must subject this case to the additional scrutiny required by the Foreign Commerce Clause"); Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 443 (1980); *Japan Line, Ltd.*, 441 U.S. at 446, 451 ("For these reasons, we believe that an inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce"); *Michelin Tire Corp.*, 423 U.S. at 283-86 (1976).

[130] *Japan Line, Ltd.*, 441 U.S. at 451. Indeed, putting constitutional interpretation aside, United States courts have frequently established special rules applicable to international commercial activities and foreign commerce. *See supra* note 123.

[131] The Commerce Clause, the Full Faith and Credit Clause, and related constitutional provisions, generally forbid states of the Union from retaliating against one another in commercial matters. "In the Commerce Clause, [the Framers] provided

First, the Court has shown special concern over state legislation that would be likely to provoke retaliatory commercial measures by foreign states.[132] Second, the Court has given particular attention to avoiding the unfairness to private parties that might result from conflicting or overreaching regulation of foreign commerce by different nations.[133] Finally, the Court has used heightened constitutional scrutiny to ensure that state regulation of foreign commerce is consistent with federal policy and international practice.[134] As we will see, all of these concerns are present when United States courts assert personal jurisdiction over foreign defendants.

Heightened constitutional scrutiny of assertions of judicial jurisdiction is necessary because these claims, even more than the imposition of taxes in *Japan Line*, can impose significant burdens on foreign commerce. As we already have seen, litigation burdens are usually substantially greater in international cases than in domestic cases.[135] Similarly, foreigners often will be unfamiliar with the jurisdictional devices used by United States courts, and thus surprised by the need to defend in a United States forum. Because certainty and predictability are especially important in international commercial

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that the Nation was to be a common market, a 'free trade unit' in which the States are debarred from acting as separable economic entities." *World-Wide Volkswagen Corp.*, 444 U.S. at 293.

[132] *Container Corp.*, 463 U.S. at 194-96; *Japan Line, Ltd.*, 441 U.S. at 450-51, 453 n.18; Chy Lung v. Freeman, 92 U.S. 275 (1875). *See also Lauritzen*, 345 U.S. at 582 ("in dealing with international commerce we cannot be unmindful of the necessity for mutual forebearance if retaliations are to be avoided"). Concern that the state conduct may provoke foreign retaliation is motivated in part by fears that the ability of the federal judiciary, or the federal political branches, to prevent retaliatory conduct in international matters, is much more limited than on an interstate level. The Court also has emphasized that foreign retaliatory measures typically would be directed at the United States as a whole, rather than at particular states of the Union. *Chy Lung*, 92 U.S. at 279 ("Upon whom would such a claim [by a foreign state] be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States"). This is not always the case. The United Kingdom recently enacted retaliatory unitary taxation legislation that penalized private companies with close connections to those states of the Union that employ unitary taxation formulas. *See* Born, *Recent British Responses to the Extraterritorial Application of United States Law*, 26 VA. J. INT'L L. 91, 101-06 (1985).

[133] *Mobil Oil Corp.*, 445 U.S. at 446-47; *Japan Line, Ltd.*, 441 U.S. at 447-48; *Cf.* Societe Int'l v. Rogers, 357 U.S. 197 (1958) (reversing trial court's sanctions because noncompliance with discovery order was required by foreign law).

[134] *Container Corp.*, 463 U.S. at 193-97; *Japan Line, Ltd.*, 441 U.S. at 451-54.

[135] *See supra* notes 102-04 and accompanying text.

matters,[136] this can have particularly severe consequences for foreign commerce.

Heightened scrutiny of assertions of judicial jurisdiction by state courts also is necessary because these claims are likely to provoke retaliatory actions by foreign states.[137] "Conduct that is overly self-regarding with respect to the taking and exercise of jurisdiction can disturb the international order and produce political, legal, and economic reprisals."[138] Indeed, exorbitant jurisdictional claims by United States courts automatically trigger foreign jurisdiction over United States nationals by countries that have enacted retaliatory jurisdictional statutes.[139]

For these reasons, the general rule that "a more extensive constitutional inquiry is required" in cases that involve "Congress' power to 'regulate commerce with foreign nations,'"[140] is fully applicable to assertions of judicial jurisdiction over foreign entities. Given the focus of existing constitutional limitations on state interference with foreign relations and commerce, heightened scrutiny is particularly appropriate when state courts assert jurisdiction over foreigners.

