# FINDING JURISDICTION IN DUE PROCESS

*Brittney Lane Kubisch**

*Originalists have devoted much attention to due process generally, but little attention to personal jurisdiction specifically. This neglect is odd given that territorial personal jurisdiction has been a due process requirement only since the Court's nineteenth-century decision in* Pennoyer. *And it is even odder given that many deem modern doctrine a mess.*

*This Article aims to begin filling this gap by explaining how and why jurisdiction relates to due process. And it does so by providing a more comprehensive understanding of the writ-based system of law that prevailed until the late nineteenth century.*

*Writs had clear ties with courts' jurisdiction. They were sovereign commands that served two court-empowering functions. They delegated adjudicative power to courts so that they could decide disputes with the power of law. And they allowed courts to constructively seize defendants or their property to bind them with their decisions. With this background, it is clear why due process—literally, proper use of writs—required both a legislative grant of jurisdiction and "tagging" the defendant with process in the state's territory where the process had both legal authority and legal force.*

*This background makes plain that* Pennoyer *had it right. But it does more than validate* Pennoyer. *It also helps resolve jurisdictional puzzles that have confounded courts and scholars alike, including why Fifth and Fourteenth Amendment Due Process differ, why both state-sovereignty and individual-rights rationales underlie jurisdictional rules, and what core jurisdictional restraints due process imposes. In providing these answers, it also clarifies the principles that should guide efforts to reform the doctrine.*



* Ken Starr Faculty Fellow, Pepperdine Caruso School of Law. For comments and criticisms on earlier drafts, I am thankful to J. Joel Alicea, Samuel L. Bray, Jud Campbell, Charlie Capps, John C. Harrison, Jason Jarvis, David Kinnaird, Mark Kubisch, Tyler Lindley, John McGinnis, Haley Proctor, and Robert J. Pushaw. I am also indebted to all the participants in the 2025 Federalist Society Junior Scholars Colloquium, the Georgetown Center for the Constitution Research Fellows Workshop Series, and the Southern California Junior Faculty Workshop for helpful discussion. All errors are my own.

## INTRODUCTION

Personal jurisdiction doctrine has long been criticized for its incoherence.[1] And much ink has been spilled trying to fix the problem. But despite the doctrine's incoherence and its tie to the Constitution, personal jurisdiction has received relatively little originalist attention.[2] This oversight is particularly surprising given the large body of originalist work on the Due Process Clauses generally and the rise of originalism as an expected and accepted mode of constitutional interpretation at the Supreme Court.[3]

Things appear to be changing on that front. In the last three jurisdictional disputes before the Court, the parties, the Justices, or both discussed the original understanding of due process as it relates to personal jurisdiction.[4] In deciding these cases, three Justices indicated a willingness to reconsider whether the jurisdictional doctrine built on *International Shoe Co. v. Washington* was correct,[5] and two explicitly called for help reconstructing the original understanding of personal jurisdiction under the Fourteenth Amendment.[6] And just last term, in

1 *See* Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1302 (2014) ("The field is widely described as a mess, an irrational and unpredictable due process morass."); *see also, e.g.*, Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1647 (2018) ("Many practitioners, judges, and academics have long lamented that personal jurisdiction doctrine is a mess."); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 618–19 (2006) (describing "near-universal condemnation" of personal jurisdiction doctrine which is "hopeless[ly] unpredictab[le]").

2 *See* Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and A Few Answers*, 73 ALA. L. REV. 483, 486–87 (2022) (explaining discussion of an originalist theory of the connection between due process and personal jurisdiction has been "rare"); *see also* Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 DUKE L.J. 941, 944–47 (2023) (noting that little originalist attention has focused on procedural doctrines like personal jurisdiction).

3 *See* Solum & Crema, *supra* note 2, at 487 (noting that despite the depth of originalist scholarship on the Due Process Clauses generally, only one prior article had undertaken to discuss an originalist view of personal jurisdiction).

4 *See infra* note 6 and accompanying text (describing this discussion in *Ford Motor Co. v. Montana Eighth Judicial District Court*); Sohoni, *supra* note 2, at 946 & nn.19–21 (collecting briefs and oral argument debating the original understanding of personal jurisdiction in *Mallory v. Norfolk Southern Railway*); Fuld v. Palestine Liberation Org., 145 S. Ct. 2090, 2110 (2025) (Thomas, J., concurring in judgment) (relying on "[h]istorical evidence" to interpret the meaning of the Fifth Amendment Due Process Clause); *see also, e.g.*, Brief for Petitioners Miriam Fuld, et al. at 17–23, *Fuld*, 145 S. Ct. 2090 (Nos. 24-20 & 24-151) (asserting original meaning of due process under the Fifth Amendment did not constrain federal courts' jurisdiction).

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

6 *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1032 (2021) (Alito, J., concurring in judgment) (recognizing that "there are grounds for questioning the standard that the Court adopted in *International Shoe*"); *id.* at 1039 (Gorsuch, J.,

*Fuld v. Palestine Liberation Organization*, two Justices relied on a "tentative" originalist interpretation of the Fifth Amendment to reject an international defendant's due process challenge to the United States' exercise of jurisdiction over it.[7]

*Pennoyer v. Neff* looms in the background of this effort to reconstruct an original understanding of the tie between due process and personal jurisdiction because it was the first Supreme Court case to connect these two concepts.[8] And there is a small, but growing group of scholars who have taken up defense of that case. Stephen Sachs, for instance, has asserted that *Pennoyer* correctly set forth the general law of jurisdiction in the nineteenth century, which could be enforced through due process.[9] Ryan Williams has defended the principle that jurisdiction is about courts' powers, which underlies *Pennoyer*'s reasoning.[10] And Cody J. Jacobs has even taken the position that the territorial rules *Pennoyer* announced are better practically and as a matter of policy than the modern *International Shoe* framework.[11]

But despite these scattered defenses, the scholarly consensus goes the other way, with many assuming that *Pennoyer* was *incorrect* in its interpretation of "due process"—even if it may have been right on other questions.[12] And both *Pennoyer* skeptics and its defenders raise several

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concurring in judgment) (seeking help from "future litigants and lower courts" to understand "the Constitution's original meaning or its history" as it relates to personal jurisdiction).

7 *Fuld*, 145 S. Ct. at 2111, 2010–11 (Thomas, J., concurring in judgment).

8 Pennoyer v. Neff, 95 U.S. 714 (1878), *overruled by*, Shaffer v. Heitner, 433 U.S. 186 (1977); *see infra* note 12.

9 Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1251–55 (2017).

10 *See* Ryan C. Williams, *Jurisdiction as Power*, 89 U. CHI. L. REV. 1719, 1724 (2022) ("defend[ing] the traditional, power-based conception of jurisdiction").

11 *See* Jacobs, *supra* note 1, at 1593 (arguing that "returning to the Territorial Model [of jurisdiction] would have several . . . practical and theoretical benefits").

12 *See* Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1115 (1981) (claiming *Pennoyer* was "the first decision to assert the relevance of the due process clause to personal jurisdiction"); John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1032 (1983) (asserting that *Pennoyer* "made the common-law doctrine of personal jurisdiction part of the fourteenth amendment"); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 174 (2004) (asserting that *Pennoyer* "graft[ed] federal common law jurisdictional rules onto the Due Process Clause"); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 835–36 (1981) (concluding *Pennoyer* incorrectly embedded territorial jurisdictional rules in the Fourteenth Amendment Due Process Clause). *See generally* Jacob Kreutzer, *Incorporating Personal Jurisdiction*, 119 PENN ST. L. REV. 211, 235–36 (2014) (describing scholarly work on this theory). Even those who think the Due Process Clause may require courts to properly acquire jurisdiction do not think *Pennoyer* should be understood as constitutionally fixing territorial personal jurisdiction requirements. *See* Sachs, *supra* note 9, at

important questions. What did the original meaning of "due process" have to do with courts' jurisdiction?[13] Why did the Fourteenth Amendment incorporate territorial limits on jurisdiction but the Fifth Amendment seemingly did not?[14] Are territorial limits on personal jurisdiction a protection of state sovereignty or an individual right?[15] And if jurisdiction is a constitutional requirement, does the Constitution actually mandate anything more than compliance with statutory limits on jurisdiction?[16]

This Article aims to begin providing answers to these questions. In doing so, it defends *Pennoyer* as an original matter. But it also reaches more broadly, seeking to begin piecing together a complete picture of the relationship between jurisdictional rules and constitutional due process guarantees.[17]

The starting point for this project is the constitutional text and, specifically, the underappreciated significance of the original meaning of "process." At the Founding and into the nineteenth century, process did not refer generally to procedures, but rather specifically meant "writs."[18] Providing "due process" thus literally meant properly using writs.[19] Understanding the full significance of this phrase requires

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1255 ("Precisely because jurisdiction is a topic in general law, and is only enforced through the vehicle of due process, its substance isn't fixed in constitutional amber."); *see also* Solum & Crema, *supra* note 2, at 524–27 (suggesting that the jurisdictional rules found in the Fourteenth Amendment Due Process Clause are dynamic and subject to change legislatively or judicially under the Rules Enabling Act).

