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Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction

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ALIENS, THE INTERNET, AND "PURPOSEFUL AVAILMENT": A REASSESSMENT OF FIFTH AMENDMENT LIMITS ON PERSONAL JURISDICTION

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INTRODUCTION

The Internet presents some unique challenges for personal jurisdiction. People are able to post material on the Internet that is instantly available worldwide. This has many wonderful applications, but it also means a single person who never leaves home can inflict significant harms on people around the world.[1] Moreover, because the Internet brings together people from parts of the world that have very different social policies concerning areas such as free speech, consumer protection, and intellectual property, there is a significant potential for conflict about underlying regulatory policy.

The international community has been struggling with questions of who should regulate the Internet and how, but little consensus has emerged. Some observers believe that disagreements over jurisdiction related to e-commerce were largely responsible for the demise of the Hague Convention of Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[2] For the United States, consideration of the pros and cons of the alternative jurisdictional approaches to e-commerce and cyberspace is complicated by an overlay of constitutional law.[3] While the rest of the world considers the policy implications of a country of origin

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[1] *See* John Eisinger, Note, *Script Kiddies Beware: The Long Arm of U.S. Jurisdiction to Prescribe*, 59 WASH. & LEE L. REV. 1507, 1508–09 (2002).

[2] Avril Haines, *Why Is It So Difficult To Construct an International Legal Framework for E-Commerce? The Draft Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters: A Case Study*, 3 EUR. BUS. ORG. L. REV. 157, 153–55, 171–73 (2002).

[3] One commentator has observed that "the American idea, so dominant ever since *Pennoyer v. Neff*, that the limits of a court's jurisdiction are largely a matter of constitutional rights seems rather fantastic to a European lawyer." MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE 67 (1995).

versus a country of destination approach,[4] the United States is wrestling with what constitutes "purposeful availment" under the Due Process Clause.

Looking at the constraints imposed by our constitutional doctrine of personal jurisdiction, Professor Redish has argued that this doctrine is ill-suited to Internet cases and that we should abandon it for those cases.[5] I share Professor Redish's dissatisfaction with the constitutional requirement of purposeful availment. However, in this Article, I explore the issue from a different angle. I believe that the most difficult issues arise from the international arena and may ultimately lead Congress to weigh in (as it has in the case of the Anticybersquatting Consumer Protection Act).[6] As a result, this Article examines what limits the Fifth Amendment imposes on the exercise of jurisdiction over aliens by the United States.[7]

The Supreme Court has never squarely considered what limits the Fifth Amendment imposes on assertions of personal jurisdiction in federal court. Commentators have, for the most part, assumed that the limits imposed by the Fifth Amendment are comparable to those imposed on the states by the Fourteenth Amendment. This Article examines that assumption and concludes that the limits imposed by the Fifth Amendment are not comparable to those imposed by the Fourteenth. Specifically, it argues that the Fifth Amendment should not be understood to include the requirement of purposeful availment[8] and that jurisdiction should be constitutional on the basis of effects in the United States.

This Article first considers the Fourteenth Amendment cases and argues that the constitutional limits on the jurisdictional authority of state courts reflect a view about the limits of state authority. It then turns to the Fifth Amendment and, after considering the practices of other nations and lessons from prescriptive jurisdiction, argues that the United States's sovereign authority should allow it to assert personal jurisdiction solely on the basis of effects in the United States, without a requirement of "purposeful availment." It further argues that concerns about reasonableness should be addressed at the subconstitutional level.

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[4] *See infra* text accompanying notes 54–56.

[5] Martin Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution*, 38 JURIMETRICS J. 575 (1998).

[6] 15 U.S.C.A. § 1125(d) (West Supp. 2003); *see infra* note 99.

[7] The focus of this Article is on jurisdiction over non-U.S. defendants. United States courts will always have jurisdiction over U.S. defendants, even applying the standards developed under the Fourteenth Amendment. *See* Milliken v. Myer, 311 U.S. 457 (1940).

[8] My focus is exclusively on the Fifth Amendment. This Article takes no position on the proper scope of the Fourteenth Amendment. It also does not consider whether the federal government can alter the jurisdictional powers of the states by treaty or statute. For a discussion of the treaty issue, see Patrick Borchers, *Judgments Conventions and Minimum Contacts*, 61 ALB. L. REV. 1161 (1998); Stanley Cox, *Why Properly Construed Due Process Limits on Personal Jurisdiction Must Always Trump Contrary Treaty Provisions*, 61 ALB. L. REV. 1177 (1998).

This Article is built on two basic premises: that personal jurisdiction is a doctrine that concerns the allocation of sovereign authority, and that the underlying sovereignty considerations of the United States within the world community are quite different from those of the states within our confederation of states. As a result, although the Due Process Clauses of the Fifth and Fourteenth Amendments are worded the same, the limitations that those clauses impose on sovereign authority are different.

I. PERSONAL JURISDICTION AS AN ALLOCATION OF SOVEREIGNTY

A. Sovereignty and the Fourteenth Amendment

The Supreme Court has had a great deal to say about constitutional limits on personal jurisdiction, though nearly all of its cases have focused on the limits imposed on states under the Fourteenth Amendment. These Fourteenth Amendment cases highlight that personal jurisdiction is a doctrine that allocates sovereignty. The modern case that most clearly delineates the Court's understanding of personal jurisdiction is *World-Wide Volkswagen v. Woodson*.[9] There, the Court held that the fact of an injury in the forum, even a foreseeable injury, is not a sufficient basis for a state to assert jurisdiction.[10] Instead, the Court held that the defendant must have purposeful contacts with the forum.[11] In explaining this result, the Court stated that "the reasonableness of asserting jurisdiction over the defendant must be assessed 'in the context of our federal system of government.'"[12] The Court further explained:

> the Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.[13]

World-Wide Volkswagen reinforces two critical points: first, that personal jurisdiction limits are based on a view about the limits of state sovereignty;[14] and second, that purposeful availment is the correct measure of state sovereignty within our federal system. It is important to differentiate between these two propositions because one can readily accept the first while rejecting the second.