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[136] *Mitsubishi Motors Corp.*, 105 S. Ct. at 3355; The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13-14 (1972).

[137] The significant risk of retaliation in the field of jurisdiction is frequently acknowledged. SZASZY, INTERNATIONAL CIVIL PROCEDURE 311 (1967); Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995, 1001, 1021 (1967) ("the proper answer to power politics is retaliation"); Smit, *The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future*, 17 VA. J. INT'L L. 443, 468 (1977); von Mehren, *Recognition and Enforcement of Foreign Judgments*, 167 Rec. des Cours 13, 100 (1981).

[138] von Mehren & Trautman, *supra* note 1, at 1127.

[139] As discussed previously at *supra* notes 68-70 and accompanying text, a number of foreign nations have enacted "retaliatory" jurisdictional provisions. These provisions grant local courts personal jurisdiction over foreign defendants, including United States citizens, in circumstances where the foreigner's home courts would exercise jurisdiction over a local. Most states that have enacted retaliatory jurisdictional provisions have not also enacted exorbitant jurisdictional statutes. *See* G. DELAUME, II TRANSNATIONAL CONTRACTS § 8.08 (1986).

European and other states also might be moved to enact additional, more severe retaliatory legislation if United States courts make repeated assertions of exorbitant jurisdiction. Retaliatory legislation already has been enacted in the United Kingdom to counter what is perceived as excessively broad claims of jurisdiction to tax by individual states, *see* Born, *supra* note 132, at 91, and improper extraterritorial applications of United States substantive laws. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257 (1981).

[140] *Japan Line, Ltd.*, 441 U.S. at 446.

Nonetheless, equally rigorous scrutiny is generally called for when federal courts assert jurisdiction over foreign entities. As we have seen, many of the reasons for applying heightened scrutiny to state jurisdictional claims are equally applicable to jurisdictional claims by federal courts.[141] Furthermore, heightened scrutiny would be consistent with notions of restraint in related issues involving foreigners in federal courts.[142]

B. A Standard of Judicial Jurisdiction

1. The Level of Due Process Scrutiny in International Cases

The contours of heightened scrutiny of judicial jurisdiction in international cases are dictated by the justifications for such scrutiny: preventing friction with foreign sovereigns, avoiding foreign retaliation or interference with United States foreign relations, and minimizing unfairness to persons engaged in foreign commerce. To accomplish these objectives, the Due Process Clause should impose two related requirements on assertions of judicial jurisdiction in international cases. First the Clause should require United States courts to use particular caution in asserting long-arm jurisdiction over foreigners; second, it should require closer connections between the forum and the defendant than are necessary in domestic cases.

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[141] Foreign relations and foreign commerce interests are arguably matters of legislative concern to Congress, but not of constitutional relevance in interpreting the Due Process Clause. As noted earlier, this argument is rebutted by the significant role that foreign relations and foreign commerce concerns have played in numerous other fields of constitutional analysis. *See supra* notes 113, 115 and 123. Of course, if Congress enacted a statute bearing on the degree of restraint United States federal courts should use in asserting judicial jurisdiction over foreigners, then an analysis of legislative intent would replace or supplement analysis calling for heightened constitutional scrutiny. When the federal political branches exercise their authority over foreign affairs and foreign commerce by granting jurisdiction, this judgment obviates the need for concern about judicial interference with foreign relations or commerce. *Container Corp.*, 463 U.S. at 194 (1983). Typically, however, legislative guidance has not addressed personal jurisdiction issues with sufficient specificity to inform general Due Process analysis. The congressional enactment most relevant to the Due Process limits on personal jurisdiction over foreign defendants is the Foreign Sovereign Immunities Act of 1976, providing for personal and subject-matter jurisdiction over foreign states and their instrumentalities. 28 U.S.C. §§ 1602-11 (1982). The Act limits United States jurisdiction to cases arising from conduct with a tight nexus to the United States, *id.* § 1605; Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490 (1983). This limitation indirectly suggests that similar restraint would be appropriate in other international cases.

[142] *See supra* notes 115, 123 and accompanying text.