13 *See infra* note 48.

14 *See infra* note 50.

15 *See infra* note 51.

16 *See, e.g.*, Solum & Crema, *supra* note 2, at 524–27; *see also* Sachs, *supra* note 9, at 1298 ("[D]ue process doesn't require any particular technique of obtaining personal jurisdiction.").

17 Stephen Sachs's defense of *Pennoyer* opened this conversation but did not focus specifically on tying the original public meaning of the phrase "due process" with the requirement of personal jurisdiction. *See* Sachs, *supra* note 9; *see also, e.g.*, Solum & Crema, *supra* note 2, at 487 (noting that Sachs's defense of *Pennoyer* does not focus on the meaning of the phrase "due process of law"). This Article seeks to take that additional step.

18 *Process*, 2 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (London, S. Crowder & J. Coote 1765) (defining "process" to mean the "writs and precepts that go forth" from a court "being either original or judicial"); *see also* Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 VA. L. REV. 447, 485 (2022) (noting when eighteenth-century Americans used the term "process" or "process of law" they "most commonly used the terms to mean writs or precepts issuing from a court rather than courtroom procedure more generally"); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1683 (2012) (suggesting that proper use of writs and "law of the land" were synonymous given the relationship between writs and law under the common law); *infra* note 89 and accompanying text.

19 *See* Crema & Solum, *supra* note 18, at 466; *see also* Andrew T. Hyman, *The Little Word "Due,"* 38 AKRON L. REV. 1, 4 (2005).

placing it in historical context: Because writs had been the basis for the Anglo-American legal system for hundreds of years, at the time of the Constitution's ratification, requiring proper use of writs would have been understood as synonymous with requiring government actors to follow the (then-existing) law of the land.

The fact that due process was rooted in and understood through the lens of a different legal system means that understanding how that legal system worked is necessary to fully grasp the rights originally associated with the "due process" guarantee. For jurisdiction, this requires understanding how writs related to courts' powers and thus how early Americans thought "due process" provided jurisdictional protections.

And as it turns out, writs had a longstanding relationship with the power of courts, including specifically their ability to exercise power over persons and property. Writs were originally written commands from the king, and they became important to courts' power for two reasons.[20] First, because the king was historically understood to be the source of all adjudicative or judicial power, he used writs to give some of this power to courts.[21] And second, courts used writs issued in the king's name to seize defendants or their property and to bind them with their judgments.[22] In other words, writs both delegated jurisdiction to courts and allowed courts to exercise jurisdiction over persons and property.

Neither of these empowering functions of the writs were mere formalities; to Englishmen, they provided important assurances that judicial power could only be exercised against them in a rightful way.[23] The king only had the right to adjudicate disputes between those subject to his power because they owed him allegiance and he was obliged to provide them with the protection of the law.[24] This social compact was the

20 *See* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 18 (5th ed. 2019); *see also infra* Part II.

21 *See* JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 8 (2009) (describing "a deep-seated association of kingship and law"); BAKER, *supra* note 20, at 62 (noting that an original writ gave the justices "jurisdiction over the matter"). *See generally infra* Part II.

22 Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 56 (1968) ("[P]hysical power was necessary for the initial obtaining of jurisdiction over defendants who would not appear to personal actions at common law, without which power no judgment could be rendered for the plaintiff against the defendant." (emphasis omitted)); *see also infra* Section II.D.

23 *See infra* Section II.C.

24 *See* LANGBEIN, LERNER & SMITH, *supra* note 21, at 4; *see also infra* Part II.

basis of legal power.[25] A purported court thus had no authority to bind anyone to its judgment as a matter of law without proper delegation of the adjudicative power that derived from this social compact.[26]

Likewise, courts developed the rule requiring seizure of a defendant prior to judgment to ensure both that the defendant received proper notice of a claim *and* that the king had legitimate authority to exercise judicial power over *him*.[27] Actual or constructive seizure of the defendant with a writ served both these functions. It ensured the defendant knew about the claim. But equally important, it ensured that the king had the power and authority to adjudicate the defendant's rights. And the king's power and authority were constrained in two ways: by the limits of sovereign power[28] under general law-of-nations principles and by the limits of the defendant's allegiance under a social compact theory.[29] Together, these two constraints limited a court's jurisdiction over persons to the nation's borders.

Americans inherited the basic framework of the English writ system, including the understanding that writs or "process" were the key to courts' powers.[30] And American courts understood process as limiting their power or jurisdiction in functionally the same two ways as medieval Englishmen did—only translating these limitations into the American constitutional system of government.[31] First, because the

25 *See* LANGBEIN, LERNER & SMITH, *supra* note 21, at 4, 7; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *354.

26 *See supra* note 21 and accompanying text; 3 BLACKSTONE, *supra* note 25, at *272 (describing the original writ as "the beginning or foundation of the suit" in common law courts because it delegated the king's power to courts); *see also infra* Part II.

27 *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 338 (2d ed. 1936) (appearance requirement ensured notice to defendants); *see also* 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 105 (3d ed. 1923) (appearance ensured consent or forced submission to the court's power).

28 Admittedly, the terms "sovereign" and "sovereignty" have been used in various different senses, but in this Article, they are used in the way Joseph Story defined them: "in its largest sense [by sovereign or sovereignty] is meant supreme, absolute, uncontrollable power, the *jus summi imperii*, the absolute right to govern." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 207, at 144 (Boston, Little, Brown, & Co., 4th ed. 1873) (footnote omitted).

29 The force of law only extended to the state's or nation's territorial borders. *See, e.g.*, DE VATTEL, THE LAW OF NATIONS, at lxii–lxiv (Philadelphia, T. & J.W. Johnson, Joseph Chitty ed. & trans., 1852) (1758). The authority of law derived from the social compact and extended to citizens everywhere, but only to noncitizens located in the territory. *See, e.g.*, BLACKSTONE, *supra* note 25, at *226.

30 As Justice Marshall put it, "the process of the court must be executed in order to give it the right to try the cause." Livingston v. Jefferson, 15 F. Cas. 660, 665 (C.C.D. Va. 1811) (No. 8411) (opinion of Marshall, Circuit Justice).

31 *See* Picquet v. Swan, 19 F. Cas. 609, 611 (C.C.D. Mass. 1828) (No. 11134) (opinion of Story, Circuit Justice) (noting a court's power to catch a defendant with process might be limited either because "the sovereign has chosen to assign [a] special limit, short of his

people were the source of all sovereign power, they had to delegate judicial power to courts. Constitutions and statutes could thus limit the jurisdiction of courts, including by authorizing only certain forms of action or by limiting the court's power to issue process. And second, because courts had to "catch" persons or property with process to acquire jurisdiction over them, the courts' jurisdictional reach was limited to the nation's or state's territorial boundaries where the process had both authority to command the defendant to appear and power to force an appearance.[32]

Because "due process" required proper use of writs, and proper use of writs required proper delegation of adjudicative power to courts *and* constructive seizure of a person or property with process where the process had both authority and power, *Pennoyer* was correct to hold that the Fourteenth Amendment's Due Process Clause incorporated jurisdictional limits on state courts.[33] And further, it was correct about the substance of those jurisdictional limits on persons and property—namely, that state courts could only properly exercise jurisdiction over nonconsenting persons that they could reach with process within their borders.[34]

Understanding the writ system and placing it in the broader context of eighteenth-century general law principles, however, also answers much more. It makes clearer the fundamental principle underlying jurisdiction: proper exercise of sovereign power. It helps explain why the Fourteenth Amendment Due Process Clause differs from the Fifth Amendment with respect to territorial limits on personal jurisdiction: Only courts of a separate state or nation would enforce the general law limits on sovereign power that resulted in personal jurisdiction's territorial limits and thus only the Fourteenth Amendment's structure (which permitted federal review of state action) clearly incorporated territorial limitations on due process. And it uncovers the

general authority" or because its power is "necessarily bounded and limited by the sovereignty of the government itself, which cannot be extra-territorial"); *see also infra* Part III.

32 *See infra* Part III. This Article uses the term "authority" to refer to the right to exercise sovereign power over an individual and "power" to refer to the ability to enforce the right to exercise power. *See* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1616–17 (2003) (drawing this distinction between authority and power).

33 *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1878), *overruled by*, Shaffer v. Heitner, 433 U.S. 186 (1977). Nor was *Pennoyer* the first source to recognize the connection between due process and proper use of process to acquire personal jurisdiction. Nineteenth-century jurist Thomas Cooley recognized this a few years earlier and shortly after the Fourteenth Amendment's ratification. *See, e.g.*, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 402–05 (Boston, Little, Brown, & Co. 1868) (tying use of process to obtain jurisdiction over persons or property to the concept of "due process of law").