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[9] 444 U.S. 286 (1980).

[10] *Id.* at 295.

[11] *Id.* at 297.

[12] *Id.* at 293–94 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).

[13] *Id.* at 293.

[14] As Professor Stein has observed, "[p]ersonal jurisdiction is inescapably political because it is tied to a power allocation between sovereigns." Allan Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 692 (1987).

The suggestion that the limits of personal jurisdiction reflect an understanding of the limits of sovereign authority did not originate with the *World-Wide Volkswagen* Court. This understanding of personal jurisdiction is apparent in *Pennoyer v. Neff*.[15] Justice Field's analysis of personal jurisdiction is explicitly grounded in his understanding of the relationship among the states. Relying on what he calls "well established principles of public law,"[16] and citing both Story's treatise on conflict of laws and Wheaton's treatise on international law, Field asserts that "[t]he several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others."[17] The view that personal jurisdiction involves an allocation of sovereign authority is also consistent with how personal jurisdiction is approached internationally. Personal jurisdiction is the subject of international conventions[18] and increasingly is viewed as falling "within the domain of customary international law."[19]

The role of jurisdiction as a doctrine for allocating power among sovereigns has been obscured by the Court's focus on the Due Process Clause—a clause that seems concerned with personal rights, not federalism or sovereignty.[20] *Pennoyer* first introduced the Fourteenth Amendment, explaining that "the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."[21] In other words, the Due Process Clause simply provides a vehicle

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[15] 95 U.S. 714 (1887).

[16] *Id.* at 722.

[17] *Id.*

[18] *See, e.g.*, European Community Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, 2001 O.J. (L 012/2); Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (signed at Montevideo on May 8, 1979), *available at* http://www.oas.org/juridico/english/treaties/b-50.html; Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Oct. 1999), *available at* http://www.hcch.net/e/conventions/draft36e.html. The Hague Conference is discussed in Patrick Borchers, *A Few Little Issues for the Hague Judgments Negotiations*, 24 BROOK. J. INT'L L. 157 (1998); Friedrich Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111 (1998); Haines, *supra* note 2; Peter Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 BROOK. J. INT'L L. 7 (1998).

[19] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 4, ch. 2, introductory n., at 304 (1987).

[20] Indeed, some have argued that, at least in the interstate context, personal jurisdiction ought more logically be situated in the Full Faith and Credit Clause. *See, e.g.*, Robert Abrams & Paul Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75 (1984); Martin Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1132 (1981); Roger Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 880–84 (1989).

[21] Pennoyer v. Neff, 95 U.S. 714, 733 (1887).

by which a defendant can attack the lack of jurisdiction.[22] The role of the Due Process Clause is essentially "passive"[23] and "derivative"[24]—it provides a vehicle for attacking exercises of jurisdiction that exceed a state's authority.

Although both *Pennoyer* and *World-Wide Volkswagen* strongly support sovereignty as a central issue in personal jurisdiction, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea*[25] can be read to retreat from this view. However, as others have persuasively argued, *Bauxites* can also be read simply to state a corollary of the *Pennoyer* approach—that the defendant's due process right to be tried by a sovereign acting within the scope of its power is waivable. Under this interpretation, concerns about sovereignty remain central. As Professor Weisburb has argued:

> commencing a consideration of personal jurisdiction with a consideration of limitations on sovereignty is not merely appropriate, but necessary. All that *Insurance Corp.* adds is the caution that the personal jurisdiction rules deduced from sovereignty limitations do not touch the fundamentals of sovereignty so extensively that they cannot be waived.[26]

Similarly, the Fifth Circuit has concluded that "sovereignty defines the scope of the due process test."[27]

Of course, recognizing personal jurisdiction as a doctrine that allocates sovereign authority does not tell us what the rules for such allocation should be.[28] In *Pennoyer*, the Court purports to derive the rules for allocating state sovereignty from its understanding that states are in many respects like independent countries.[29] Similarly, *World-Wide Volkswagen* implies that the requirement of purposeful availment flows logically from our federal sys-

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[22] As Professor Stein has explained, *Pennoyer*'s insight was that illegitimate authority constituted not only an offense against federalism and interstate comity, but also a violation of the *defendant*'s due process right to fairness. *See* Stein, *supra* note 14, at 710 n.96.

[23] *Id.* at 693.

[24] Stephen Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U. L.Q. 1291, 1294 (1983).

[25] 456 U.S. 694 (1982).

[26] Arthur Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 414 (1985). *See* Stein, *supra* note 14, at 712.

[27] Busch v. Buchman, 11 F.3d 1255, 1258 (5th Cir. 1994).

[28] Professor von Mehren has described three principal theoretical accounts—relational, power, and instrumental—that have been used to explain allocations of government judicial authority. *See* ARTHUR VON MEHREN, THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE DOCTRINE, POLICIES AND PRACTICES OF COMMON- AND CIVIL-LAW SYSTEMS 30–36 (2003). Whatever the theory that is used to justify assertions of adjudicatory authority, such authority is a form of government power. In a world of multiple sovereigns, a decision about which sovereign or sovereigns can exercise jurisdiction is fundamentally a decision about the allocation of sovereign power.

