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Response

What If *Pennoyer* Was Right?

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This year, as every year, I led a new cohort of first-year students into the world of personal jurisdiction. *Pennoyer v. Neff*[1] set expectations for how challenging civil procedure can be, introduced concepts such as quasi-in-rem jurisdiction to which we would later return, and provided a foil for appreciating the Court's expansion of personal jurisdiction "in *International Shoe* and its progeny."[2] Otherwise, *Pennoyer* largely faded from view.

In Pennoyer *Was Right*, Professor Sachs seeks to upend not only my well-settled teaching routine, but the constitutional approach to personal jurisdiction that has emerged from *International Shoe v. Washington*,[3] which has largely superseded *Pennoyer*. Sachs would return *Pennoyer* to prime place and leave *International Shoe* to be reinterpreted through *Pennoyer*'s lens—an undeniably innovative move.[4]

Yet the move is grounded not in innovation, but in a return to the original understanding of the Fourteenth Amendment's Due Process Clause on which *Pennoyer* relied.[5] Prior to the enactment of the Fourteenth

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1. 95 U.S. 714 (1878).

2. Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

3. 326 U.S. 310 (1945).

4. Stephen E. Sachs, Pennoyer *Was Right: Jurisdiction and General Law*, 95 TEXAS L. REV. 1249, 1255, 1313, 1318–19 (2017). As Sachs explains, *International Shoe's* jurisdictional requirements could provide the governing standard under a general-law approach, provided those requirements reflected current customary international law (CIL).

5. *See id.* at 1287–91.

Amendment, Sachs explains, courts refused to recognize the judgments of other sovereigns if those judgments were not supported by personal jurisdiction.[6] In deciding whether a judgment-issuing court possessed personal jurisdiction, courts would apply not constitutional law but general law, which included the law of nations.[7] General law was neither state nor federal.[8] As a result, state courts were not bound by federal courts' general law conclusions nor could personal jurisdiction determinations be appealed from state to federal court.[9]

The Fourteenth Amendment made the question of personal jurisdiction a federal one;[10] enforcement of the judgment of a court that lacked personal jurisdiction would "deprive [the defendant] of life, liberty, or property, without due process of law."[11] By making the presence of personal jurisdiction a federal issue, the Amendment paved the way to appeal judgments lacking personal jurisdiction to the federal courts.[12] The Amendment did not, however, impose a federal standard—whether minimum contacts or anything else—to govern the reach of personal jurisdiction.[13] Instead, the Fourteenth Amendment was adopted against the understanding that courts would continue to apply general law to determine when an exercise of personal jurisdiction was excessive.[14]

Based on this understanding, Sachs proposes a return to general law[15]—which he generally suggests means a return to customary international law (CIL)[16]—to set the boundaries of personal jurisdiction.[17]

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6. *Id.* at 1252–53, 1269–70, 1272–78.

7. *Id.* at 1252–53, 1269–70, 1276–88, 1302.

8. *Id.* at 1252–53, 1262–63, 1265.

9. *Id.* at 1252–53, 1265, 1270, 1293–94, 1306–07.

10. *Id.* at 1249, 1252–53, 1288–89, 1306, 1309–10.

11. U.S. CONST. amend. XIV; *see* Sachs, *supra* note 4, at 1252–53, 1288, 1297–98, 1300, 1306.

12. Sachs, *supra* note 4, at 1252–53, 1288–89, 1306–07.

13. *Id.* at 1249, 1252, 1288–89, 1297–1300, 1306–07, 1309–10, 1317.

14. *Id.* at 1288–89, 1299, 1310.