34 *See Pennoyer*, 95 U.S. at 733.

reason that personal jurisdiction is sometimes described as a protection of state sovereignty and sometimes as an individual right: Jurisdictional limits prevented one state from interfering with another state's right to exercise sovereign power within its own territory and, in enforcing these rules, courts also protected individual defendants from the improper exercise of a foreign government's sovereign power against them.

This Article focuses primarily on how the doctrine of personal jurisdiction ties to the meaning of the phrase "due process" in the Constitution. But understanding the writ-based system of law also sheds light on why due process is associated with many other requirements that originalists have tied to the Due Process Clauses, including subject-matter jurisdiction, separation-of-powers concepts, and the notion that deprivations must occur only pursuant to established law. It also begins to illustrate how the jurisdictional concepts that underlie due process fit with many other principles originalists have found elsewhere in the Fourteenth Amendment, including the social compact theory that informs the Equal Protection Clause and the general law principles that inform the Privileges and Immunities Clause.[35]

It is worth emphasizing at the outset what this Article does not argue. Though the Article examines the history of the writ-based system of law to make clearer the fundamental rights that Anglo-Americans thought that system protected and why and how it protected them, it does not claim that Americans constitutionalized the writ system whole cloth. Instead, it tries to distill the core principles and ways of thinking about courts' powers that were intuitive to that system. And through distilling those principles, it attempts to further the discussion about the original understanding of due process.

Because this Article focuses on reconstructing the original public meaning of "due process" as it relates to personal jurisdiction, certain assumptions and methodological techniques are used. The Article takes it as a given that the Due Process Clauses had some original public meaning and that this meaning remains significant in interpreting the Clause today; it does not undertake to defend originalism as a mode of interpretation. And because the focus is on reconstructing an American understanding of due process, the discussion of English history sometimes uses resources that historians would not deem perfectly

35 *E.g.*, Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1, 12–13 (explaining that social compact theory was dominant during Reconstruction and informs the concept of equal "protection" of the law); William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185 (2024) (arguing that the Fourteenth Amendment's Privileges and Immunities Clause secured certain fundamental rights that were defined by the general law).

reliable (like William Blackstone), but that would have influenced the perspective of eighteenth- and nineteenth-century Americans.[36]

The argument proceeds as follows. Part I describes the current originalist understanding of the meaning of due process and the questions about jurisdictional doctrine that have plagued courts and scholars. Part II traces the history of the writ in England with a particular focus on how and why it was used to delegate adjudicative power to courts and to acquire power over persons and property. Part III describes the jurisdictional significance that early American courts ascribed to writs and ends by showing how *Pennoyer* put all these pieces together and tied them to the Fourteenth Amendment's Due Process Clause. And Part IV explains how viewing jurisdiction through the lens of the writ-based system can help resolve some of the confusion surrounding constitutional jurisdictional doctrine.

## I. THE PUZZLING TIE BETWEEN DUE PROCESS AND JURISDICTION

### A. *Originalist Views on Due Process*

The Fifth and Fourteenth Amendments specify that the federal and state governments cannot deprive persons of "life, liberty, or property" without "due process of law."[37] The precise meaning of this constitutional language has fractured originalists.[38] They largely agree that the Due Process Clauses relate to a provision in the Magna Carta that prevented depriving persons of private rights except "by the law of the land."[39] But they disagree about what specific protections were

36 Blackstone was one of the "most widely read and respected authorities on English common law in late-eighteenth-century America." Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 428 (2010); *see* Livingston v. Jefferson, 15 F. Cas. 660, 664 (C.C.D. Va. 1811) (No. 8411) (describing Blackstone as one "from whose authority no man will lightly dissent"). For clarity, this Article also uses modern legal terminology to describe the legal effect of particular historical practices, even if that terminology may not have been used at the time.

37 U.S. CONST. amend. V; *id.* amend. XIV, § 1.

38 *See, e.g.*, Crema & Solum, *supra* note 18, at 450–51 (describing various originalist views on due process); Chapman & McConnell, *supra* note 18, at 1675–77 (similar); Williams, *supra* note 36, at 414 ("[T]he original meaning of the Fifth and Fourteenth Amendment Due Process Clauses is arguably more widely disputed today than at any time since the late 1930s.").

39 *See, e.g.*, Chapman & McConnell, *supra* note 18, at 1682, 1681–82 (quoting MAGNA CARTA ch. 29 (1215), *reprinted in* A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 43 (1964)) (describing the tie to the Magna Carta's law-of-the-land protection as "uncontroversial," *id.* at 1681); Hyman, *supra* note 19, at 10 ("It is well-known that the federal Due Process Clause has its origins in the 'law of the land' clause of Magna Carta."); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 320 (1999) ("Scholars agree that the federal and state due process clauses are derived from the Magna Carta . . . ."); *see also In re*

originally included in the due process right.[40]

The conflicts are numerous. More broadly, originalists disagree about whether due process protected only procedural rights or whether it also included certain substantive guarantees.[41] And even those who agree that due process provided only procedural protections diverge about whether the Clause required solely compliance with positive law or also guaranteed that positive-law procedural rules would conform to certain principles of justice and fairness.[42] Originalists further disagree about whether due process applies only to executive and judicial action or whether it also applies to the legislative branch.[43]

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Winship, 397 U.S. 358, 378–79 (1970) (Black, J., dissenting) (recognizing that the Due Process Clauses relate to the Magna Carta's "law of the land" guarantee); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) (same). *But see, e.g.*, Crema & Solum, *supra* note 18, at 462 (arguing that "due process" and "law of the land" were not synonymous).

40 *See supra* note 38.

41 *Compare, e.g.*, Howard Jay Graham, *Procedure to Substance—Extra-Judicial Rise of Due Process, 1830–1860*, 40 CALIF. L. REV. 483, 484–86 (1952) ("[P]re-Civil War use and understanding of the phrases 'due process of law' and 'law of the land' were overwhelmingly procedural." *Id.* at 484.), *and* Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1412 (1974) ("Neither the words [of the Due Process Clauses] nor their history, whether in 1787 or in 1868, suggest that [they] imposed substantive limitations on what government might do, on the purposes it might pursue or the means by which it might seek them."), *and* Hyman, *supra* note 19, at 2 (arguing that due process provides only procedural protections), *with, e.g.*, Williams, *supra* note 36, at 415 (concluding that Fourteenth Amendment due process had a substantive component), *and* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 640–45 (2009) (arguing "due process of law" required an act to comply with natural law), *and* Ely, *supra* note 39, at 327 (concluding that due process "connoted substantive guarantees of fundamental rights against government"), *and* Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1072 (1956) (concluding that the Fourteenth Amendment right to due process had a "substantive spirit").

42 *Compare, e.g.*, Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 96 ("Procedures named in statutes were due process of law."), *and* Whitten, *supra* note 12, at 743 ("[D]ue process did not refer to any specific procedure . . . ."), *and* Solum & Crema, *supra* note 2, at 485 ("[T]he original meanings of the Due Process of Law Clauses of the Fifth and Fourteenth Amendments were not general commands that all legal procedures (including the assertion of personal jurisdiction) conform to a conception of procedural fairness."), *with, e.g.*, John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997) (recognizing that one view of procedural due process would "require that judicial or executive deprivations follow fair procedures"), *and* Chapman & McConnell, *supra* note 18, at 1677 (asserting that statutes violated due process if "they exercised judicial power or abrogated common law procedural protections").

43 *Compare, e.g.*, Easterbrook, *supra* note 42, at 98 ("[T]he Due Process Clause places little or no legitimate restraint on the contents of legislation."), *and* Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 371 (1911) (arguing that "law of the land" protections did not constrain exercise of legislative power), *with, e.g.*,

At the core of this originalist disagreement, however, is some consensus: Due process at least required the government to proceed through the courts before depriving someone of their private rights.[44] As Nathan Chapman and Michael McConnell explained in their influential work on the original meaning of due process, "[f]rom at least the middle of the fourteenth century, . . . due process consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law."[45] In other words, governments could not deprive individuals of private rights to life, liberty, and property unless they did so through a court applying either statutes or accepted common law principles.[46]

For a long time, judges and scholars have accepted that part of the guarantee of judicial action was that the court have jurisdiction.[47] But lurking beneath this accepted general proposition are many unsettled specifics. What connects the requirement of due process and a court's

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Hyman, *supra* note 19, at 29–30, 30 n.70 (concluding that "due process" guarantees constrain legislatures), *and* Ely, *supra* note 39, at 324 ("[T]he Bill of Rights, including the due process clause, was clearly intended to bind the legislative branch."), *and* Douglas Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 TEX. L. REV. 875, 892 (1982) ("The great innovation of American bills of rights was that they restrained legislative power, and there is no reason to believe that due process clauses were not part of that innovation.").