[29] Of course, as others have noted, the Court also ignored important respects in which states are *not* like independent nations. *See, e.g.*, Geoffrey Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 246–47.

tem and is an inevitable consequence of territorially based states.[30] It clearly is not. The European Union is composed of territorially based countries, and it has allocated jurisdictional authority without reliance on the concept of purposeful contact.[31] But regardless of whether the test that the Court has developed for allocating sovereign power among the states is inevitable or even sensible,[32] it still reflects a view about how power ought to be divided. As Professor Werner has aptly put it, "[j]urisdiction *is* power."[33]

B. Sovereignty and the Fifth Amendment

Just as constitutional limits on the authority of states to exercise personal jurisdiction reflect a view about the limits of state sovereignty, so too, any constitutional limit on the jurisdictional power of the United States courts should reflect a view about the limits of U.S. sovereignty.[34] In considering the scope of U.S. sovereignty with respect to jurisdiction, most courts and commentators have assumed that the power of the United States vis-à-vis other nations is parallel to the power of states vis-à-vis each other.[35] There is much discussion about whether contacts should be considered on a nationwide basis,[36] but the largely unexamined assumption seems

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[30] The Court explained that "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." Quoting from *International Shoe*, the Court stressed "that the reasonableness of asserting jurisdiction over the defendant must be assessed 'in the context of our federal system of government.'" World-Wide Volkswagen v. Woodson, 444 U.S. 286, 293–94 (1980).

[31] *See infra* text accompanying notes 42–56.

[32] *See, e.g.*, Redish, *supra* note 20, at 1129–33 (arguing that the limitations the Court has imposed on state court jurisdiction are not implicit in our federal structure).

[33] Donal Werner, *Dropping the Other* Shoe: Shaffer v. Heitner *and the Demise of Presence-Oriented Jurisdiction*, 45 BROOK. L. REV. 565, 568 (1979) (emphasis in original).

[34] The Supreme Court has never decided what limits the Fifth Amendment might impose with respect to personal jurisdiction. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 482 U.S. 97, 102–03 n.5 (1987) (declining to decide whether "a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits"); Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 113 n.* (1987) (finding "no occasion . . . to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits").

[35] One exception is Professor Abrams. *See* Robert Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1 (1982).

[36] *See, e.g.*, Busch v. Buchman, 11 F.3d 1255, 1257–58 (5th Cir. 1994); Go-Videa, Inc. v. Akai Elec. Co., 885 F.2d 1406, 1415–16 (9th Cir. 1989); Gary Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 37–42 (1987); Ronan Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 820–23 (1988); Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1210–11 n.116 (1984). The other issue that the cases and commentators discuss is whether, in addition to requiring purposeful contacts, the Fifth Amendment also imposes a reasonableness requirement, but these cases do not question that

to be that the nature of the contacts required is the same for the nation as it is for the states.[37] The assumption of parallel sovereignty does not withstand scrutiny. There is no reason to assume that the scope of legitimate judicial authority of the United States as it operates in the international community is essentially parallel to the scope of the authority of each of our individual states.[38] States are situated within the United States quite differently than is the United States within the international community. First, all the states are governed by the same overriding Constitution. As a result, whatever the rules for personal jurisdiction, they are guaranteed to be reciprocal. Second, any judgment that complies with the rules must be enforced.[39] The same is not true in the international arena. Countries sometimes assert broader jurisdiction for themselves than they will recognize by other countries,[40] and there is no guarantee that any judgment will be enforced.

In this environment, to what extent does the Constitution constrain U.S. exercises of sovereign judicial authority? I believe the constraints should be very modest and should not include the requirement of "purposeful availment." In reaching this conclusion, I rely on two lines of authority: first, the scope of judicial jurisdiction as practiced by other nations and as recognized by international law, and second, the scope of United States prescriptive jurisdiction.

1. The Scope of Judicial Jurisdiction as Practiced by Other Nations and as Recognized in International Law.—In considering the constitutionally permissible scope of the judicial jurisdiction of U.S. courts, it is useful to understand the scope of authority that other countries assert for themselves and that international law generally accepts. We could, of course, read the Constitution to renounce forms of judicial jurisdiction that other

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there must be purposeful contacts. *See, e.g.*, Republic of Pan. v. BCCI Holdings (Lux.) S.A., 119 F.3d 935, 945 (11th Cir. 1997); Sec. Investor Prot. Corp. v. Vigman, 764 F.2d 1309, 1315–16 (9th Cir. 1985). *See generally* Stanley Cox, *Jurisdiction, Venue, and Aggregation of Contacts: The Real Minimum Contacts and Federal Questions Raised by* Omni Capital, International v. Rudolf Wolff & Co., 42 ARK. L. REV. 211 (1989); Maryellan Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction*, 79 NW. U. L. REV. 1 (1984).

[37] The failure to critically examine this assumption is in some respects quite understandable, given the origins of our doctrine. *Pennoyer* purports to rely on international law to determine the scope of state power. If states have the same power that nations have with respect to personal jurisdiction, then it may seem quite sensible to simply transfer the limitations imposed on states to the United States. However, as discussed below, some of the limits that we impose on states under the Fourteenth Amendment are, in important respects, more restrictive than the power asserted by other nations and apparently permitted as a matter of international law.

[38] *See* Hazard, *supra* note 29, at 246–47; Friedrich Juenger, *Constitutional Control of Extraterritoriality?: A Comment on Professor Brilmayer's Appraisal*, 50 LAW & CONTEMP. PROBS. 39, 42 (1987).

[39] *See* U.S. CONST. art. IV, § 1.