In the words of one English judge, "as a matter of international comity it seems to me important to make sure that no . . . service [outside the jurisdiction] shall be allowed unless it is clearly within both the letter and spirit" of applicable English jurisdictional statutes.[143] Or, as Justice Harlan explained, "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[144] As both comments suggest, before asserting jurisdiction over foreign persons, United States courts should give careful scrutiny to the defendant's relationship to the forum, paying especial attention to jurisdictional claims likely to offend foreign sovereigns.

One benefit of heightened constitutional scrutiny is that it would reduce the risk of exorbitant United States jurisdictional claims caused by misapplications of personal jurisdictional standards. Because the consequences of exorbitant jurisdictional claims in international cases are more serious than in domestic cases, it is appropriate to use greater care to ensure that such claims are not made. By focusing on offense to foreign sovereigns, the suggested analysis also would seek to reduce the likelihood that United States jurisdictional assertions would be inconsistent with emerging norms of international law and thus objectionable to foreign states. For example, under the suggested analysis, the Due Process Clause would likely preclude the exercise of "tag" jurisdiction in international cases based on a foreigner's fleeting presence in the forum. Although jurisdiction based on transitory presence within the forum is often permitted in domestic cases,[145] it is inconsistent with emerging principles of international law. Moreover, in most commentator's eyes, "tag" jurisdiction is inconsistent with the premises underlying *International Shoe*'s minimum contacts test.[146] Under the heightened scrutiny proposed above,

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[143] *George Monro, Ltd.*, [1944] 1 K.B. at 437 (Scott, J.).

[144] United States v. First Nat'l City Bank, 379 U.S. 378, 403-04 (1965) (Harlan, J., dissenting). *See also Shaffer*, 433 U.S. at 218 (Stevens, J., concurring).

[145] United States courts have generally rejected constitutional challenges to assertions of jurisdiction based on transitory presence within the forum. Fauntleroy v. Lum, 210 U.S. 230 (1908); Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959); *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (1971).

[146] Commentators are virtually unanimous in condemning "tag" jurisdiction as inconsistent with *International Shoe*'s principles of reasonableness and fairness. *E.g.*, Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); von Mehren, *Recognition and Enforcement of Foreign Judgments*, 167 Rec. des Cours 13, 43, 59 (1981).

"tag" jurisdiction should not be available in international cases.[147]

Due Process analysis in international cases also should require closer prelitigation contacts between the defendant and the forum than would be necessary in domestic cases. Specifying exactly how much closer a foreign defendant's connections with the forum should be admittedly is difficult, and perhaps unwise. As in the domestic context, "the criteria by which we mark the boundary line between those activities which justify the subjection of a [foreign] corporation to suit, and those which do not, cannot be simply mechanical or quantitative."[148] Although precision is difficult and perhaps undesirable, however, the appropriate Due Process standard in international cases should require more substantial, direct, or foreseeable distribution of products into the forum, or more pervasive and sustained business contacts with the forum, than that required in domestic cases. As we already have seen, this would reduce the risks of offending foreign sovereigns, provoking retaliatory responses, interfering with United States foreign affairs, and imposing unfairness on foreign defendants.

2. *The Focus of Due Process Analysis in International Cases*

International cases not only require a different level of Due Process scrutiny from that applicable in domestic cases, but also demand a different focus of Due Process analysis. For purposes of international law and foreign relations, the separate identities of individual states of the Union are generally irrelevant. In the Supreme Court's words, "[f]or local interests, the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."[149]

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[147] "'Tag' jurisdiction, *i.e.*, jurisdiction based on service of process on a person only transitorily in the territory of the state, is not generally acceptable under international law." RESTATEMENT (REVISED) FOREIGN RELATIONS LAW § 421 comment e (Tent. Draft No. 6, Apr. 12, 1985). Article 5 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, *see supra* note 45, expressly excludes "tag" service as an acceptable basis for jurisdiction.

[148] *Int'l Shoe Co.*, 326 U.S. at 319. *See also* Note, *National Contacts As a Basis for In Personam Jurisdiction Over Aliens In Federal Question Suits*, 70 CALIF. L. REV. 686 (1982); Note, *Personal Jurisdiction Over Alien Corporations In Antitrust Actions: Towards A More Uniform Approach*, 54 ST. JOHN'S L. REV. 330 (1980).