44 *See* Whitten, *supra* note 12, at 754 (noting due process clearly required "judicial proceedings before rights could be taken"); *see also* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 569 (2007) ("American constitutions were widely understood to require an opportunity for 'judicial' proceedings when the government proposed to act upon core private rights."); Crema & Solum, *supra* note 18, at 452 ("[T]he Due Process of Law Clause requires that the executive secure the judiciary's approval before depriving an individual of their rights." (emphasis omitted)); David Kinnaird, *Habeas Corpus and Void Judgments*, 100 NOTRE DAME L. REV. 1045, 1066 (2025) (noting due process "limits the extent to which Congress can authorize non-Article III officials to engage in adjudication involving life, liberty, or property").

45 Chapman & McConnell, *supra* note 18, at 1679; *see also* Easterbrook, *supra* note 42, at 95–96 (noting that due process required judicial action and service of a writ on the defendant prior to judgment in cases involving private rights).

46 *See* Chapman & McConnell, *supra* note 18, at 1679 (due process required a deprivation to occur according to law and using judicial process); *see also* Hyman, *supra* note 19, at 2–3 (due process required courts to follow positive law or to consider the common law absent any positive law guidance); Kinnaird, *supra* note 44, at 1065 (recognizing due process constrains "executive officials [to] act pursuant to a judicial order authorized by the law of the land").

47 *See* Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1073 (1994) ("The law of personal jurisdiction is an established part of constitutional law."); Sachs, *supra* note 9, at 1299 (noting that because due process requires "actor, reus, judex" it is a real problem if a court acts "*coram non judice*" as they would without jurisdiction); *see also* Pennoyer v. Neff, 95 U.S. 714, 733 (1878), *overruled by*, Shaffer v. Heitner, 433 U.S. 186 (1977); COOLEY, *supra* note 33, at 397.

jurisdiction?[48] Do the Due Process Clauses constitutionalize any specific rules about jurisdiction or only the requirement that the court adhere to statutory constraints on the limits of its power?[49] Do the Fifth Amendment and Fourteenth Amendment Due Process Clauses apply differently in incorporating jurisdictional rules?[50] Is the requirement of personal jurisdiction an individual right or protection of state sovereignty?[51]

These disagreements stem from the murky tie between due process and jurisdiction. Yet no originalist has undertaken to explain precisely why the phrase "due process" encompasses jurisdictional requirements for courts.

### B. *Constitutional Jurisdictional Requirements*

Given the unclear link between due process and personal jurisdiction, it should come as no surprise that the jurisdictional requirements that courts have associated with due process have not remained fixed. This raises questions about what jurisdictional principles are embedded in due process.

In *Pennoyer*, the Court specified two types of jurisdictional requirements that it deemed part of Fourteenth Amendment due process. First, the legislature had to pass a law that gave the court jurisdiction over the subject matter of the dispute. As the Court put it, "there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit."[52] And second,

48 *E.g.*, Solum & Crema, *supra* note 2, at 487; Conison, *supra* note 47, at 1075.

49 *See supra* notes 12, 16.

50 *See, e.g.*, Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703, 1706–10 (2020) (arguing that Fifth Amendment and Fourteenth Amendment Due Process Clauses differ and that the Fifth Amendment does not contain territorial constraints on jurisdiction); Whitten, *supra* note 12, at 799–804 (noting that, prior to the Fourteenth Amendment, due process was not understood to incorporate jurisdictional rules related to territorial service of process); *see also* Fuld v. Palestine Liberation Org., 145 S. Ct. 2090, 2119 & n.3 (2025) (Thomas, J., concurring in judgment) (acknowledging that the Due Process Clauses in the Fifth and Fourteenth Amendments may not have the same meaning and have long been interpreted differently with respect to personal jurisdiction requirements).

51 *E.g.*, Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 732 (2012) (describing a shift from the sovereignty-based rationale for jurisdiction in *Pennoyer* to an individual-rights rationale in modern doctrine); Redish, *supra* note 12, at 1113–14 (noting the tension between the state-sovereignty rationales that govern most personal jurisdiction rules and the individual-rights focus that dominates the discussion of most other due process doctrines); *see also Fuld*, 145 S. Ct. at 2103–06 (recognizing that both state-sovereignty and individual-rights rationales underlie the modern doctrine of personal jurisdiction, but not explaining how these rationales relate to due process).

52 *Pennoyer*, 95 U.S. at 733.

the court had to properly acquire jurisdiction over the defendant or the defendant's property, which required serving process on the defendant or property located in the state.[53] In other words, due process required courts to acquire personal jurisdiction over a nonconsenting defendant in a specific way—through "tagging" the defendant or his property with process within the physical borders of the state.[54]

The jurisdictional rules that the Court set forth in *Pennoyer* are not the same rules that the Court enforces under the Due Process Clauses today. Modern doctrine—originating nearly a half-century later in *International Shoe*—provides that the Fourteenth Amendment Due Process Clause allows a state to exercise jurisdiction over a defendant so long as the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[55]

This test thus no longer places dispositive emphasis on where the defendant was served with process. Instead, the Court has created two classes of jurisdiction that turn on the totality of the defendant's contacts with the forum state. In the first, where the defendant's contacts with the forum are "continuous and systematic,"[56] the defendant is subject to jurisdiction for any claim—also known as general jurisdiction.[57] And in the second, where the defendant's contacts with the forum are "single or isolated,"[58] the defendant is only subject to jurisdiction for claims connected to its contacts—also known as specific jurisdiction.[59]

Under modern doctrine, the Court has still retained aspects of the *Pennoyer* rule. A state may still exercise general jurisdiction over a noncorporate defendant for any claim if she is personally served with process while physically in the state.[60] But the rule has changed to make tagging the defendant with process *sufficient*, but no longer *necessary* for jurisdiction. And the Court has rejected *Pennoyer*'s conclusion that

53 *See id.* Specifically, the Court held that in actions against the defendant personally he had to "be brought within its jurisdiction by service of process within the State, or his voluntary appearance." *Id.* And in actions against the defendant's property, "property in the State [must be] brought under the control of the court, and subjected to its disposition by process adapted to that purpose." *Id.*

54 *See id.*; *see also* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2034 (2023) (plurality opinion) (noting that this jurisdiction is sometimes called "tag" jurisdiction).

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

56 *Id.* at 317.

57 *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021).

58 *Int'l Shoe*, 326 U.S. at 317.

59 *See Ford Motor Co.*, 141 S. Ct. at 1024.

60 *See* Burnham v. Superior Ct., 495 U.S. 604, 619 (1990) (plurality opinion) ("[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system . . . .").

a state may exercise jurisdiction over in-state property even when the defendant herself lacks minimum contacts with the state, concluding that this form of jurisdiction is inconsistent with a "standard of fairness and substantial justice."[61]

These changes have raised many big picture questions about personal jurisdiction. Most notably, what principle should guide the court in deciding whether a state's exercise of jurisdiction complies with the "due process" requirement?

### C. *Comparing Fifth and Fourteenth Amendment Due Process*

Another question that has plagued scholars and courts is the distinction between the jurisdictional requirements imposed under the Fifth and Fourteenth Amendment Due Process Clauses.

As many scholars have recognized, prior to the passage of the Fourteenth Amendment, virtually no state or federal court decisions concluded that the extraterritorial exercise of personal jurisdiction violated due process.[62] Instead, the rules requiring territorial jurisdiction generally were enforced when the plaintiff went to a different state's or nation's courts to execute the judgment.[63] The second court would examine the first judgment to determine if the court issuing it had jurisdiction.[64] And it would do so by applying general law principles regarding the limits of sovereign power and natural justice, not due process constitutional provisions.[65]

This means that the Fifth Amendment has long been understood to *not* impose the same territorial limits on personal jurisdiction as the Fourteenth Amendment. As the Court recognized just last term in *Fuld*, "the Due Process Clause of the Fifth Amendment necessarily permits a more flexible jurisdictional inquiry" that differs from the inquiry courts conduct under the Fourteenth Amendment.[66] The originalists on the Court went even further, concluding that the Fifth Amendment imposes no jurisdictional limits on federal courts *at all*.[67] Yet all members of the Court either accepted that the Fourteenth Amendment

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61 Shaffer v. Heitner, 433 U.S. 186, 206 (1977); *see also id.* at 212 (concluding that holding property to answer for claims is "fundamentally unfair to the defendant" who personally lacked other in-state contacts).

62 *See supra* note 12 and accompanying text.

63 *See, e.g.*, Sachs, *supra* note 9, at 1252 ("[P]ersonal jurisdiction mattered mostly for *recognition*.").

64 *See id.* at 1253.