[40] *See* Max Rheunstein, *The Constitutional Basis of Jurisdiction*, 22 U. CHI. L. REV. 775, 800 (1955) ("[C]ountries frequently claim for themselves a scope of jurisdiction which is broader than that which other countries are willing to concede to them.").

countries legitimately claim for themselves (and indeed exercise over U.S. citizens), but as one commentator has argued in the context of prescriptive jurisdiction:

> to argue that the Due Process clause of the Fifth Amendment could impose general limitations upon U.S. extraterritorial jurisdiction stricter than those required by customary international law is to argue that the Fifth Amendment denies to the United States a degree of authority recognized and asserted by most of the other nations of the world.[41]

In looking at the jurisdictional practices of other countries, one discovers that there is much commonality. For example, most countries permit jurisdiction on the basis of the defendant's domicile, as well as on the basis of transnationally related events occurring in the forum.[42] What is noticeably absent from the jurisdictional rules of many countries is the requirement of purposeful availment. Instead, effects or harm within the country is generally sufficient.[43]

Two cases involving the Internet dramatically illustrate that other countries do not require purposeful contacts. In the *Yahoo!* litigation, France asserted jurisdiction over U.S.-based Yahoo! for hosting a site on which Nazi memorabilia was offered for sale and which was accessible in France.[44] Although the court found that the harm in France was unintentional, it nonetheless asserted jurisdiction.[45] Similarly, Australia allowed jurisdiction against a U.S. company in a defamation case brought by an Australian plaintiff based on an article posted in *Barron's Online*.[46] The

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[41] A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNT'L L. 379, 383 (1997).

[42] *See* REIMANN, *supra* note 3, at 75.

[43] For example, English law permits tort jurisdiction if the damage was sustained in England. *See* J.G. COLLIER, CONFLICT OF LAWS 80 (3d ed. 2001). Australia similarly permits tort jurisdiction on the basis of effects within that country. *See* MICHAEL TILBURY ET AL., CONFLICT OF LAWS IN AUSTRALIA 797 (2002); *see also* RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 176 (4th ed. 2000) (Japan allows jurisdiction in "a place of tort."). Similarly, the *Restatement*, which purports to set forth "some international rules and guidelines for the exercise of jurisdiction to adjudicate in cases having international implications," RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 4, ch. 2, introductory n., at 304 (1987), does not require the equivalent of purposeful availment. Instead, it would permit jurisdiction on the basis of effects within the state, provided those effects are "substantial, direct, and foreseeable." *Id.* § 421(2)(j). The *Restatement* does not elaborate on the meaning of this phrase, though to the extent the *Restatement* is intended to be a statement about current customary international law, this phrase must be understood against the backdrop of common practice. As the EU's approach to consumer transactions in the e-commerce arena suggests, a harm to a consumer seems to be treated as a sufficient effect without much inquiry into the foreseeability of the harm.

[44] *See* UEJF v. Yahoo!, Inc., T.G.I. Paris, Nov. 20, 2000, No. RG 00/05308, *available at* http://www.kentlaw.edu/perritt/conflicts/frenchorder.pdf (English translation of court order).

[45] *See* Denis Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 BUS. LAW. 601, 649 (2003).

[46] *See* Dow Jones & Co. v. Gutnick, [2002] HCA 56 (Dec. 10, 2002), *available at* http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html.

court held that harm to the plaintiff's reputation was suffered in Australia and that this was a sufficient basis for jurisdiction in Australia.

The regulation that controls jurisdiction among the member nations of the European Union (EU) provides another useful example.[47] That regulation does not require purposeful contacts; tort claims can be brought "in the place of the harm."[48] The regulation also provides that in cases of multiple defendants there is jurisdiction where any one defendant is domiciled,[49] and further that there is jurisdiction over third party defendants.[50] There is no requirement that these additional defendants have *any* contacts with the forum.

The EU regulation also illustrates that other countries are willing to balance the relative situation of the plaintiffs and defendants, rather than focusing exclusively on protecting the defendant.[51] Thus, the EU allows claims for maintenance and child support to be brought in the domicile of the maintenance creditor[52]—a result that is at odds with the Court's holding in *Kulko*.[53] Similarly, the EU allows consumers to sue businesses in the consumer's home country, provided the business does any commercial activity in the consumer's country or "by any means, directs such activities to" the consumer's home country.[54] Offering goods and services for sale via an interactive website accessible in the consumer's domicile may be a sufficient connection to permit the business to be sued in the consumer's home.[55] This approach has been criticized within Europe, but the criticism has focused not on the theoretical need for purposeful contacts, but instead on the relative merits of a pro-consumer versus a pro-business regulatory regime from a policy perspective.[56]

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[47] *See* Council Regulation 44/2001 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Maters, 2001 O.J. (L 012) 1 [hereinafter EC Regulation]. For a discussion of the scope of the Brussels Convention, the precursor to the Brussels Regulation, see Patrick Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COM. L. 127–33 (1992); Juenger, *supra* note 36, at 1205–11; Linda Silberman, *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension*, 28 VAND. J. TRANSNAT'L L. 389, 400–05 (1995).

[48] EC Regulation, *supra* note 47, art. 5(3). The place of the harm is limited to "direct" harm, and this has generated what one commentator called "some microscopic debate" over what exactly would constitute a direct harm. *See* Borchers, *supra* note 47, at 146.

[49] EC Regulation, *supra* note 47, art. 6(1).

[50] *Id.* art. 6(2). This approach is at odds with the Court's holding in *Asahi*.

[51] *See* REIMANN, *supra* note 3, at 81–82.

[52] EC Regulation, *supra* note 47, art. 5(2).

[53] *See* Kulko v. Super. Ct., 436 U.S. 84 (1978).

[54] EC Regulation, *supra* note 47, art. 15.

[55] *See* European Commission, Explanatory Memorandum to the Proposal for a Council Regulation on Jurisdiction, COM (1999) 348 of 14 July 1999, at 16; Opinion of the Economic and Social Committee on the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, CES 233/2000-99/1054 CNS, March 2000, at 7–8.

[56] *See* Haines, *supra* note 2, at 176–78.