[149] Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889). *See also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 100 (1824) (Johnson, J., concurring) ("the states are unknown to foreign nations"); *Belmont*, 301 U.S. at 331 ("in respect of our foreign relations generally, state lines disappear. As to such purposes the State . . . does not exist"). The Revised Restatement on Foreign Relations Law observes:

Under this basic principle of international law, foreign nations may properly complain when a United States court asserts jurisdiction over a national who has no reasonable connection *to the United States.*[150] A foreign nation, however, has no basis for complaint under international law when a United States court asserts jurisdiction over a national who has a reasonably close relationship to the United States, even if the foreign national has *no* connections with the state of the Union asserting jurisdiction.[151] "International law addresses the reasonableness of an exercise of jurisdiction to adjudicate by a [nation-state]; it does not concern itself with the allocation of jurisdiction among domestic courts, for example between national and state courts in a federal system."[152]

The *de minimis* importance of individual states of the Union for purposes of international law and foreign relations has important implications for defining Due Process limitations on exercises of judicial jurisdiction in international cases. It suggests inquiring into a foreign defendant's contacts with the United States as a whole, rather than into contacts with a particular state. A Due Process test which looks to "national contacts" would be consistent with international law. As we have seen, international law is not concerned with allocations of jurisdiction among national sub-units. Instead, international law looks only to the propriety of a *nation-state's* assertion of jurisdiction over foreigners. Indeed, a national contacts test would be in closer keeping with the practice of other nations than the current Due Process analysis employed by United States courts.[153]

Putting aside questions of international law, a Due Process standard for jurisdiction which looked to national contacts would serve important public policy goals. First, a national contacts test would

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"A state of the United States is not a 'state' under international law, since by its constitutional status it does not have capacity to conduct foreign relations. The United States alone, not any of its constituent states, enjoys international sovereignty and nationhood." RESTATEMENT (REVISED) FOREIGN RELATIONS LAW § 1 Reporter's Note (e) (Tent. Draft No. 6, Apr. 12, 1985).

[150] This Article previously addressed the limits that international law places on assertions of judicial jurisdiction over foreigners. *See id.* at § 421 and comment a; *supra* notes 76-88 and accompanying text.

[151] *Id.* at § 421, comments h-j.

[152] *Id.*

[153] *See supra* notes 45-70 and accompanying text. *Cf. Japan Line, Ltd.*, 441 U.S. at 449 (emphasizing the "need for federal uniformity" in matters affecting foreign commerce).

permit United States courts to exercise jurisdiction to the fullest extent permitted under international law. This would relieve United States plaintiffs of the burden of litigating in foreign forums, without giving foreign governments basis for offense.

Second, a national contacts test would provide a better method for dealing with foreign defendants who have significant United States contacts spread evenly, but thinly, over a number of individual states.[154] Jurisdiction in some United States forum would clearly be desirable in such cases, but current Due Process analysis would generally preclude any individual state from asserting jurisdiction. A test looking at least in part to national contacts would improve on current law by facilitating suits by United States plaintiffs against foreign defendants with significant, but widely dispersed contacts with this country.

Third, considering a foreign defendant's *national* contacts and his expectations about being required to litigate in *United States* courts would provide a reasonably well-tailored measure of inconvenience to foreign defendants. "[C]orporations . . . headquartered in foreign lands will usually be no more inconvenienced by a trip to one state [of the Union] than another."[155] Similarly, there are relatively minor differences among the several states of the Union in procedural rules,

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[154] *See Centronics Data Computer Corp.*, 432 F. Supp. at 664 (national contacts test necessary to prevent aliens from committing "serious torts or contract breaches without ever having enough contacts with any one [United States] forum to give those injured an opportunity to seek redress" in the United States); *Engineered Sports Prods.*, 362 F. Supp. at 728 ("due process or traditional notions of fair play and substantial justice should not immunize an alien defendant from suit in the United States simply because each state makes up only a fraction of the substantial nationwide market for the offending product").