15. Professor Sachs proposes a return to the general law in the sense that he would replace personal jurisdiction standards derived from the Fourteenth Amendment with standards that derive from CIL to mimic the resort to general law that the Fourteenth Amendment contemplated. In another sense, Professor Sachs's proposal is no return at all. The federal common law that exists post-*Erie*, and that would govern personal jurisdiction under Professor Sachs's proposal, is only "'general' in the sense that its content is derived from general principles or practice . . . . [I]t has federal law status, rather than general law status, in U.S. courts." Bradley et al., Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 936 n.38 (2007); *see also* Sachs, *supra* note 4, at 1268–69 (discussing how contemporary general law is general in its source); *infra* text accompanying note 50.

16. According to traditional understanding, CIL emerges from the "general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987); *see also* Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060 (describing

In this brief response, I assume that Sachs's account of the original understanding and resulting proposal are well-grounded. I focus instead on the conceptual, practical, and normative implications of that understanding and proposal. The conceptual implications I explore arise in another area of law—U.S. foreign relations law.

I. Conceptual Implications

Over the last two decades, U.S. foreign relations law scholars have debated the domestic legal status of CIL.[18] The Restatement (Third) of the Foreign Relations Law of the United States took the position of most scholars that CIL is federal common law.[19] This position became known as the modern view.[20] The modern view, and its endorsement in the Restatement, came under attack by scholars who argued that federal courts may apply CIL as common law only as authorized by the Constitution or statute.[21] This position came to be known as the revisionist position.[22] While Professor Sachs's article is not framed to address the modern-versus-revisionist debate, it bears on two aspects of that debate.

First, the conflict over the domestic status of CIL raised the question whether CIL, prior to the Supreme Court's landmark ruling in *Erie Railroad Co. v. Tompkins*,[23] was federal common law or general common law.[24] The issue is significant in light of *Erie*'s rejection of a federal general common law.[25] The debate, it appears, has been settled in favor of CIL as pre-*Erie* general law.[26] Professor Sachs's article confirms the accuracy of that settlement. As Professor Sachs documents, the law of nations governing personal jurisdiction was treated as general law

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CIL as "general practice accepted as law"). In other words, CIL requires both state practice and a sense of legal obligation that is termed *opinio juris*. RESTATEMENT (THIRD) §102 cmt. c.

17. Sachs, *supra* note 4, at 1249, 1254–55, 1313–14, 1316, 1318–19. While Sachs for the most part asserts that the general law of personal jurisdiction should derive from CIL, he leaves open the possibility that American practice may displace norms of CIL, in which case the content of CIL would be less relevant. *See id.* at 1321–23. CIL would remain the place to start, however. *See id.* at 1324–25.

18. *See, e.g.*, Bradley et al., *supra* note 15, at 871 (identifying, in 2007, "the domestic status of [CIL]" as "[t]he most contested issue in U.S. foreign relations law during the last decade").

19. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. d (AM. LAW INST. 1987) ("Customary international law is considered to be like common law in the United States, but it is federal law.").

20. Bradley et al., *supra* note 15, at 836, 870–71.

21. *See, e.g.*, *id.* at 871.

22. *See id.*

23. 304 U.S. 64 (1938).

24. Bradley et al., *supra* note 15, at 882–85.

25. *See id.* at 882–83; *Erie*, 304 U.S. at 78 ("There is no federal general common law.").

26. *See* Bradley et al., *supra* note 15, at 892–93 ("These passages show that the Court in *Sosa* understood CIL as having general law, rather than federal law, status prior to *Erie*.").

historically.[27] Neither federal nor state courts were bound by each other's interpretations of the law of personal jurisdiction and state court conclusions on personal jurisdiction did not present issues of federal law that could be appealed to the federal judiciary.[28] The Fourteenth Amendment federalized the issue of personal jurisdiction but did not replace the general law as the source of personal jurisdiction boundaries.[29]