One final observation about jurisdiction in other countries: there is a long history of aggressive assertions of jurisdiction and retaliation.[57] Article 14 of the French Civil Code grants French courts jurisdiction over all disputes in which the plaintiff is French, regardless of whether the defendant or the dispute has any connection with France.[58] A number of countries allow "assets" jurisdiction under which a court acquires in personam jurisdiction, allowing judgments of any size based on the presence of property.[59] Finally, some courts assert "retaliatory" jurisdiction.[60] For example, domiciliaries of Belgium can sue in Belgian courts if the foreigner's home country would assert jurisdiction over a Belgium citizen in a similar circumstance.[61] These more aggressive jurisdictional bases are now prohibited within the European Union;[62] however, the prohibition extends only to member countries exercising jurisdiction over citizens of other member countries. Thus, United States citizens are subject to these more aggressive jurisdictional bases.[63]

This brief survey highlights several important points. First, there is no reason to believe that the requirement of purposeful contacts is inherent in territorially-based states. Territorially-based states around the world exist and co-exist without using this test. Second, many other countries assert jurisdiction over U.S. citizens as well as others without requiring purposeful availment. These countries may require some nexus between the parties or the dispute and the forum. However, the nexus is not nearly as demanding as our Fourteenth Amendment test of purposeful availment and does not require "targeting."[64] Instead, it seems generally sufficient that there are ef-

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[57] *See* Juenger, *supra* note 36, at 1204; Kurt Nadelmann, *Jurisdictionally Improper Fora*, *in* XXTH CENTURY COMPARATIVE AND CONFLICTS LAWS: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 330, 330–31 (K. Nadelmann et al. eds., 1961).

[58] French Civil Code art. 14; *see* Born, *supra* note 36, at 14; Juenger, *supra* note 36, at 1204.

[59] *See* Born, *supra* note 36, at 14. One commentator explained that "a Russian may leave his galoshes in a hotel in Berlin and may be sued in Berlin for a debt of 100,000 Mark because of 'presence of assets within the jurisdiction.'" Nadelmann, *supra* note 57, at 329.

[60] *See* Born, *supra* note 36, at 15; Nadelmann, *supra* note 57, at 330–31.

[61] *See* Born, *supra* note 36, at 15.

[62] *See* EC Regulation, *supra* note 47, art. 3(2) & annex I.

[63] It should be noted that other countries disapprove of some forms of personal jurisdiction that states have been permitted to exercise under the Fourteenth Amendment, notably tag jurisdiction and general doing business jurisdiction. Some have argued that such forms of jurisdiction violate international law and that states therefore ought not be permitted to exercise them. *See* Russell Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611 (1991). The Supreme Court has not had occasion to decide whether the exercise of tag jurisdiction might unduly interfere with the exercise of foreign relations. This Article does not take a position on whether state power ought to be constrained in this regard. *See* Stein, *supra* note 14, at 739–40 n.220. Nonetheless, whatever power states have to exercise these forms of jurisdiction against aliens, the federal government surely has that much power as well.

[64] *See, e.g.*, Young v. New Haven Advocate, 315 F.3d 256, 262–63 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 2092 (2003); Pavlovich v. Super. Ct., 58 P.3d 2, 8–9 (Cal. 2002). One article has referred to cases requiring targeting as a "strict effect test" and distinguished this from a "soft effects test," which

fects within the forum that are at least reasonably direct and not completely unforeseeable. The question therefore is whether our Constitution renounces for the U.S. government an element of sovereignty asserted by other countries and generally accepted as a matter of customary international law. I think we should be reluctant to read such a renunciation into the vague language of the Due Process Clause.

Some have argued that the purposeful availment requirement reflects a core commitment to "limited sovereignty"[65] and consent as the only legitimate bases for asserting government authority.[66] There are several difficulties with this argument. First, in cases involving non-voluntary transactions such as torts, the "consent" is entirely hypothetical and, as Professor Brilmayer has observed, "theories of tacit consent almost always assume exactly what they set out to prove."[67] Second, it is not at all clear that a general commitment to a theory of political consent necessarily leads to "purposeful availment."[68] For example, Professor Richard Epstein, who has argued that "the consent principle neatly explains the dynamics of many of our jurisdictional doctrines,"[69] has also argued that in the ordinary tort case, the victim should be able to sue in the place where the harm occurred.[70]

The problems of consent theory are compounded in the international context. There is an odd circularity to arguing that the reason an alien is protected from jurisdiction by our Constitution is because she has not done anything to accept the legitimacy of that Constitution. As Professor Weisburd has observed,

> aliens overseas may engage in behavior that harms the interests of the United States but not those of their own communities. To hold such aliens beyond the reach of American law by reason of their rights under the Fifth Amendment would allow them to enjoy the benefits of the Constitution while avoiding the burdens imposed on the American community by their behavior.[71]

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simply requires effects. Rice & Gladstone, *supra* note 45, at 608–13; *see also* Michael Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345 (2001) (advocating a "targeting" test). Rice and Gladstone argue that a "soft effects test" goes beyond what the Supreme Court has allowed. Rice & Gladstone, *supra* note 45, at 613. In this Article, I am arguing that the Fifth Amendment should be construed to allow jurisdiction on the basis of a "soft effects test."

[65] Cox, *supra* note 36.

[66] *See, e.g.*, Margaret Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5, 19 (1989); Trangsrud, *supra* note 20, at 884–85.

[67] Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1304 (1989). *See* Gottlieb, *supra* note 24, at 1301 ("[I]mplied consent . . . is inherently circular.").

[68] For a discussion of some of the difficulties with tacit consent as it relates to personal jurisdiction, see Wendy Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 536–46 (1991).

[69] Richard Epstein, *Consent, Not Power, as the Basis of Jurisdiction*, 2001 U. CHI. LEGAL F. 1, 2.

[70] *See id.* at 30–31.