Based on the reported decisions, it is apparently not uncommon for foreigners to have significant contacts with the United States, but not with any particular state. One common fact pattern involves the foreign defendants who have entered into contracts with unrelated United States entities calling for distribution of the foreign company's product in the United States, without any further reference to particular states of the Union. *See Gorso*, 330 F. Supp. at 834; *Le Manufacture Francaise*, 620 P.2d at 1040; *Ross*, 373 N.E.2d at 1288. *World-Wide Volkswagen Corp.* would often preclude jurisdiction in such cases, because the defendant could not "reasonably anticipate being haled into [the forum-state's] court." *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

[155] *Centronics Data Computer Corp.*, 432 F. Supp. at 663; *Charles Gendler & Co.*, 508 A.2d at 1140 ("New York, which Nippon proffers as an alternative forum, is no more convenient for Nippon, which is located in Tokyo"). This, of course, is not always the case. For example, a Nova Scotia company that has significant trade with Maine, but no other state in the Union, would likely have fairly strong objections to being required to defend against a suit in Arizona or Texas.

including discovery, legal ethics, including treatment of legal fees, or in the quantum of damages likely to be recovered. In contrast, United States rules and practices in these areas often differ dramatically from rules and practices in other countries.[156] Finally, the United States social, cultural, and political environment will be equally foreign to non-citizens, regardless of the particular state the parties choose as the forum.

For these reasons, requiring a foreign defendant to litigate in the United States, rather than in another country, has major consequences and can impose significant hardship. The risk of unfairly imposing these hardships on foreigners can be minimized by requiring closer contacts with the United States forum than would be necessary in an interstate context. Once it is clear that litigation will be required in *some* United States forum, however, it often will be relatively unimportant *which* United States forum is selected. Unlike the existing "state" contacts test, a test looking at least in part to national contacts, would more accurately reflect this proposition.[157]

The exact focus of a Due Process test based on national contacts will vary in different types of cases. In federal question cases arising in federal courts, a "pure" national contacts Due Process standard that looks *solely* to the defendant's contacts with the United States is appropriate.[158] This test would be consistent with the Due Process Clause of the fifth amendment, as well as with principles developed under the fourteenth amendment.[159] The federal government pos-

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[156] M. GLENDON, M. GORDON & C. OSAKWE, COMPARATIVE LEGAL TRADITIONS 167-92, 457-505 (1985).

[157] In *Asahi Metal Indus. Co. v. Superior Court of California, supra* note 22, currently pending before the United States Supreme Court, Petitioner has argued briefly that assertions of jurisdiction should be moderated in international cases because of the danger of offending foreign sovereigns or violating international law. Brief for Petitioner at 13-15, 26, Asahi Metal Indus. Co. v. Superior Court of California, 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985), *cert. granted*, 54 U.S.L.W. 2103 (U.S. Mar. 3, 1986). Neither Respondent nor Petitioner, nor the lower courts, addresses the question whether a national contacts test would be appropriate in international cases.

[158] *See* Note, *National Contacts As a Basis for In Personam Jurisdiction Over Aliens In Federal Question Suits*, 70 CALIF. L. REV. 686 (1982); *Alien Corporations*, *supra* note 34, at 470 (citing federal decisions adopting a national contacts test); Note, *Personal Jurisdiction Over Alien Corporations In Antitrust Actions: Towards a More Uniform Approach*, 54 ST. JOHN'S L. REV. 330 (1980).

[159] Lilly, *supra* note 31, at 129 ("the principle that a federal court can constitutionally aggregate contacts seems relatively straightforward"); *Alien Corporations*, *supra* note 34, at 481-82 ("the aggregation of national contacts [by federal courts] is clearly constitutional").

sesses sovereignty over all United States territory, and therefore, it may constitutionally provide for nationwide service of process.[160] It necessarily follows that United States territory as a whole should be the relevant geographical unit for purposes of assessing minimum contacts by foreigners in federal question cases.[161] Indeed, application of a pure national contacts test by federal courts in federal question cases would be the appropriate parallel to application of the *International Shoe* state contacts test used by state courts in cases involving non-resident citizens of the United States.

A pure national contacts test in federal question cases also would serve important policy goals. As we already have seen, a pure national contacts test would give United States courts jurisdiction over foreigners to the maximum extent permitted under international law, and would more accurately gauge the actual degree of hardship that United States litigation causes foreigners.[162] Moreover, a pure national contacts test would be more consistent with the achievement of the federal policies underlying congressional statutes. Indeed, it makes little sense to consider interstate notions of state sovereignty in deciding the reach of federal personal jurisdiction over foreigners.[163]

Judicial jurisdiction of state courts over state law claims presents a somewhat different question. Application of a pure national contacts test in state law cases might well be seen as exceeding territorial

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[160] Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442 (1946) ("Congress [can] provide for service of process anywhere in the United States"); Robertson v. R.R. Labor Bd., 268 U.S. 619, 622 (1925) ("Congress has power, likewise, to provide that the process of every District Court shall run into every part of the United States"); United States v. Union Pac. R.R., 98 U.S. 569, 604 (1878); Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838).