Second, the debate over the domestic status of CIL raised concerns over the sidelining of CIL in domestic law.[30] Perhaps the primary motivation behind resistance to the revisionist position is not concern for its historical, doctrinal, or theoretical accuracy but for a comparatively reduced role for CIL in American law. Some of this concern is overstated. While the modern position clearly supports the application of CIL as federal common law, the revisionist position does not foreclose that possibility.[31] Instead, the revisionist position supports application of CIL within the restrictions that govern post-*Erie* federal common law.[32] Consistent with the revisionist view and *Erie*'s concern for federal judicial lawmaking, federal courts may apply CIL when instructed to do so by statutes such as the Federal Piracy Statute or the Foreign Sovereign Immunity Act.[33] CIL may also serve interpretive and gap-filling functions when courts interpret treaties or foreign affairs statutes.[34]

Professor Sachs's article provides another example of a scenario in which CIL might be available (to the extent it exists)[35] to federal courts under a revisionist approach. In his view, the Due Process Clause of the Fourteenth Amendment prohibits the interstate enforcement of judgments from courts lacking personal jurisdiction.[36] Such judgments are "void; [their] execution [would thus take] away property (or, less commonly, liberty) without due process of law."[37] The Due Process Clause, however, does not dictate when a state may exercise personal jurisdiction.[38] Rather, it was adopted against the backdrop understanding that personal jurisdiction must not exceed the bounds set by the law of nations, which formed part of

27. *See* Sachs, *supra* note 4, at 1252–53, 1269–70, 1273, 1283–84, 1307.

28. *See id.* at 1252–53, 1264–65, 1270, 1307.

29. *Id.* at 1249, 1252–53, 1288–89, 1307, 1309–10.

30. *See, e.g.*, Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1828 (1998) (emphasizing that under the revisionist view, "in most cases, [CIL] is not United States law at all!").

31. *See* Bradley et al., *supra* note 15, at 910.

32. *Id.*

33. *See id.* at 919–20.

34. *See id.* at 920–22.

35. *See infra* Part II.

36. *See* Sachs, *supra* note 4, at 1252–53.

37. *Id.*

38. *See id.* at 1249, 1252–53, 1288–89, 1297–1300, 1306–07, 1309–10, 1317.

the general law.[39] In other words, the Due Process Clause does not enshrine the law of nations, or any other personal jurisdiction standard, as constitutional law; it merely requires that judgments be supported by personal jurisdiction and anticipated that the law of nations would define whether personal jurisdiction is proper.[40]

In this regard, the dynamic underlying the Due Process Clause parallels that underlying the Alien Tort Statue (ATS), which has been a focal point in the debate over CIL's domestic legal status.[41] The ATS, which was enacted as part of the First Judiciary Act, authorizes federal courts to hear suits "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[42] In 1980, the statute became the platform for U.S. litigation involving violations of the CIL of human rights.[43] The Supreme Court resolved its first ATS case in 2004. In that case—*Sosa v. Alvarez-Machain*[44]—the Court concluded that the ATS is jurisdictional only; it provides federal courts jurisdiction to hear law of nations claims by aliens, but it does not create causes of action for those violations.[45] The First Congress assumed that the general law would provide the causes of action.[46] Based on that congressional understanding or intent, the *Sosa* Court found some federal judicial authority to create common law causes of action for violations of customary international law.[47] Just as the source of the authority to create causes of action derived from congressional intent, the scope of that authority was confined by congressional intent as well.[48] Federal courts could only recognize causes of action that were as well-defined and as widely accepted as the law of nations violations Congress likely had in mind in enacting the ATS: piracy,

39. *See id.* at 1252–53, 1269–70, 1273, 1277–89, 1299, 1302, 1310.

40. *See id.* at 1249, 1252–53, 1288–89, 1297–1300, 1306–07, 1309–10, 1317.

41. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2nd Cir. 1980) (concluding that ATS suits between foreign nationals do not run afoul of Article III of the Constitution because "the law of nations . . . has always been a part of the federal common law").

42. 28 U.S.C. § 1350 (2012).

43. *See generally Filartiga*, 630 F.2d 876.

44. 542 U.S. 692 (2004).

45. *Id.* at 712–14, 729.

46. *Id.* at 714–25, 729–30; Bradley et al., *supra* note 15, at 894–95.