65 *See id.*

66 Fuld v. Palestine Liberation Org., 145 S. Ct. 2090, 2105 (2025).

67 *See id.* at 2110 (Thomas, J. concurring in judgment).

Due Process Clause does constrain jurisdiction or, at the very least, left open this possibility.[68]

The distinction between the interpretation of the Fifth and Fourteenth Amendment Due Process Clauses raises questions about why they apply differently when it comes to enforcing territorial personal jurisdiction rules. Stephen Sachs has theorized that the Fourteenth Amendment Due Process Clause has properly been treated as different because it allows the federal courts to enforce general law norms against the states.[69] Many others have concluded that the absence of pre-Fourteenth Amendment precedent applying territorial jurisdiction rules under due process clauses proves that *Pennoyer* was wrong as an original matter.[70]

Thus, the question remains whether *Pennoyer* was right to conclude that territorial personal jurisdiction is a Fourteenth Amendment Due Process requirement. And assuming *Pennoyer* was right, no one has fully explained why Fifth Amendment due process does not contain the same protections as the Fourteenth Amendment—a discrepancy that the originalists on the Supreme Court just recently highlighted in *Fuld*.[71]

### *D. Individual Right Versus Protection of State Sovereignty*

Lurking beneath the puzzle of the differing interpretations of Fifth and Fourteenth Amendment due process is another question that has confounded courts and scholars alike: Are the personal jurisdiction requirements found in the Due Process Clauses a protection of individual rights or state sovereignty or both?[72] And if both, what parts of the protection relate to individual rights and what parts relate to state sovereignty?[73]

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68 *See id.* at 2102–04 (majority opinion); *see also id.* at 2119 & n.3 (Thomas, J., concurring in judgment) (leaving open the possibility that the Fourteenth Amendment Due Process Clause might be interpreted differently from the Fifth Amendment Due Process Clause).

69 *See* Sachs, *supra* note 9, at 1252–53.

70 *See, e.g.*, Whitten, *supra* note 12, at 802–04 (noting that, prior to the Fourteenth Amendment, "due process" protections were not interpreted as imposing territorial limits and attributing *Pennoyer*'s decision to incorporate those rules in due process to an improper interpretation of the Fourteenth Amendment); *see also supra* note 12.

71 *See Fuld*, 145 S. Ct. at 2103–06; *id.* at 2119 & n.3 (Thomas, J., concurring in judgment).

72 *See* Redish, *supra* note 12, at 1113–14 (noting that the personal jurisdiction rules found in due process differ from the other substantive and procedural due process rights in that "the Court has infused vague concepts of interstate sovereignty" in developing personal jurisdiction rules).

73 *See Fuld*, 145 S. Ct. at 2103–06 (implicating this question).

The existence of both potential justifications has been evident since the Court decided *Pennoyer*. In *Pennoyer*, the Court primarily relied on a state sovereignty rationale, emphasizing that Oregon could not extend its law into another state to require a defendant to answer claims against him.[74] As the Court made clear, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," but "no State can exercise direct jurisdiction and authority over persons or property without its territory."[75] The Court grounded this rule in interstate federalism principles: It was "an elementary principle" of law "that the laws of one State have no operation outside of its territory, except so far as is allowed by comity."[76] As authority for these principles, the Court cited Justice Story's treatise regarding conflicts of laws, which was primarily concerned with how international law theories affected the choice of law among nations—not due process guarantees.[77]

But the Court also gestured to the idea that these rules protected the individual rights of the defendant. If a nonresident defendant was not served in the forum state, then the state had not properly established an "obligation [of] the non-resident to appear."[78] And absent a personal obligation to appear before the forum state's court, the Court could not "establish [the defendant's] personal liability."[79] In other words, in addition to protecting each state's sovereignty, the rule requiring territorial service of process also protected individuals from a state's unjustified efforts to exercise judicial power over them.[80]

This tension has resurfaced throughout the Court's personal jurisdiction jurisprudence post-*Pennoyer*. In *International Shoe*, the Court appeared to shift the emphasis towards protecting the individual litigant from an unfair exercise of state authority, rooting the requirement that the defendant "have certain minimum contacts with [the state]" in the idea that subjecting a defendant to jurisdiction where he has minimum contacts would "not offend 'traditional notions of fair play and substantial justice.'"[81] But just over a decade later in *Hanson v. Denckla*, the Court emphasized that due process jurisdictional

74 *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1878), *overruled by*, Shaffer v. Heitner, 433 U.S. 186 (1977).

75 *Id.*

76 *Id.*

77 *See id.* (citing JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 17–38, at 21–39 (Boston, Little, Brown, & Co., 8th ed. 1883)); *see also* Redish, *supra* note 12, at 1116.

78 *Pennoyer*, 95 U.S. at 727.

79 *Id.*

80 *See id.* at 728.

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

requirements are "more than a guarantee of immunity from inconvenient or distant litigation" but also "are a consequence of territorial limitations on the power of the respective States."[82] After another twenty years passed, the Court appeared to shift its rationale again, stating that "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, [are] the central concern of the inquiry into personal jurisdiction" after *International Shoe*.[83]

These two views of personal jurisdiction have continued to surface in the Court's modern decisions.[84] Most recently, these dual rationales came into focus in the Court's decision in *Fuld*.[85] There, the Court expressly recognized that it had "repeatedly described the due process limitations imposed by the Fourteenth Amendment as driven by two principles: (1) 'treating defendants fairly,' and (2) 'protecting "interstate federalism."'"[86] And it rejected application of any federalism-based rationale in divining the rules of personal jurisdiction applicable under the Fifth Amendment, because it concluded that the Constitution does not govern the relationship between the United States and other sovereign nations in the same way that it governs the relationships between the states themselves.[87] Ultimately, the Court did not define what, if any, personal jurisdiction limitations remain in the Fifth Amendment as a consequence of individual fairness considerations and absent the state sovereignty rationale.[88]

The relationship between the Due Process Clauses, personal jurisdiction, and its two rationales thus remains murky. So too do the questions of how each of these rationales work individually or in tandem to limit the jurisdiction of courts.

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82 Hanson v. Denckla, 357 U.S. 235, 251 (1958).

83 Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

84 *See* Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987) (noting that due process rules of personal jurisdiction "represent[] a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty" (quoting Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982))); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) (describing the personal jurisdiction rules found in the Fourteenth Amendment Due Process Clauses as "an instrument of interstate federalism").

85 Fuld v. Palestine Liberation Org., 145 S. Ct. 2090, 2105 (2025).

86 *Id.* at 2103 (quoting Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1025 (2021)).

87 *See id.* at 2104.

88 *See id.* at 2106.

### *E. Using the Meaning of "Due Process" to Solve Jurisdictional Puzzles*

Faced with these jurisdictional puzzles, it seems that some piece is missing that would help shed light on what ties due process, personal jurisdiction, and the principles and rationales that should guide courts in divining personal jurisdiction rules. A deeper understanding of the writ-based system of law that existed from before the drafting of the Magna Carta until the late nineteenth century is this missing piece.

The phrase "due process" specifically referred to the writ-based system of law.[89] The word "process" was a synonym for "writs."[90] And ensuring "due" process meant that the writs were lawfully issued and

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89 Other scholars have provided a more fulsome explanation of the connection between due process and writs, so this Article will merely provide a brief overview. *See* Crema & Solum, *supra* note 18, at 462 (arguing that "due process" originally meant through use of "duly issued writs or precepts"); Chapman & McConnell, *supra* note 18, at 1683 (suggesting that proper use of writs may have been synonymous with "law of the land" given the relationship between writs and law under the common law); *see also* Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 267–268, 278 (1975) (noting that "it seems quite clear that the word 'process' referred to writs," *id.* at 268, and thus concluding that in its origins, due process meant that "judgment and execution were not to be rendered against any man unless and until he was brought personally before the court by the appropriate writ," *id.* at 267); Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L.J. 1, 82 (2007) ("As a result, framing-era Americans would still have understood that 'process of law' referred primarily to written instruments that conferred authority."). Though there is some disagreement about whether "due process" and "law of the land" were synonymous at the time of the Founding, this Article takes the position that requiring proper use of writs did functionally require adherence to the law of the land and thus that the two phrases are largely synonymous. *See* Crema & Solum, *supra* note 18, at 524–25, 524 n.331 (noting disagreement about whether "due process" and "law of the land" were synonymous at the time of the Founding); Williams, *supra* note 36, at 430 (suggesting that Coke equated the meaning of "due process" and "law of the land" because he "viewed 'due process of law' as having a relatively more precise and determinate meaning, such that 'due process of law' could be used to provide the 'true sense and exposition' of the (presumably more amorphous) 'law-of-the-land' provision" in the Magna Carta); *see also* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 10 (New York, O. Halsted 1827) ("The words, by the law of the land, . . . are understood to mean due process of law . . . ." (emphasis omitted)). Given the importance of writs to all aspects of procedural and substantive law, equating "due process" with "law of the land" would have been logical to eighteenth-century lawyers. *See id.*

90 *See Process*, *supra* note 18 (defining "process" to mean the "writs and precepts that go forth" from a court "being either original or judicial"); *see also Process*, 2 NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE (London, Black, Young, & Young 1832) (defining "process" in "law" to mean "the whole course of proceedings, in a cause, real or personal, civil or criminal, from the original writ to the end of the suit"); Crema & Solum, *supra* note 18, at 462. Chief Justice Marshall likewise explained that "process" referred to "the paper which issues from the Court"—which was by and large in the form of a writ. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 32 (1825).

executed.[91] Thus, providing "due process" literally meant properly using writs.