[161] Several lower court decisions conclude that national contacts tests, authorized by various congressional enactments, are constitutional. FTC v. Jim Walter Corp., 651 F.2d 251 (5th Cir. 1981); Texas Trading & Milling Corp. v. Fed. Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981). Similarly, Justice Stewart, dissenting in Strafford v. Briggs, 444 U.S. 527, 544 (1980) (emphasis added), stated that "due process requires only certain minimum contacts between the defendant and *the sovereign that has created the court.*" The Court, however, did not reach this issue.

[162] *See supra* notes 155-56 and accompanying text.

[163] Adoption of a pure national contacts standard in federal question cases could be linked to more liberal venue transfers allowed under 28 U.S.C. § 1404(a) (1982). This would help avoid seriously inconveniencing foreign defendants in those cases where one United States federal forum would be significantly more convenient than others. *See infra* notes 168-71 and accompanying text. Several lower courts already have adopted such an analysis. *Eng'g Equip. Co.*, 446 F. Supp. at 706; Holt v. Klosters Rederi A/S, 355 F. Supp 354 (W.D. Mich. 1973).

limitation on state sovereignty. Under prevailing constitutional doctrine applied in domestic cases, the states possess limited sovereignty supporting assertions of judicial jurisdiction only over persons having some connection to the forum.[164] At least a partial response is that assertions of judicial jurisdiction by a state court over foreigners will implicate the sovereignty of other nations, but not the sovereignty of other states of the Union.[165] And, as we have seen, a national contacts test is an entirely acceptable protection for a foreign nation's sovereignty. Moreover, putting aside theories based on sovereignty, a national contacts test in state law cases would serve important public interests by ensuring United States jurisdiction over foreigners with significant United States ties, and at the same time gauging inconvenience to foreigners and offense to foreign sovereigns.[166]

Notwithstanding the legitimacy of considering national contacts in state law cases, considering *only* national contacts probably would frustrate important policies underlying the Due Process Clause. The forum state's interest in adjudicating particular disputes should be a factor in Due Process analysis.[167] A pure national contacts test, however, might permit state jurisdiction in many situations where the forum state had little or no genuine interest in resolving the dispute.[168] Likewise, while foreign defendants will have a comparatively weak interest in litigating in one United States forum rather than another,[169] in certain cases they may have *some* such prefer-

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[164] *See supra* notes 7-12 and accompanying text; *World-Wide Volkswagen Corp.*, 444 U.S. at 293.

[165] This is the converse of the notion that "the sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp.*, 444 U.S. at 293. Where jurisdiction over a foreigner is involved, it is the sovereignty of foreign countries, not sister states, that is implicated. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605 (1982) (granting state courts jurisdiction over foreign nations on basis of national contacts test).

[166] *See supra* notes 153-57 and accompanying text.

[167] *World-Wide Volkswagen Corp.*, 444 U.S. at 292; *McGee*, 355 U.S. at 223. *See* Weinberg, *supra* note 29, at 935-37.

[168] A pure national contacts test would, for example, permit a Texas court to adjudicate claims against a Canadian company arising from a dispute that had significant contacts with Maine, but no contacts with Texas. A rigorous application of *forum non conveniens* principles would reduce the risk that such jurisdictional claims would be made, but could not eliminate the risk. Among other things, the *forum non conveniens* defense does not focus sharply on state interest, and resolution of *forum non conveniens* claims is left to the trial judge's discretion. *Piper Aircraft Co.*, 445 U.S. at 257; Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

[169] *See supra* notes 155-56 and accompanying text.

ences.[170] A pure national contacts test would fail to take these interests into account.

