CIVIL PROCEDURE — PERSONAL JURISDICTION — D.C. CIRCUIT DISMISSES SUIT AGAINST NATIONAL PORT AUTHORITY OF LIBERIA FOR LACK OF PERSONAL JURISDICTION. — *GSS Group Ltd. v. National Port Authority*, 680 F.3d 805 (D.C. Cir. 2012).

The rise of the Internet and the rapid pace of globalization have spurred a "proliferation of transnational litigation."[1] Foreign litigants have flocked to the United States,[2] raising questions about the authority of federal courts to assert jurisdiction over foreign defendants.[3] Recently, in *GSS Group Ltd. v. National Port Authority*,[4] the D.C. Circuit dismissed a suit against the National Port Authority of Liberia (NPA) brought under the Federal Arbitration Act[5] and the Foreign Sovereign Immunities Act of 1976[6] (FSIA). The court decided that the NPA was entitled to Fifth Amendment due process protections and lacked sufficient contacts with the United States to support the exercise of personal jurisdiction.[7] Commenting on the NPA's entitlement to due process protections, the concurrence suggested that the constitutional right to contest personal jurisdiction should not extend to foreign defendants and Congress should be free to set its own jurisdictional standards. But denying Fifth Amendment protections to foreign defendants is not necessary to afford Congress such flexibility. The Supreme Court has yet to address whether the *Fifth* Amendment offers foreign defendants the same protections against federal courts sitting in cases arising under federal law that the *Fourteenth* Amendment does against state courts. Within the existing due process framework, courts could develop a standard for personal jurisdiction under the Fifth Amendment that accounts for the federal government's unique role in international affairs and strengthens Congress's ability to determine whether foreign defendants may be sued in American courts.

The NPA is a public corporation organized under the laws of Liberia and wholly owned by the Liberian government.[8] On June 9, 2005, the NPA entered into a contract with GSS Group, Ltd. (GSS), a construction company headquartered in Israel, for the construction and operation of a container park in Monrovia, Liberia.[9] Several

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[1] *See* Austin L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 42–43 (2006).

[2] *Id.* at 44.

[3] *See, e.g.*, SECURITIES LITIGATION AND ENFORCEMENT 19 (Donna M. Nagy et al. eds., 3d ed. 2011) (discussing extraterritorial personal jurisdiction in the context of securities litigation).

[4] 680 F.3d 805 (D.C. Cir. 2012).

[5] 9 U.S.C. §§ 1–16 (2006).

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

[7] *GSS Grp.*, 680 F.3d at 817.

[8] *Id.* at 808.

[9] *Id.*

months later, a new Liberian government declared the contract "null and void ab initio" for failing to comply with the country's competitive bidding process.[10] Invoking the contract's binding arbitration clause, GSS submitted the dispute for arbitration in London.[11] The NPA refused to participate, and the arbitrator held it in breach.[12]

Following the decision, GSS filed suit in the United States District Court for the District of Columbia to confirm the arbitral award pursuant to the Federal Arbitration Act and under the FSIA's jurisdictional provisions.[13] The NPA moved to dismiss, arguing among other things that the Due Process Clause of the Fifth Amendment prevented the court from exercising jurisdiction because the NPA lacked sufficient minimum contacts with the United States.[14] GSS offered three responses: (1) "the NPA may not claim any due process protections because it is a foreign instrumentality";[15] (2) nonresident aliens are not entitled to due process protections;[16] and (3) "foreign state-owned corporations . . . should receive no due process protections."[17] GSS did not argue that the NPA had sufficient contacts with the United States to satisfy the Fifth Amendment.[18]

Judge Friedman granted the NPA's motion to dismiss. He noted that while the FSIA provided an adequate statutory basis for establishing personal jurisdiction over the NPA, the "question remains whether the Constitution permits the exercise of personal jurisdiction."[19] Answering in the negative, Judge Friedman rejected each of GSS's arguments against the applicability of Fifth Amendment protections to the NPA. Although "foreign sovereign nations are not among the 'person[s]' afforded rights by the Fifth Amendment," that exclusion only extends to a foreign instrumentality when it is "legally indistinguishable" from the foreign sovereign.[20] GSS failed to allege such a connection between Liberia and the NPA.[21] GSS's argument that nonresident aliens should not receive due process protections fared no better. Judge Friedman did acknowledge that it was "not clear why foreign defendants . . . should be able to avoid . . . jurisdiction" by invoking due process when, in other contexts, "nonresident aliens with-