This plain meaning of the phrase "due process" helps connect the phrase "due process" and jurisdiction. As the next Part describes, one of the key functions of writs or process in English common law and equity courts was to vest courts with the power to decide controversies and to subject the defendant or his property to a court's power. In other words, as Blackstone explained, writs were "the foundation of the jurisdiction of th[e] court."[92]

This meaning persisted until well into the nineteenth century. American treatise writers in the nineteenth century continued to state that process was the means through which courts subjected persons or property to their power. Thomas Cooley's treatise, for example, explained that "to render the jurisdiction of a court effectual in any case, it is necessary that the thing in controversy, or the parties interested, be subjected to the process of the court."[93] A court from the era similarly explained that "send[ing] compulsory process" was the means of exercising "jurisdiction over persons."[94] An early state court decision even used the phrase "due process" to describe the court's ability to properly catch a defendant with the writ—describing "absconding defendants" as those "who willfully evade the due process of law."[95]

Understanding the constitutional dimensions of personal jurisdiction, therefore, requires an examination of how writs worked to empower courts and what principles were deemed essential to the use of writs or process to attain jurisdiction.

## II. HOW PROCESS EMPOWERED COURTS[96]

The best place to start in grasping the jurisdictional principles embedded in the writ-based system of law is the beginning. Understanding the historical development of the writ system in England, how it

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91 "To be lawful, or 'due,' a process must either be issued from a court with competent jurisdiction or, in the case of deprivations preceding adjudication, be founded on a cause of action subject to a court's jurisdiction." Crema & Solum, *supra* note 18, at 466; *see also* Hyman, *supra* note 19, at 4 ("[T]he word 'due' simply means 'owed' according to the 'law of the land' . . . .").

92 3 BLACKSTONE, *supra* note 25, at *273; *see also* ALEXANDER MARTIN, CIVIL PROCEDURE AT COMMON LAW § 10, at 9 (St. Paul, W. Publ'g Co. 1905) ("Original writs were such as were used in the institution of actions at law. . . . [And they] were anciently essential to the exercise of jurisdiction in the case.").

93 COOLEY, *supra* note 33, at 401–02.

94 *Ex parte* Graham, 10 F. Cas. 911, 912 (C.C.E.D. Pa. 1818) (No. 5657).

95 Nelson v. North, 1 Tenn. (1 Overt.) 33, 34 (1799) (opinion of Overton, J.).

96 This history is inevitably complex, and this Article does not attempt to cover all the complexities. Instead, it focuses on the portions of history relevant to the use and development of the writ as a means of obtaining jurisdiction to decide a dispute.

worked to empower courts, and what rights protections it provided litigants gives some insight into what jurisdictional rules could be found in later constitutional "due process" guarantees and why.

Some key themes emerge from this history that are consistent with an originalist understanding of due process. For one, the use of writs eventually led to a separation between the king's authority and the courts' authority to decide cases.[97] And writs limited courts' authority to resolve disputes to cases that fit within an established form of action—that is an action that had either long been recognized at common law or, later, that Parliament specially authorized.[98]

But writs were also crucial to a court's ability to exercise sovereign power to adjudicate cases and bind persons or property with their decisions. That is why Blackstone described them as "the foundation" of a court's jurisdiction.

These requirements are consistent with later American notions of jurisdiction that were eventually enforced through due process.

### A. *The Origins of a Writ-Based Legal System*

A writ originally was a written and sealed command from the king.[99] In medieval times, English kings (and others in positions of authority) used writs to perform a variety of executive functions.[100] But they became an important tool in law because the king used them to vest courts with his judicial power to decide disputes.[101]

As the ultimate protector of both persons and property in his domain, the king originally possessed the authority to resolve disputes involving his subjects.[102] But by the late twelfth or early thirteenth

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97 *See infra* Section II.A; *see also* Chapman & McConnell, *supra* note 18, at 1684 (recognizing that the rising jurisdiction of common law courts "effectively separated from the Crown the power to deprive persons of rights without the consent of a quasi-independent tribunal").

98 *See infra* Section II.B.

99 *See* BAKER, *supra* note 20, at 18 (defining the writ as "[t]he means by which the king's commands could reach far and wide, in a suitably awesome and imperious form"); R.C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL: STUDIES IN THE EARLY HISTORY OF THE COMMON LAW 110 (1959) (similar); Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 523 (1923).

100 *See* VAN CAENEGEM, *supra* note 99, at 177.

101 *See* LANGBEIN, LERNER & SMITH, *supra* note 21, at 8 (describing "a deep-seated association of kingship and law"); 3 BLACKSTONE, *supra* note 25, at *23–24 (explaining that "all courts of justice, which are the medium by which [the king] administers the laws, are derived from the power of the crown").

102 *See supra* note 101; *see also* BAKER, *supra* note 20, at 12; VAN CAENEGEM, *supra* note 99, at 26–27 (noting that the Anglo-Saxon king was "more in the nature of a supreme guardian . . . of the communal courts," *id.* at 26).

century, the king routinely delegated this authority to courts.[103] The initial reason for this shift was purely practical. As the king's court began to supplant preexisting local and feudal court systems, the king could no longer personally hear and decide every case.[104]

The king thus used writs to delegate his adjudicative authority to advisors who were experienced with the law.[105] And those advisors used writs to take subsequent actions in the name of the king in the course of deciding the dispute and executing the judgment.[106]

At first, the king exercised discretion in deciding whether to delegate his authority to courts, and the writs issued to delegate authority to courts were all uniquely suited to individual cases.[107] But as the same kinds of disputes arose repeatedly, writs that the king issued to delegate the authority to decide them became more and more systemized.[108] Eventually, the systemized writs issued as a matter of course rather than at the king's discretion.[109]

Systemization occurred for reasons of administrative efficiency. Because they were written and sealed documents, writs came from the king's chancery or "writing office" which the Chancellor, as possessor

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103 *See* BAKER, *supra* note 20, at 21–22; LANGBEIN, LERNER & SMITH, *supra* note 21, at 86 (explaining that writs "began close to the person of the king" but eventually "underwent a process of separation from the monarch, as royal civil justice became routinized and institutionalized").

104 The king's courts ultimately triumphed for a number of reasons, including superior jurisdiction, organization and predictability, use of professional jurists to decide cases, and better recordkeeping. *See* 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 84 (2d ed. 1903) ("Slowly but surely justice done in the king's name by men who are the king's servants becomes the most important kind of justice . . . ."); VAN CAENEGEM, *supra* note 99, at 18 (noting that the ultimate triumph of the king's courts stemmed from the fact that the king "was the head of the feudal pyramid" and "[h]is court was therefore the ultimate point which any feudal litigation could reach"); *see also id.* at 19, 25–26 n.4 (partially attributing the rise of royal courts to the professionalization of royal judges and the fact that royal courts "enrolled"—in other words, recorded—"their judgments," *id.* at 26 n.4).

105 *See* BAKER, *supra* note 20, at 18; *see also* 3 BLACKSTONE, *supra* note 25, at *41 (noting that the king used to sit and decide cases before the king's bench, but eventually "committed his whole judicial authority" to the judges); VAN CAENEGEM, *supra* note 99, at 28 (noting that the king had to resort to sending officials with "delegated royal authority" to dispense justice).

106 *See* BAKER, *supra* note 20, at 18, 71–72; *see also id.* at 587 (showing translation of *capias* writ which nominally issued in the king's name).

107 LANGBEIN, LERNER & SMITH, *supra* note 21, at 89–91.

108 VAN CAENEGEM, *supra* note 99, at 177 (noting "common law writs were the outcome of a process of judicialisation and specialisation" of old executive writs).