[71] Weisburd, *supra* note 41, at 425. There is another problem with the argument that our Constitution embodies a core commitment to limited sovereignty and jurisdiction only by consent when dealing

2. Lessons from Prescriptive Jurisdiction.—Judicial jurisdiction concerns the authority of a sovereign to adjudicate a dispute. A closely related issue is prescriptive jurisdiction—that is, the authority of a sovereign to apply its laws to a dispute. In the interstate context, the Supreme Court has relied on the Due Process Clause of the Fourteenth Amendment to impose limits on state prescriptive jurisdiction, just as it has used that clause to impose limits on state judicial jurisdiction.[72] Thus, in considering the limits that the Fifth Amendment imposes on judicial jurisdiction, it is useful to consider the parallel question of what limits it imposes on prescriptive jurisdiction.

The Supreme Court has not ruled on the extent to which the Fifth Amendment limits Congress's prescriptive jurisdiction. Indeed, there is a debate in the literature as to whether the Fifth Amendment imposes *any* constraints on prescriptive jurisdiction.[73] However, the cases and commentaries on the constitutional scope of prescriptive jurisdiction offer several important lessons. First, although there is an extensive case law concerning the Fourteenth Amendment limits on state prescriptive jurisdiction,[74] courts that have considered the Fifth Amendment limits tend not to cite or rely on the Fourteenth Amendment cases.[75] This at least suggests that, with respect to prescriptive jurisdiction, courts do not view federal power as equivalent to state power.

Second, the Fifth Amendment limits on prescriptive jurisdiction appear to be quite modest, if any exist at all. As noted earlier, some courts and commentators have found that the Fifth Amendment imposes *no* limits.[76] The Ninth Circuit has held that the Fifth Amendment requires "a sufficient nexus between the defendant and the United States, so that such application

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with outsiders; this supposed core principle is inconsistent with much that the Constitution clearly permits. Most dramatically, the Constitution permits wars and conquest of Native Americans without the consent of the affected people. *See id.* at 405–06. Less dramatically, as the next subsection highlights, the U.S. has regularly exercised prescriptive jurisdiction without a showing of anything resembling purposeful availment in the choice of law arena. Thus, the claim that the Constitution extends U.S. sovereignty only to those who have "consented" is at best overstated.

[72] The tests for prescriptive and judicial jurisdiction are not the same. Indeed, the test for prescriptive jurisdiction is less restrictive than that for judicial jurisdiction. This has led one commentator to quip that it seems as if the Court thinks "an accused is more concerned with where he will be hanged than whether." Linda Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978).

[73] *Compare* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992) (arguing that the Fifth Amendment does impose limits), *with* Weisburd, *supra* note 41.

[74] *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

[75] *See generally* Brilmayer & Norchi, *supra* note 73, at 1228–33 (noting the failure of courts to rely on these cases).

[76] *See* United States v. Cardales, 168 F.3d 548 (1st Cir. 1999); United States v. Martinez-Hidalgo, 993 F.2d 1052 (3d Cir. 1993); Weisburd, *supra* note 41.

[of U.S. law] would not be arbitrary or fundamentally unfair."[77] This may mean, as Professor Born has noted, that the Fifth Amendment "might preclude extension of federal law to conduct abroad that has only de minimus contact with or effect upon the United States or its nationals,"[78] but effects within the United States would seem to meet that minimum requirement. Indeed, the *Restatement (Third) of Foreign Relations* allows prescriptive jurisdiction on the basis of "substantial effect[s]" without any showing of purposeful availment.[79]

Third, the limitations imposed by the Fifth Amendment on judicial jurisdiction ought not to be significantly more demanding than those imposed on prescriptive jurisdiction. In the Fourteenth Amendment context, the Court has imposed significantly different standards for choice of law than it has for jurisdiction. Whatever the justifications for this in the interstate context,[80] the international arena presents quite a different situation. If a state or country has prescriptive but not judicial jurisdiction, then of necessity it must rely on the courts of other states or countries for its policies to be vindicated. This is far less problematic in the interstate context than in the international one,[81] because states, unlike other countries, have some obligations not to treat the laws of other states with hostility.[82] More importantly, the fundamental differences among the substantive policies of the states are far fewer than among nations. In the *Yahoo!* case, France would probably not have found it a satisfactory solution to rely on U.S. courts to enforce French laws.[83] Not surprisingly, in international law, jurisdiction to adjudicate has traditionally been treated "as ancillary to jurisdiction to pre-

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[77] *See* United States v. David, 905 F.2d 245, 248–49 (9th Cir. 1990). Interestingly, the Ninth Circuit also held that no nexus is required with respect to activities on a stateless vessel of the high seas because "any nation may assert jurisdiction over stateless vessels." United States v. Juda, 46 F.3d 961, 967 (9th Cir. 1995).

[78] GARY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 513 (3d ed. 1996).

[79] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987). Moreover, as Professor Born has noted, "neither the due process clause nor other constitutional provisions have in fact imposed significant constraints on the extraterritorial reach of U.S. law." BORN, *supra* note 78, at 513.

[80] The Court's approach to the Fourteenth Amendment has been criticized in this regard. *See, e.g.*, Harold Maier & Thomas McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 266–71 (1991); Perdue, *supra* note 68, at 570–73.

[81] *See* Haines, *supra* note 2, at 188 n.105 (noting that it is generally "not considered to be a good idea to set up a private international law framework in which courts are regularly required to apply foreign law, since judges will inevitably be dealing with a system of law they are unlikely to be familiar with and will presumably make more mistakes in its application"). The author makes this observation in the context of discussing international agreements that might call for this arrangement. It seems even less desirable to expect nations to rely on other nations to apply their law in the absence of some agreement or convention.