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[10] *Id.* (internal quotation marks omitted).
[11] *Id.*
[12] *Id.* at 808–09. The arbitrator assessed damages of $44,347,260. *Id.* at 809.
[13] GSS Grp. Ltd. v. Nat'l Port Auth., 774 F. Supp. 2d 134, 136 (D.D.C. 2011).
[14] *Id.* The court did not reach the NPA's other defenses. *Id.* at 137.
[15] *Id.* at 138.
[16] *Id.* at 139.
[17] *Id.*
[18] *Id.* at 137–38.
[19] *Id.* at 137.
[20] *Id.* at 138–39.
[21] *Id.* at 139.

out connections to the United States typically do not have rights under the United States Constitution."[22] But he refused to investigate the issue further, finding the practice "enshrined in law, including . . . Supreme Court precedent."[23] Finally, Judge Friedman concluded that state-owned foreign corporations do not "possess the characteristics of a sovereign nation" that justify excluding foreign governments from Fifth Amendment protections.[24]

On appeal, a unanimous panel of the D.C. Circuit affirmed the judgment.[25] Writing for the panel, Senior Judge Randolph[26] described the FSIA's jurisdictional scheme as giving district courts subject matter jurisdiction over any "nonjury civil action against a foreign state" for which the state is not entitled to immunity, and personal jurisdiction upon service of process.[27] However, he added that the Constitution imposes "non-statutory personal jurisdiction requirements."[28] He observed that, under D.C. Circuit precedent, "foreign states are not 'persons' protected by the Fifth Amendment."[29] But state-owned corporations are different. The Supreme Court has "repeatedly held that foreign corporations may invoke due process protections to challenge the exercise of personal jurisdiction."[30] A foreign instrumentality is entitled to similar protections unless "a foreign sovereign controls [it] to such a degree that a principal-agent relationship arises."[31] Because GSS had conceded the absence of such a relationship, the court lacked a reason for denying the NPA due process protections.[32]

Like the district court, Judge Randolph noted an apparent tension in the Supreme Court's personal jurisdiction jurisprudence: although the Court has held that "aliens without property or presence in . . . the United States have no constitutional rights,"[33] it has extended *International Shoe Co. v. Washington*'s[34] due process–based "minimum con-

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[22] *Id.* The D.C. Circuit first took note of this potential inconsistency in *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 302 n.* (D.C. Cir. 2005).

[23] *GSS Grp.*, 774 F. Supp. 2d at 139.

[24] *Id.* at 141. GSS moved to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure, but the district court held that GSS waived the arguments by failing to raise them on the motion to dismiss; the D.C. Circuit affirmed this holding. *GSS Grp.*, 680 F.3d at 811–12.

[25] *GSS Grp.*, 680 F.3d at 817.

[26] Senior Judge Randolph was joined by Senior Judge Williams and Judge Garland.

[27] *GSS Grp.*, 680 F.3d at 811.

[28] *Id.*

[29] *Id.* at 813 (quoting Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96 (D.C. Cir. 2002)).

[30] *Id.*

[31] *Id.* at 814–15.

[32] *Id.* at 817.

[33] *Id.* at 815 (citing, for example, United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990)).

[34] 326 U.S. 310 (1945).

tacts" protections to foreign defendants.[35] Although he proposed two potential solutions to this inconsistency,[36] he did not commit to either. Instead, he found that "unmistakable" Supreme Court precedent extending constitutional protections and GSS's waiver of the argument foreclosed the issue.[37]

Senior Judge Williams wrote a concurring opinion[38] urging reconsideration of "both the merits of the assumption . . . that private foreign corporations deserve due process protections, and . . . the application of that assumption to entities owned by a foreign state."[39] These protections, he argued, impose a "constitutional straightjacket"[40]: they inhibit Congress's ability to set jurisdictional boundaries in accordance with diplomatic needs and "'frustrate the United States government's clear statutory command' to subject foreign states to the jurisdiction of the federal courts" through the FSIA.[41] He asserted that eliminating constitutional restrictions would allow the courts and Congress to decide when foreign defendants may be sued in U.S. courts.[42]