109 *Id.* at 178, 193; BAKER, *supra* note 20, at 61–62; 3 BLACKSTONE, *supra* note 25, at *274 ("[T]he royal writs are held to be demandable of common right, on paying the usual fees . . . ."); *see also* POLLOCK & MAITLAND, *supra* note 104, at 150.

of the king's seal, headed.[110] The Chancellor hired a team of clerks who were functionally professional administrators to help him draft the writs, and these clerics tended to copy previously issued writs when drafting new writs that addressed similar problems.[111] As the same language in the same types of writs consistently repeated, English jurists started to create collections of common types of writs for lawyers to study and master.[112] Particular forms of writs soon became associated with substantive and procedural rules for particular kinds of claims or forms of action. In other words, the writs became the law.[113]

Although the systemization started as a matter of administrative efficiency, it ultimately had two significant substantive effects on the English legal system that influenced later generations' understanding of their rights. First, the consistent delegation of the authority to decide disputes to those with legal expertise created a sense of entitlement to an impartial judicial determination of disputes regarding private rights.[114] As Sir Edward Coke put it in the seventeenth century, when rejecting King James's effort to assert authority to enter judgment in a case, "causes which concern the life, or inheritance, or goods, or fortunes" of English subjects "are not to be decided by natural reason but by the artificial reason and judgment of law," which could only come from judges who had long honed their legal expertise.[115] Blackstone similarly noted, "though the king himself used to sit in . . . court, and still is supposed so to do; he did not, neither by law is he empowered to, determine any cause or motion, but by the mouth

110 VAN CAENEGEM, *supra* note 99, at 138; *see also* 3 BLACKSTONE, *supra* note 25, at *273 (explaining that the chancery was "the shop or mint of justice, wherein all the king's writs are framed").

111 *See* VAN CAENEGEM, *supra* note 99, at 136–37; *see also* EARLY REGISTERS OF WRITS, at xiii, xvii–xiv (Elsa de Haas & G.D.G. Hall eds., 87 Selden Soc'y 1970); POLLOCK & MAITLAND, *supra* note 104, at 150; BAKER, *supra* note 20, at 62–63.

112 *See* EARLY REGISTERS OF WRITS, *supra* note 111, at xii–xiii. Two compilations—Glanvill's and one attributed to Henry de Bracton—were particularly influential in this regard. *See* VAN CAENEGEM, *supra* note 99, at 139, 178, 354–56; *see also* BAKER, *supra* note 20, at 185–87.

113 *See* EARLY REGISTERS OF WRITS, *supra* note 111, at xi–xii (describing writs as "the basis of the mediaeval common law," *id.* at xi); *see also* HOLDSWORTH, *supra* note 27, at 512 ("[L]earning of writs was the first thing taught to students of [the common] law.").

114 *See* Chapman & McConnell, *supra* note 18, at 1687 (describing Coke's rejection of King James' claim of a right to enter judgment in a case because "ancient customs of the realm required the King to leave the decision of cases to his judges, who are trained in the law"); VAN CAENEGEM, *supra* note 99, at 227–28 (explaining that "time and frequent use . . . make[] a writ into a writ of course" in the common law, *id.* at 227); BAKER, *supra* note 20, at 61; *see also* POLLOCK & MAITLAND, *supra* note 104, at 150.

115 Prohibitions del Roy (1607) 77 Eng. Rep. 1342, 1343; 12 Co. Rep. 63, 65.

of his judges, to whom he hath committed his whole judicial authority."[116]

Second, the entrenchment of particular common forms of writs for addressing common wrongs created the expectation that other forms of writs could not be issued unless Parliament specifically authorized their creation.[117] By the thirteenth century, jurists, litigants, and courts began to express the view that new forms of writs needed legislative sanction.[118] This led to a system of formulaic writs that represented the common law forms of action, which were used in English courts and familiar to early Americans.[119] And it further created the expectation that common law courts would only have the authority to decide cases using those common law forms of action or some other form of action that Parliament had authorized—essentially a requirement that cases be decided only according to existing common law or statutory authority.[120]

### *B. Vesting Courts with Judicial Power Through Original Writs*

The systemized writs that the king's chancery issued were called original writs to differentiate them from the judicial writs that the courts themselves issued (which are discussed later in this Part).[121] These original writs were

> [M]andatory letter[s] from the king in parchment, sealed with his great seal, and directed to the sheriff of the county wherein the injury is committed or supposed so to be, requiring him to command the wrongdoer or party accused, either to do justice to the complainant, or else to appear in court, and answer the accusation against him.[122]

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116 3 BLACKSTONE, *supra* note 25, at *41.

117 *See* BAKER, *supra* note 20, at 62–63.

118 *See id.*

119 *See id.*

120 *See id.* at 63 (noting that fixing the common law forms of action in the thirteenth century had the "momentous" effect of making "the law of the land . . . be circumscribed by the range and wording of original writs" and "defining and delimiting all the rights and remedies known to the common law, and thus as fixing the common law within an immutable formulary framework"); *see also* Chapman & McConnell, *supra* note 18, at 1683–84 ("[D]ue process required judgment by an independent court pursuant to the system of remedial writs," which essentially meant that a person could not be deprived of "life, liberty, or property without judgment by a common law court applying settled law.").

121 *See infra* Section II.D.1; *see also, e.g.*, Jurow, *supra* note 89, at 273 (noting that a sixteenth-century treatise recognized "two general kinds of process, original and judicial" (citing WILLIAM LAMBARD, EIRENARCHA: OR OF THE OFFICE OF THE JUSTICES OF PEACE, IN TWO BOOKES 415 (London, Newbery & Bynneman, rev. ed. 1582))).

122 3 BLACKSTONE, *supra* note 25, at *273; *see also* MARTIN, *supra* note 92, § 10, at 9.

Original writs were key to courts' authority because they vested the court with the king's judicial power to decide disputes and bind parties to the decision as a matter of law. Courts could not hear cases without the original writ "because they held it unfit that th[e] justices, being only the substitutes of the crown, should take cognizance of any thing but what was thus expressly referred to their judgment" by the king.[123] Once a writ issued from the chancery office, the sheriff would attempt to serve the accused and then to return to court with the writ and a report on his attempts to get the defendant to comply with it.[124] This return of the writ was "the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause."[125]

Writs not only vested the court with judicial power to decide cases but also constrained the courts' authority to decide cases to particular, established forms of action. Because a plaintiff had to obtain an original writ from Chancery to vest a common law court with jurisdiction, and because the types of original writs were limited and corresponded to particular claims and procedures, the original writs limited courts' authority to resolving specific kinds of disputes in particular ways.[126] As Blackstone explained, a litigant seeking "for that particular specific remedy which he is determined or advised to pursue" must apply for the correct writ from the Crown.[127] And a court that obtained a certain kind of writ was only empowered to provide relief if the plaintiff's claim fit into the form of action that the original writ initiated.

The use of original writs thus affected courts' authority in two ways.[128] The original writ was necessary to vest the courts with the

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123 3 BLACKSTONE, *supra* note 25, at *273; *see also* Jurow, *supra* note 89, at 268 (recognizing that "civil causes were to be brought only by means of an original writ out of the Chancery").

124 *See* 3 BLACKSTONE, *supra* note 25, at *275.

125 *Id.* at *273; *see also* BAKER, *supra* note 20, at 62 (noting that the original writ "authorized the initiation of proceedings" and when returned gave the justices "jurisdiction over the matter").

126 *See* MARTIN, *supra* note 92, § 10, at 10 (noting that the choice of original writ "came in the course of time to control the cause and form of action"); BAKER, *supra* note 20, at 63 ("The choice of original writ governed the whole course of litigation from beginning to end, since the procedures and methods of trial available in an action commenced by one kind of writ were not necessarily available in another.").

127 3 BLACKSTONE, *supra* note 25, at *273. He then gives examples:

> As, for money due on bond, an action of debt; for goods detained without force, an action of detinue or trover; or, if taken with force, an action of trespass vi et armis; or, to try the title of lands, a writ of entry or action of trespass in ejectment; or, for any consequential injury received, a special action on the case.

*Id.* (emphases omitted).

128 *See* MARTIN, *supra* note 92, § 10, at 10 ("The original writ from very early times served three very material purposes: it defined and determined concisely the form of action;

authority to issue judgments that had the force of law (i.e., the judicial power).[129] And the limited forms of original writs available restricted the types of claims or subject matter that common law courts could decide with their judicial power.[130]

### *C. Notice, Power, and the Common Law Appearance Requirement*

Ensuring that a court was vested with judicial power to decide a specific kind of case was not enough to allow it to enter a judgment that bound a particular person or altered title to property. The court also needed the right to exercise authority over either the defendant or his property to bind them with its judgment.

The rules about when the court had this authority developed in response to two considerations. First, courts needed to ensure that defendants had notice and an opportunity to contest a plaintiff's claim before depriving them of private rights. This concern was a very real one in pre-Founding England. Until modern improvements in communication and travel developed, courts faced many obstacles to ensuring that defendants were properly informed of claims against them.[131] Because of lost communications, illiterate persons, and corrupt officials, there was constantly the "peril of delay, mistake and fraud" in judicial actions.[132] Courts thus had to take abundant precautions to ensure that defendants were notified of any claims against them and had the opportunity to present their defense.[133]

Second, courts had to ensure that they had the authority to adjudicate the defendants' rights. Courts were able to bind parties to judgments with law because the king vested them with his power to do so.[134] But the king's power was not unlimited. His sovereign power to

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it gave the court in which the defendant was required to appear jurisdiction of the action, and it enjoined or enforced his appearance."). The appearance requirement and its relation to writs is discussed in the next two Sections. *See infra* Sections II.C–D.