[82] *See* Hughes v. Fetter, 341 U.S. 609, 613 (1951); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1986–90 (1997).

[83] Indeed, a federal court in California declared the French judgment unenforceable in the U.S. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 181 (N.D. Cal. 2001).

scribe."[84] Similarly, the Fifth Amendment ought to be understood to allow personal jurisdiction to the extent Congress has the power to prescribe U.S. law.

II. WHAT ABOUT CONVENIENCE AND REASONABLENESS?

In *World-Wide Volkswagen*, the Court observes that the limitations on personal jurisdiction perform two distinct functions. One is allocating sovereignty among the states of our federal system, which I have already discussed. The other is "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum." Even if the "sovereignty" component of the Fifth Amendment is understood to be quite different than that component of the Fourteenth Amendment, one might argue that the inconvenience components of the two amendments are essentially equivalent.[85] However, I believe that, at least in the Fifth Amendment context, concerns about convenience and reasonableness should be addressed at the subconstitutional level of venue and forum non conveniens.

In determining what role convenience and reasonableness play under the Fifth Amendment, it is important to remember that, even within the Fourteenth Amendment context, the Court has not found a general right to avoid inconvenience. In both *Burger King*[86] and *Asahi*,[87] the Court makes clear that concerns about inconvenience are only one aspect of a broader inquiry about fairness. As the Court observed in *Asahi*: "A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief."[88] Both burdens and state interest must be analyzed differently in the international context than in the interstate context.

First, although the burdens on the defendant may be great, so are the burdens on the plaintiff if jurisdiction is denied.[89] As one court has observed, "many of the inconvenience[s in international litigation] are symmetrical."[90] By protecting a foreign defendant from "the unique burdens

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[84] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 4, ch. 2, introductory n., at 304.

[85] As with the contacts prong, the Supreme Court has not determined the extent to which fairness or convenience are factors under the Fifth Amendment. The lower courts are split on the issue, with some suggesting that the Fifth Amendment is satisfied provided there are contacts with the U.S., *e.g.*, Busch v. Buchman, 11 F.3d 1255, 1257–58 (5th Cir. 1994); Fitzsimmons v. Barton, 589 F.2d 330, 333 (7th Cir. 1979), and others suggesting that a further fairness or convenience inquiry is required, *e.g.*, Republic of Pan. v. BCCI Holdings (Lux.) S.A., 119 F.3d 935, 945 (11th Cir. 1997); Bellaire Gen. Hosp. v. Blue Cross Blue Shield of Mich., 97 F.3d 822, 826 (5th Cir. 1996).

[86] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).

[87] *See* Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 113 (1987).

[88] *Id.*

[89] *See* Born, *supra* note 36, at 25.

[90] Ins. Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1272 (9th Cir. 1981).

placed upon one who must defend oneself in a foreign legal system,"[91] we may consign the U.S. plaintiff to enduring those burdens. Second, the "interests of the forum" (i.e., the interests of the United States) should be given great weight in the international context. As one treatise has observed, where Congress has chosen to assert broad jurisdiction, the "statute should be afforded substantial weight as a legislative articulation of federal social policy."[92]

General concerns about convenience and reasonableness can be addressed at the subconstitutional level using the doctrine of forum non conveniens. Under this doctrine, the court can take into account both public and private interests[93] and can assure that the plaintiff will in fact have an alternative forum. As Professors Degnan and Kane have argued:

> Adjusting for fairness by use of *forum non conveniens* also has important practical advantages. First, the Supreme Court has had occasion recently to refine its standards for *forum non conveniens* in the international setting so there exists well-developed doctrine allowing for easy application. Second, it places convenience concerns in their proper perspective, keeping separate questions of sovereign power from those of whether, in light of all the circumstances presented, jurisdiction should be declined and the parties remitted to some other forum to settle their dispute. Third, *forum non conveniens* offers the added possibility that the court can adjust for potential inequities between parties by using conditional dismissals—a device not available under the "black-or-white" approach to jurisdiction.[94]

Finally, I note that international law does not appear to require a convenience or open-ended "reasonableness" inquiry.[95] The *Restatement (Third) of Foreign Relations* indicates that jurisdiction is appropriate "if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable."[96] However, the section goes on to provide that where there is a "substantial, direct, and foreseeable effect" in the state, then jurisdiction will generally be reasonable.[97] As the earlier discussion indicates, other countries do not appear to engage in an open-ended "reasonableness" inquiry, but instead assert jurisdiction where there is some nexus such as effects. Once

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[91] *Asahi*, 480 U.S. at 114.

[92] 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1068.1, at 625 (2002).

[93] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981).

[94] Degnan & Kane, *supra* note 36, at 819.

[95] Professor Silberman has observed: "I do not think that any fair reading of jurisdictional law in the member states of the European Union or of the Brussels Convention establishes anything like the amorphous reasonableness standard that has been elevated to constitutional principle by the United States Supreme Court." Silberman, *supra* note 47, at 396.

[96] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421(1) (1987).

[97] *Id.* § 421(2).

again, we should pause before concluding that our government is constitutionally disabled from asserting jurisdiction over foreigners under circumstances in which other countries consider it entirely appropriate.