By limiting the cases that courts have jurisdiction to decide, the constitutional doctrine of personal jurisdiction restricts the ability of legislatures to determine when and where defendants may be sued. Judge Randolph was likely correct that the Supreme Court's practice of affording foreign defendants the right to challenge personal jurisdiction is firmly entrenched. Nevertheless, a "constitutional straightjacket" on Congress's authority is not the inevitable result. In *International Shoe*, the Supreme Court ruled that the *Fourteenth* Amendment restricts state jurisdiction to cases in which the defendant has "minimum contacts" with the state such that the suit does not "offend 'traditional notions of fair play and substantial justice.'"[43] Since then, the Court has interpreted *International Shoe* as requiring the out-of-state or foreign defendant to have "purposefully avail[ed] itself of the privilege[s]" of the forum state.[44] However, whether the *Fifth* Amendment

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[35] *GSS Grp.*, 680 F.3d at 815–16.

[36] Judge Randolph suggested that either (1) the defendant's appearance to contest jurisdiction in the United States or (2) the infliction of damage in the United States by an American court may entitle the defendant to due process protections. *See id.* at 816.

[37] *Id.* at 816–17.

[38] *Id.* at 817 (Williams, J., concurring). Judge Randolph joined Judge Williams's opinion.

[39] *Id.* at 819. He also suggested reconsidering *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005). *See GSS Grp.*, 680 F.3d at 817 (Williams, J., concurring).

[40] *GSS Grp.*, 680 F.3d at 819 (Williams, J., concurring).

[41] *Id.* at 818–19 (quoting Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 98–99 (D.C. Cir. 2002)).

[42] *Id.*

[43] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[44] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785 (2011) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)) (internal quotation mark omitted).

offers foreign defendants identical protections against federal courts sitting in federal question jurisdiction is an unexamined issue. In light of the federal government's unique role in foreign affairs, courts could, within the existing doctrine, develop a Fifth Amendment standard for personal jurisdiction over foreign defendants that empowers Congress to authorize more suits in federal courts than the Fourteenth Amendment allows in state courts.

The Supreme Court has not directly addressed Fifth Amendment limitations on the exercise of personal jurisdiction by federal courts over foreign defendants. Federal courts may exercise personal jurisdiction only to the extent authorized by state law unless a federal statute permits broader jurisdiction or the defendant is not subject to jurisdiction in any state's courts.[45] When federal courts are bound by state law, the Fourteenth Amendment — as interpreted by *International Shoe* and its progeny — restricts their exercise of personal jurisdiction. When federal courts are authorized to exercise jurisdiction beyond state law constraints, however, the Fifth Amendment controls.[46] Curiously, the Supreme Court has not addressed these Fifth Amendment restrictions.[47] Many federal courts faced with the issue have adopted a modified form of *International Shoe*'s Fourteenth Amendment framework by requiring minimum contacts with the United States, rather than with a particular state.[48] While this approach guarantees jurisdiction over domestic defendants, it offers little guidance in determining when a foreign defendant has sufficient contacts for jurisdiction.[49] The Supreme Court has yet to weigh in on whether the Fourteenth Amendment's "purposeful availment" requirement for state jurisdiction also applies to foreign defendants claiming Fifth Amendment protections.

The doctrine of personal jurisdiction is a malleable tool that protects individual liberty by limiting the reach of sovereign authority. Originally a form of federal common law, personal jurisdiction

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[45] *See* FED. R. CIV. P. 4(k).

[46] *See, e.g.*, Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102–03 (1987); 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1068.1, at 592–94 (3d ed. 2002).

[47] *See* Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455, 456 (2004); *see also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 n.* (1987) (refusing to consider whether the Fifth Amendment permits jurisdiction based on aggregate "*national* contacts").