47. *See Sosa*, 542 U.S. at 724–25, 729–32; David H. Moore, *An Emerging Uniformity for International Law*, 75 GEO. WASH. L. REV. 1, 31–35, 37, 49 (2006); Bradley et al., *supra* note 15, at 891, 894, 903.

48. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004); Moore, *supra* note 47, at 39 (acknowledging the argument that certain limitations the *Sosa* Court imposed on federal common lawmaking derived from congressional intent); Bradley et al., *supra* note 15, at 902, 903–04 (noting "the Court's insistence in *Sosa* that any federal common law relating to CIL be grounded in, conform to, and not exceed the contours of what the political branches have authorized"); *id.* at 904 (observing that the Court "tethered modern recognition of CIL-based claims to the historical paradigms Congress anticipated in enacting the ATS").

offenses against ambassadors, and violation of safe conducts.[49]

Sosa's translation of the First Congress's intent from a pre-*Erie* world, in which general law was neither state nor federal and did not support arising under jurisdiction, into a post-*Erie* world, in which federal common law can preempt state law and give rise to federal question jurisdiction, did not escape criticism.[50] Justice Scalia wrote separately to argue the impossibility of such a translation.[51] Yet, whatever the merits of translation, grounding federal judicial authority to apply CIL[52] in congressional intent coheres with the revisionist view that constitutional or congressional authorization is required before federal courts can apply CIL as a rule of decision.[53]

The same holds true with the Due Process Clause. Relying on constitutional intent to find federal judicial authority to turn to CIL in assessing personal jurisdiction is consistent with the revisionist position. Moreover, the translation of that intent from pre- to post-*Erie* worlds is not as problematic in the context of the Due Process Clause. The Due Process Clause federalized the requirement that a judgment be supported by personal jurisdiction to be enforceable.[54] As a result, there was a federal ground for the Supreme Court to hear appeals from state court decisions regarding personal jurisdiction before *Erie*.[55] In the course of hearing those appeals, the Supreme Court would apply general law.[56] As a doctrinal matter, the Court's interpretation of general law might not have bound state courts, but as a practical matter state courts ultimately "conform[ed] to the federal view of [the general law], on pain of being reversed."[57]

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49. *Sosa*, 542 U.S. at 715–17, 720, 724–25, 732; *see also* Moore, *supra* note 47, at 34–37 (discussing how the Court found in congressional intent ongoing authority for federal courts to recognize limited causes of action grounded in CIL).

50. *See Sosa*, 542 U.S. at 739–41, 744–47 (Scalia, J., concurring); *see also* Bradley et al., *supra* note 15, at 873, 895 (noting *Sosa*'s "translation of the specific intentions of the ATS framers to the regime of post-*Erie* federal common law"); *id.* at 875, 878 (contrasting the characteristics of pre-*Erie* general common law and post-*Erie* federal common law); *id.* at 896 (noting problems with *Sosa*'s attempted translation).

51. *Sosa*, 542 U.S. at 739, 744–47 (Scalia, J., concurring); *id.* at 729–31 (majority opinion) (summarizing and responding to Justice Scalia's opinion).

52. While *Sosa* focused on federal court authority to recognize causes of action based on CIL and not on the domestic status of CIL generally, the Court's reasoning supports a revisionist view of that broader question. *See* Bradley et al., *supra* note 15, at 909.

53. *See* Moore, *supra* note 47, at 8, 32–37 ("[T]he [*Sosa*] Court nodded support for the [revisionist] position by demonstrating that the application of CIL in federal courts turns on congressional intent."); Bradley et al., *supra* note 15, at 902–04 (arguing that the *Sosa* Court's focus on congressional intent is inconsistent with the modern view that all CIL is federal common law).

54. Sachs, *supra* note 4, at 1249, 1252–53.

55. *See id.* at 1249, 1252–53, 1288, 1306–07, 1310.

56. *See id.* at 1249, 1288, 1306–09, 1310.