These considerations suggest that a Due Process jurisdictional analysis in state law international cases should look to both state and national contacts. Under this modified national contacts test, a state court could not assert jurisdiction absent some minimal link between the defendant and the forum state.[171] This link would not require the same sort of relationship that the traditional minimum contacts test demands, but would require some type of connection with the forum state. Connections that would satisfy the requirement would reflect either the forum state's interest in adjudicating the dispute, or the defendant's expectation of suit within the state's courts. For example, the forum state generally would have an interest in adjudicating claims that arise from injuries suffered within the state, from conduct taking place within the state, or from out-of-state conduct affecting domiciliaries of the state. A defendant's expectation of suit within a particular state would be a factual issue, turning largely on the defendant's specific or general prelitigation contacts with the forum.[172]

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[170] In the hypothetical in note 168, involving a Canadian company with connections to Maine but not to Texas, the defendant might have a preference for litigating in Maine rather than in Texas.

Foreign defendants' preferences for particular United States forums would be affected by choice-of-law considerations. Although substantive laws in different states of the Union are broadly similar, in many contexts there may be significant differences. The United States Supreme Court, however, has repeatedly held that choice-of-law considerations are irrelevant to Due Process limitations on personal jurisdiction. *Keeton*, 465 U.S. at 778 ; *Hanson*, 357 U.S. at 254.

[171] In general, the personal jurisdiction of federal courts in diversity cases should be treated similarly to that of state courts in state law cases. This conclusion would be required by the current text of Rule 4(e) of the Federal Rules of Civil Procedure, *supra* note 23. Quite apart from Rule 4 or other legislative directives that federal courts adhere to state jurisdictional limitations in diversity cases, the reasons requiring only a modified national contacts test for state law claims in state courts also apply to Due Process analysis in diversity cases. Federal courts exercising diversity jurisdiction act in effect as state courts enforcing substantive state policies. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). This suggests that federal courts exercising diversity jurisdiction be treated in the same manner as state courts.

Conversely, personal jurisdiction exercised by state courts in federal question cases should be treated similarly to that of federal courts in federal law cases. The federal government's interest in the effectuation of federal policies, even in a state court, is independent of a defendant's connections with a particular state of the Union.

[172] Just as transfers of venue would be useful in reducing inconvenience to the parties in federal court actions, *see supra* note 163; more liberal use of *forum non conveniens* would be helpful in state court actions. *See Piper Aircraft Co.*, 454 U.S. at 235; *Gulf Oil Corp.*, 330 U.S. at 501.

V. CONCLUSION

United States courts and commentators have devoted comparatively little attention to the constitutional limitations on personal jurisdiction over foreign defendants. As a result, lower courts have taken a variety of inconsistent approaches to judicial jurisdiction questions in international cases. These divergent approaches have had the undesirable effect of treating similarly situated foreign litigants in unpredictable, disparate ways.

The majority approach of United States courts to questions of judicial jurisdiction in cases involving foreign defendants has been to apply domestic Due Process standards derived from *International Shoe* and its progeny. These standards do not adequately reflect the special considerations affecting jurisdictional claims in international cases. These considerations, federal control over foreign relations and foreign commerce, require a refinement of domestic Due Process standards for application in international cases.

First, the level of constitutional scrutiny of jurisdictional claims should be raised in international cases. United States courts should use restraint in deciding jurisdictional issues in international cases, and jurisdiction over foreign defendants should be asserted only after a clear showing of a sufficiently close relationship to the United States to alert the defendant to the possibility of suit there. Second, the focus of constitutional analysis should be shifted in international cases. In state law international cases, the Due Process Clause should require consideration of foreign defendants' national contacts, as well as their contacts with the forum state. In federal question cases, a pure national contacts test, looking solely to the defendant's contacts with the United States as a whole, should be used.

Refining the existing domestic Due Process standards for international cases would serve important public policy goals. On the one hand, by requiring reasonably close connections with the United States as a whole, a national contacts test would permit United States courts to exercise jurisdiction to the fullest extent permitted under international law. By abandoning an unnecessary concern for foreign defendants' contacts with a particular state in the Union, this refinement would, for example, ensure United States jurisdiction over foreign litigants with substantial, but thinly-spread United States contacts. On the other hand, by requiring heightened constitutional scrutiny in international cases, the refinements would reduce the risks of exorbitant assertions of jurisdiction over foreigners. This, in turn, would minimize the danger of giving offense to foreign

sovereigns or provoking retaliatory commercial or legal actions. Finally, these improvements would make Due Process analysis in international cases more predictable and more responsive to the United States and foreign interests at stake in these cases.