[48] *See, e.g.*, Warfield v. KR Entm't, Inc. (*In re* Fed. Fountain, Inc.), 165 F.3d 600 (8th Cir. 1999); Go-Video Inc. v. Akai Elec. Co., 885 F.2d 1406, 1415 (9th Cir. 1989). *See generally* Thomas F. Green, Jr., *Federal Jurisdiction in Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1961) (advocating for this shift in doctrine).

[49] A defendant within the United States necessarily has contacts with the United States, but the scope of the "minimum contacts" required to satisfy "traditional notions of fair play and substantial justice" remains unclear.

emerged to police the exercise of state court jurisdiction over out-of-state defendants.[50] Justice Field's landmark opinion in *Pennoyer v. Neff*[51] constitutionalized the doctrine under the Due Process Clause of the Fourteenth Amendment. Yet constitutionalizing the doctrine did not freeze its development. Throughout the twentieth century, the Court updated the requirements for asserting jurisdiction over out-of-state defendants as the American economy evolved, culminating in *International Shoe*.[52] Since then, federal courts have emphasized both territorial limitations on sovereign authority[53] and fairness to defendants[54] as the fundamental values protected under this touchstone minimum contacts framework.[55] Indeed, in affirming the Fourteenth Amendment "purposeful availment" requirement for courts asserting jurisdiction over out-of-state and foreign defendants, the Supreme Court recently commented that personal jurisdiction "restricts 'judicial power . . . as a matter of individual liberty,'" but decided that the inquiry is a "sovereign-by-sovereign" analysis that ultimately turns on "whether the sovereign has authority to render [a judgment]."[56]

"Simple identity of phrasing" between the Fifth and Fourteenth Amendments, therefore, does not require that they set identical restrictions.[57] Rather, determining the appropriate restrictions on the exercise of personal jurisdiction entails an analysis of sovereignty concerns.[58] Within *International Shoe*'s framework, a Fifth Amendment doctrine of personal jurisdiction could reflect that Fourteenth Amendment limitations on state law implicate different sovereignty interests than do Fifth Amendment limitations on federal power.[59]

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[50] *See* James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004) (discussing the origins of the doctrine).

[51] 95 U.S. 714 (1877).

[52] The Court relaxed the doctrine to accommodate states' need to assert jurisdiction over out-of-state defendants as interstate travel and industrialization increased, *see* Kane v. New Jersey, 242 U.S. 160 (1916), eventually culminating in *International Shoe*, *see* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957).

[53] *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[54] *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 539–40 (1995).

[55] The Court has struggled to define "minimum contacts" or the fairness sufficient to justify imposing the power of the court on a defendant. *See* Weintraub, *supra* note 54, at 531.

[56] *Nicastro*, 131 S. Ct. at 2789 (quoting *Ins. Corp. of Ir.*, 456 U.S. at 702).

[57] A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379, 416–17 (1997) (discussing extraterritorial legislation).

[58] *See Nicastro*, 131 S. Ct. at 2789; *see also* Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 294 (3d Cir. 1985). The Court has yet to clarify the weight that sovereignty concerns should receive in the personal jurisdiction analysis.

[59] In the context of incorporation, the Supreme Court has rejected interpretations that apply the same constitutional provision differently to the states and the federal government. McDonald v. City of Chicago, 130 S. Ct. 3020, 3035 (2010). In the context of personal jurisdiction, the limita-

The federal government's authority in the international arena differs from the authority of the states vis-à-vis other states and nations. As a "member of the family of nations," the "power of the United States" should be "equal to the . . . power of the other members of the international family."[60] But in the international sphere, the federal government does not enjoy the same jurisdictional reciprocity from foreign nations that the Constitution affords the states. Globally, many countries extend jurisdiction over foreign defendants along concepts of "effects or harm within the country."[61] The precise contours of sufficient "effects or harm" are not subject to uniform determination: no super-sovereign restricts how foreign states assert jurisdiction.[62] Moreover, nations adjust jurisdiction to promote national interests.[63] Compared to the requirement of "purposeful availment," these global standards afford foreign legislatures more flexibility in deciding when to authorize suits against foreigners in their courts.[64]

The federal government also possesses unique sovereign authority to protect American interests overseas. In the international arena, "state lines disappear" and "complete power over international affairs is in the national government."[65] Among its litany of obligations, the federal government must "protect[] the United States from acts harmful to it but performed by aliens outside its borders."[66] To that end, courts have interpreted the government's authority to include "impos[ing] liabilities . . . for conduct outside its borders that has consequences within its borders."[67] Indeed, "American law has become a potent tool for effectuating American foreign policy."[68] As a limit on the effectiveness of this extraterritorial legislation, the Fifth Amendment doctrine of personal jurisdiction constrains the federal government's sovereign authority to protect national interests.[69]

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tion on the federal court need not be different than the limitation on the states. Both would face the strictures of the *International Shoe* framework.