CONCLUSION

This Article argues that it is constitutional under the Fifth Amendment for U.S. courts to assert personal jurisdiction solely on the basis of effects in the U.S., without any requirement of "purposeful availment."[98] Under this approach, where authorized by Congress, it would be constitutional for U.S. courts to assert jurisdiction over an alien defendant who had posted material on the Internet that caused harm in the United States. The Fifth Amendment would also permit jurisdiction against cybersquatters whose domain names caused harm here.[99]

This Article takes no position on whether Congress ought to assert jurisdiction to the full extent permitted by the Fifth Amendment. There may be good reasons for restraint. Nonetheless, I believe that the Constitution gives Congress the power to invoke the jurisdiction of the federal courts to protect U.S. interests from harmful effects in the U.S. caused by foreigners acting abroad. One might object that a more expansive view of personal ju-

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[98] At least one court has suggested that effects alone may be sufficient under the Fourteenth Amendment. *See* Janmark, Inc. v. Reidy, 132 F.3d 1200, 1202 (7th Cir. 1997). However, I agree with the courts and commentators who have concluded that this misreads the Supreme Court cases. *See, e.g.*, Young v. New Haven Advocate, 315 F.3d 256, 262–63 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 2092 (2003); Pavlovich v. Super. Ct., 58 P.3d 2, 8–9 (Cal. 2002); Redish, *supra* note 5, at 596–600. My argument here is that regardless of what the Court ultimately concluded with respect to the Fourteenth Amendment, effects alone should be sufficient under the Fifth Amendment.

[99] The Anticybersquatting Consumer Protection Act authorizes in rem jurisdiction in some circumstances, 15 U.S.C.A. § 1125(d)(2) (West Supp. 2003), and there has been much discussion about the constitutionality of this aspect of the Act. *See, e.g.*, Andrew Grotto, *Due Process and In Rem Jurisdiction under the Anti-Cybersquatting Consumer Protection Act*, 2 COLUM. SCI. & TECH. L. REV. 1 (2001); Thomas Lee, *In Rem Jurisdiction in Cyberspace*, 75 WASH. L. REV. 97 (2000); Catherine Struve & R. Polk Wagner, *Realspace Sovereigns in Cyberspace: Problems with the Anticybersquatting Consumer Protection Act*, 17 BERKELEY TECH. L.J. 989 (2002). Since cybersquatting is likely to cause effects in the U.S. (at least to U.S. plaintiffs), there would likely be in personam jurisdiction over cybersquatters, *see* Jason W. Callen, Comment, *Asserting in Personam Jurisdiction over Foreign Cybersquatters*, 69 U. CHI. L. REV. 1837, 1860–61 (2002); therefore, it is not necessary to resolve the extent to which *Shaffer v. Heitner*, 433 U.S. 186 (1977), applies to the Fifth Amendment. I note, however, that jurisdiction by attachment is widely used by other countries. *See* Nadelmann, *supra* note 57, at 324–26; Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y. B. INT'L 145, 171–72 (1972–73). As Professor Nadelmann observes, "It seems that this possibility of proceeding against the absent debtor with assets within reach has always been considered normal." Nadelmann, *supra* note 57, at 324–25. Even the *Restatement (Third)* allows jurisdiction based on the presence of property, though "only in respect of a claim reasonably connected with" the property. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (2)(k). In light of this wide practice, even if there were no in personam jurisdiction, one might conclude that in rem jurisdiction is permissible under the Fifth Amendment. Interestingly, Germany has apparently concluded that for jurisdictional purposes, domain names ending in ".de" have a situs in Germany. *See* Ray August, *International Cyberjurisdiction: A Comparative Analysis*, 39 AM. BUS. L. J. 531, 559–60 (2002).

risdiction is inconsistent with language by the Supreme Court that has cautioned restraint when jurisdiction over foreigners is involved.[100] As the Court observed in *Asahi*: "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[101] While caution may be appropriate with respect to permissible exercises of state jurisdiction,[102] the situation with respect to federal power is quite different. It would be an odd deference to the federal foreign affairs power for the Court to constitutionally disable Congress from asserting jurisdiction to the full extent that other nations do.[103]

The argument I am presenting here is not that alien defendants are outside the protection of the Fifth Amendment. I assume that alien defendants, like all defendants, have the right to notice and the other procedural due process protections covered by the Fifth Amendment. Similarly, I assume that alien defendants, like all defendants, have the right to be tried by a competent tribunal, that is, a tribunal that is acting within the scope of its sovereign authority. This, of course, begs the question of what is the scope of the United States's sovereign authority? In determining the scope of United States authority, the limitations we have developed for the states are poor analogues. Indeed, I think one might reasonably conclude that with respect to the questions of allocation of sovereign authority between the United States and other nations, the Constitution does not constrain at all. There has been debate about this point in the context of prescriptive jurisdiction and little clear judicial guidance. But for purposes of addressing many of the jurisdictional problems raised in the Internet context, we need not fully resolve whether the Fifth Amendment constrains at all. It will be sufficient that the United States can exercise jurisdiction on the basis of effects—as other countries do and international law would permit.

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[100] *See* Born, *supra* note 36, at 2–27.

[101] Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 115 (1987) (quoting United States v. First Nat'l City Bank, 379 U.S. 378, 401 (1965) (Harlan, J., dissenting)). In *Asahi*, the Court also stated that it was appropriate to take into account "the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the California court." 480 U.S. at 115. In the Fifth Amendment context, the concern about properly considering the policies of other nations should at most be a rule of statutory construction, rather than a constitutional mandate that would override the judgment of the political branches. *Cf.* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (noting that in the context of legislative authority, "legislation of Congress, *unless a contrary intent appears*, is meant to apply only within the territorial jurisdiction of the United States" (emphasis added)).

[102] *See* Born, *supra* note 36, at 27–33.

[103] Professor Born argues that "equally rigorous scrutiny is generally called for when federal courts assert jurisdiction over foreign entities." *Id.* at 34. However, he notes that where Congress has in fact acted, this "obviates the need for concern about judicial interference with foreign relations." *Id.* at 34 n.141; *see also* Struve & Wagner, *supra* note 99, at 1005 n.64 ("Where Congress has enacted legislation authorizing suit against a foreign cybersquatter, a federal court's assertion of jurisdiction may be less open to question because the concern of state interference with federal foreign policy does not exist.").