57. *Id.* at 1253; *see also id.* at 1288–89, 1309–10, 1313–14.

Consequently, personal jurisdiction issues both qualified for federal resolution and involved a federal understanding of general law that state courts followed even before *Erie*. Transplanting personal jurisdiction analysis into a post-*Erie* world thus does not involve as radical a transformation as occurred in translating the congressional intent behind the ATS.

II. Practical Implications

Professor Sachs generally asserts that a return to the original understanding of the Due Process Clause would leave federal courts in the position of applying evolving norms of CIL to determine the scope of personal jurisdiction.[58] There is a practical difficulty with this approach. There is no customary international law to apply.[59] Or at least that is the position of the Restatement (Fourth) of the Foreign Relations Law of the United States.[60] According to the Reporters, while "[t]he U.S. Supreme Court once regarded the exercise of personal jurisdiction . . . as subject to international law. . . . modern [CIL] generally does not impose limits on jurisdiction to adjudicate."[61] The Restatement (Third) had offered international law principles governing jurisdiction to adjudicate,[62] but recognized that "it is not always clear whether the principles governing jurisdiction to adjudicate are applied as requirements of public international law or as principles of national law."[63] The principles the Restatement (Third) offered "generally tracked the due-process jurisprudence of the U.S. Supreme Court."[64] The draft Restatement (Fourth) makes clear that these

58. *See supra* note 17 and accompanying text.

59. Professor Sachs briefly acknowledges that "there may not be . . . any shared rules about judicial jurisdiction," but he suggests that the search for such rules should begin with international law. Sachs, *supra* note 4, at 1325.

60. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Part III, Introductory Note (AM. LAW INST., Tentative Draft No. 1, March 21, 2016); *id.* § 302, Rep. Note 1; Donald Earl Childress III, *Jurisdiction, Limits Under International Law*, *in* European Encyclopedia of Private International Law (Jürgen Basedow, Giesela Rühl, Franco Ferrari, Pedro de Miguel Asensio, eds., forthcoming 2017) (expressing doubt that there is customary international law governing jurisdiction to adjudicate, while suggesting that there may be general principles of law on the topic).

61. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302, Rep. Note 1 (AM. LAW INST., Tentative Draft No. 1, March 21, 2016). "Jurisdiction to adjudicate [refers to] jurisdiction to subject persons or things to the process of a country's courts or administrative tribunals." *Id.* Introductory Note.

62. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (AM. LAW INST. 1987).

63. *Id.* part IV, chpt. 2, Introductory Note; *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302, Rep. Note 11 (AM. LAW INST., Tentative Draft No. 1, March 21, 2016).

64. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302, Rep. Note 11 (AM. LAW INST. 2017); *see also* RESTATEMENT (THIRD) OF THE FOREIGN

principles reflect U.S., not international, law.[65] The result is that resort to CIL is even more problematic than it would normally be. As the Supreme Court recognized in *Sosa*, judicial identification of international law norms, which are based on state practice and *opinio juris*,[66] generally involves "a substantial element of discretionary judgment."[67] Working to create a CIL of personal jurisdiction would take judicial discretion to another, far more troubling, level.[68]

III. Normative Implications

Professor Sachs suggests that a return to a system in which the Due Process Clause requires that judgments be supported by personal jurisdiction but does not provide constitutional rules would have at least two normative benefits. First, it would leave personal jurisdiction rules as ordinary law that Congress could reform within the scope of its enumerated powers.[69] Second, it would allow personal jurisdiction law to dodge the longstanding conflict over whether, or to what extent, Due Process protects sovereignty or individual liberty.[70] Whether these are benefits and, if they are, whether they would be realized is uncertain.