60 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

61 Perdue, *supra* note 47, at 462; *see* Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 328–31 (2002) (comparing personal jurisdiction in the United States and Europe).

62 *See* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 11–20 (1987).

63 Nations craft jurisdictional treaties, *see generally* Silberman, *supra* note 61, or extend jurisdiction to retaliate against another nation's unfavorable policies, *see* Parrish, *supra* note 1, at 49.

64 *See* Perdue, *supra* note 47, at 462.

65 United States v. Belmont, 301 U.S. 324, 331 (1937).

66 Weisburd, *supra* note 57, at 414.

67 United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945); *see also* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 608 (9th Cir. 1976).

68 Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992).

69 National interests are an important part of the personal jurisdiction analysis. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (noting state interests in "furthering

In contrast, the Constitution does not allow states a similar role in foreign affairs; they are, "as a direct result of the constitutional plan, no longer unlimited sovereigns."[70] Permitting state courts to assert jurisdiction over foreign defendants risks "offend[ing] foreign sovereigns" and creating "exorbitant assertions of judicial jurisdiction."[71] Thus, courts apply a heightened standard of scrutiny under the Fourteenth Amendment when states legislate regarding foreign commerce or attempt to assert authority abroad — scrutiny that has not been extended to the federal government under the Fifth Amendment.[72]

A Fifth Amendment doctrine of personal jurisdiction could account for the differences between federal and state authority. Federal courts have already applied a modified form of *International Shoe*'s minimum contacts analysis to the Fifth Amendment, requiring contacts with the United States, rather than with a particular state.[73] Within this framework, courts could continue to develop Fifth Amendment standards for personal jurisdiction that reflect the federal government's unique sovereign authority in the international realm. For example, "minimum contacts" need not require that a defendant "purposefully avail itself of the privileges" of the United States — a defendant's creation of "effects or harm" within the country could be sufficient for the exercise of personal jurisdiction.[74] Similarly, courts could assess "traditional notions of fair play and substantial justice" to account for the federal interests in having U.S. law enforced abroad.[75] Such changes would — consistent with the principles of the doctrine of personal jurisdiction — allow Congress more leeway than the states to determine when foreign defendants may be sued in American courts. A "constitutional straightjacket" need not be the inevitable outcome of allowing foreign defendants to contest personal jurisdiction.

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fundamental substantive social policies"); Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1213 (10th Cir. 2000) (holding that personal jurisdiction analyses should examine federal policies).

70 Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 34 (1982).

71 Born, *supra* note 62, at 29.

72 *See id.* at 33 ("[H]eightened scrutiny is particularly appropriate when state courts assert jurisdiction over foreigners."); Brilmayer & Norchi, *supra* note 68, at 1217–21.

73 *See* sources cited *supra* note 48.

74 *See* Perdue, *supra* note 47, at 464–65 (arguing for an effects-based test in the context of the Fifth Amendment); *cf.* Janmark, Inc. v. Reidy, 132 F.3d 1200 (7th Cir. 1997) (permitting jurisdiction over a defendant who caused a tort in Illinois regardless of purposeful availment).

75 *See, e.g.*, Synthes v. GMReis, 563 F.3d 1285, 1299 (Fed. Cir. 2009) (noting a "'substantial interest' in enforcing the federal patent laws"); *see also* David S. Welkowitz, *Beyond* Burger King*: The Federal Interest in Personal Jurisdiction*, 56 FORDHAM L. REV. 1, 25–33 (1987) (proposing a threshold assessment of the "interests of the state in asserting its authority," *id.* at 26).