The desirability of congressional control over personal jurisdiction limits depends, at least in part, on whether those limits primarily attempt to resolve questions of inter-sovereign relations or to protect individual liberty interests. If the former, Congress may be a fit body to oversee rules of

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RELATIONS LAW OF THE UNITED STATES § 421, Rep. Note 1 (AM. LAW INST. 1987) ("The modern concepts of jurisdiction to adjudicate under international law are similar to those developed under the due process clause of the United States Constitution.").

65. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302, Rep. Note 1, 11 (AM. LAW INST., Tentative Draft No. 1, March 21, 2016).

66. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (AM. LAW INST. 1987).

67. Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (2004).

68. *Cf.* Sachs, *supra* note 4, at 1325 (asserting that "[f]inding the current conventional answers is not only easier than finding true ones—it may also be more suitable for a judge's role").

69. *See id.* at 1249, 1252–53, 1254–55, 1286–87, 1313–15, 1316–18; *Sosa*, 542 U.S. at 731 (recognizing that Congress "may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such").

70. *See* Sachs, *supra* note 4, at 1255 (asserting that in returning to the *Pennoyer* regime, courts applying the Due Process Clause should avoid "pitched battles of modern jurisdiction doctrine—between 'sovereignty' and 'liberty,'" looking instead "to jurisdiction's general- and international-law origins"); *id.* at 1255 (arguing that through a return to *Pennoyer* courts would not "need to plumb the depths of due process" to resolve the liberty versus sovereignty debate); *id.* at 1323 (returning to the *Pennoyer* approach would "help[] us resolve the oft-repeated conflict of 'sovereignty' and 'liberty' that's long occupied the courts"); *id.* at 1323 ("Understanding jurisdiction as general law. . . . [t]he judge's task wouldn't be to find the best theory of due process, to reconcile ancient traditions with fundamental fairness, and so on, but to issue the ruling most consistent with our existing practices.").

personal jurisdiction. States are equally represented in the Senate, which must sign off on any personal jurisdiction legislation. And the President may provide a check on whether that legislation is in the interest of the federal system as a whole. On the other hand, if personal jurisdiction rules ought to focus on individual liberty, leaving Congress in control without a judicial check may be unwise. Some judicial limits on Congress's majoritarian impulses might be desirable.

Leaving the issue of personal jurisdiction to ordinary law implicates liberty interests and the debate over the primary target of personal jurisdiction limits in another way. In effect, leaving the issue to the relevant ordinary law resolves the debate in favor of sovereignty concerns.[71] Under the ordinary law approach, personal jurisdiction is a matter for courts to oversee (absent congressional intervention) by reference to CIL.[72] The CIL of personal jurisdiction, to the extent it does or will exist, is created primarily by sovereign states and international organizations created and populated by sovereign states. As a result, the CIL of personal jurisdiction is likely to emphasize sovereignty over liberty. As Professor Sachs acknowledges, CIL provides judgments about how to accommodate the authority of independent and co-equal sovereigns.[73] As a result, resort to CIL avoids questions about whether due process should focus on sovereignty or liberty, but effectively favors sovereignty when it comes to personal jurisdiction.

Conclusion

Professor Sachs's exposition of the original understanding of the Fourteenth Amendment's Due Process Clause, as reflected in *Pennoyer*, has the potential to reconfigure the constitutional scaffolding of personal jurisdiction law. That understanding also has important implications for the ongoing foreign relations law debate over the domestic status of CIL. At the same time, the approach to personal jurisdiction that Professor Sachs proposes raises significant concerns, both practical and normative, that should give pause to its adoption.

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71. Professor Sachs seems to perceive this as the correct outcome. *See* Sachs, *supra* note 4, at 1323 ("[O]ur notions of sovereignty are necessarily connected to our convictions about which judgments are lawful. Indeed, it's hard to see how the field could be about anything else.").

72. *See supra* note 17 and accompanying text.

73. *See* Sachs, *supra* note 4, at 1255 ("General law may not be popular at the moment, but it offers something important: a conventional settlement of the problems of political authority that personal jurisdiction so obviously raises."); *see also id.* at 1313–14, 1316, 1324–25.