129 *See supra* note 105 and accompanying text.

130 Because there were limited kinds of original writs and they returned to particular courts as a matter of historical practice—in England, generally Common Pleas or the King's Bench—the original writs placed subject-matter limits on the scope of each court's authority. *See* MARTIN, *supra* note 92, §§ 18–19, at 14–17. Writs, however, were not the only means of defining the subject-matter jurisdiction of the courts; the king also defined subject-matter jurisdiction through direct grants of power to them. *See* BAKER, *supra* note 20, at 62 (mentioning alternative ways of granting jurisdiction through eyre or assize commission). A full examination of the English origins of subject-matter jurisdiction is beyond the scope of this Article. The key point is that writs affected both the subject-matter and personal jurisdiction of courts.

131 *See* PLUCKNETT, *supra* note 27, at 338.

132 *Id.*

133 *See id.*

134 *See supra* note 105 and accompanying text. *See generally supra* Section II.B.

adjudicate cases and bind parties to his decisions had derived from two legal traditions: Anglo-Saxon custom and the Norman feudal system.[135] And both of these traditions only justified applying sovereign power to certain persons and property—not anyone or anything in the world.[136]

Differing notice and power considerations led courts to apply different rules depending on the type of case. In real property actions, courts would grant default judgments without securing a defendant's appearance.[137] But in personal actions, courts would not enter a judgment until the plaintiff had appeared.[138]

### 1. Default Judgments in Property Actions

The concept of royal power over property derived from the Norman feudal system.[139] In the feudal system, the king was the ultimate owner of land, and the lords (and anyone who derived property rights from them) were conditional grantees who held their land subject to their fealty to the king.[140] Thus, everyone in the kingdom had to submit to the king's authority to retain their rights to land—including any

135 LANGBEIN, LERNER & SMITH, *supra* note 21, at 4 ("The Anglo-Saxon monarchy inherited from Germanic antiquity the tradition that the king had a responsibility to protect the folk, a duty that embraced keeping the peace and rendering justice. . . . [F]eudalism added reciprocal obligations of lord and vassal, initially centered on land holding, but with implications that became broader."); *see also* BAKER, *supra* note 20, at 10–13 (describing the overlapping ideas of communal justice and seignorial authority deriving from feudal practices).

136 *Cf.* Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499, 594 (1981) ("The 'true principle' [that determined whether a foreign judgment would be recognized] was later seen to be the theory of obligation, that is, that the judgment of a court with competent jurisdiction over the defendant imposes a duty or obligation on the defendant that English courts are bound to enforce.").

137 *See* 2 POLLOCK & MAITLAND, *supra* note 104, at 592; Levy, *supra* note 22, at 75; *see also* MARTIN, *supra* note 92, § 12, at 11 (default judgment without an appearance was allowed in proceedings "against land within the jurisdiction of the court").

138 *See infra* notes 155–56 and accompanying text.

139 *See* 2 BLACKSTONE, *supra* note 25, at *48; *see also* POLLOCK & MAITLAND, *supra* note 104, at 66–67, 93–94 (recognizing Norman influence had a significant impact on feudal law taking root in England); BAKER, *supra* note 20, at 15 (noting that the Norman conquest brought "a brand of feudalism which gave seignorial jurisdiction a new basis").

140 *See* 2 BLACKSTONE, *supra* note 25, at *45, *51–53, *57 ("[T]he feodal [sic] obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection, in return for his own fealty and service." *Id.* at *57.); *see also* 1 *id.* at *354–55. Another way of describing this feudal theory of property ownership is "dependent tenure." POLLOCK & MAITLAND, *supra* note 104, at 69. The basic "theory [is] that every acre of land is immediately or mediately 'held of' the sovereign lord." *Id.*

authority he exercised in resolving disputes.[141] And if subjects failed to submit to the king's authority and breached the conditions in their grant, the king could exercise his ultimate ownership to take the land away.[142]

The feudal origins of royal authority over property, combined with the different notice considerations applicable in actions against land, led to the application of specific rules for in rem jurisdiction. When initiating a real action, a common law court would summon the defendant by placing a white stake in his property and, if the defendant failed to respond, would issue a writ seizing the disputed property and placing it in the "king's hand."[143] If the defendant failed to appear to "heal" his default, then the land would be awarded to the plaintiff.[144] The plaintiff did not need to get the defendant to appear to get judgment in an action against property.[145]

The absence of an appearance requirement in real property actions resulted from the different notice and authority considerations at play in those cases. Real property actions were "local" actions at common law, meaning they had to be brought in the court near the property.[146] This, combined with the requirement that a physical stake be placed in the disputed land, provided adequate assurance of notice to any defendant who might legitimately claim a right to the property.[147] A defendant did not need to travel, read, or depend on potentially corrupt officials to learn about such actions.

Feudal principles likewise gave the king—and courts acting in his name—more direct authority to declare rights to real property. The king had the power to award land to the plaintiff without securing the defendant's appearance because he was the land's ultimate feudal owner, and the land reverted to him when the defendant breached the

141 *See* 2 BLACKSTONE, *supra* note 25, at *54, *57. In other words, the "most essential element of feudalism" was "jurisdiction in private hands, the lord's court." POLLOCK & MAITLAND, *supra* note 104, at 68.

142 This is because the king "retained the dominion or ultimate property of the feud or fee: and the grantee . . . had only the use and possession, according to the terms of the grant . . . ." 2 BLACKSTONE, *supra* note 25, at *53.

143 2 POLLOCK & MAITLAND, *supra* note 104, at 592; *see* 3 BLACKSTONE, *supra* note 25, at *279–80; *see also* JONATHAN MCGOVERN, THE TUDOR SHERIFF: A STUDY IN EARLY MODERN ADMINISTRATION 87 (2022) (noting the use of the white staff to summon defendants in property actions).

144 2 POLLOCK & MAITLAND, *supra* note 104, at 592.

145 *See id.*

146 5 HOLDSWORTH, *supra* note 27, at 117–18 (noting the distinction between "local" actions concerning property and "transitory" personal actions).

147 *See* 2 POLLOCK & MAITLAND, *supra* note 104, at 592–93; PLUCKNETT, *supra* note 27, at 343.

duty in his conditional grant by failing to appear when summoned.[148] The basic idea was that the "contumacious tenant" of the king forfeit his land for failing to "submit[] to [the king's] justice."[149]

2. The Appearance Requirement in Personal Actions

Personal actions differed from real actions for two main reasons. First, these actions were "transitory" and could be brought anywhere.[150] They therefore posed a higher risk of fraud or mistake due to lack of notice to the defendant.[151] But second, and equally important, the king's authority to enter a valid personal judgment depended on the parties rightfully being subject to his sovereign power.[152]

The roots of Anglo-American ideas about authority over persons differed from the roots of their ideas about power over property. Personal authority traced its roots to the Anglo-Saxon idea that the king had the power to conclusively resolve disputes between his subjects because he was obligated to provide them with the protection of the law and to remedy breaches of the peace.[153] In other words, the king's authority was limited to persons that were either permanently or temporarily part of a social compact with him.[154]

The way courts handled both of these concerns was the same: They concluded "no judgment should be given in personal actions against an absent defendant."[155] In other words, getting the defendant to make an appearance was essential to the court's jurisdiction over his person.[156] This resolved any notice-related concerns because a defendant actually present before the court clearly knew about the claim against him. And it also resolved any concerns about the king's

148 *See supra* notes 139–42 and accompanying text. The king's ultimate ownership of all property likely meant he did not need the "consent" of the defendant (voluntary or coerced) in order to adjudicate rights to property, which eliminated the need for the defendant's appearance. *See* HOLDSWORTH, *supra* note 27, at 105 (noting personal jurisdiction was premised on the idea of "consent of the parties" whether actual or coerced through the proper exercise of sovereign power).

149 2 POLLOCK & MAITLAND, *supra* note 104, at 592.

150 *See, e.g.*, 5 HOLDSWORTH, *supra* note 27, at 118.

151 *See* PLUCKNETT, *supra* note 27, at 338, 343.

152 *See* HOLDSWORTH, *supra* note 27, at 105; Levy, *supra* note 22, at 58.

153 *See* BAKER, *supra* note 20, at 11; *see also* LANGBEIN, LERNER & SMITH, *supra* note 21, at 8 (noting that Germanic kings "had a duty to protect the folk").

154 *See generally infra* Section II.D.3.

155 PLUCKNETT, *supra* note 27, at 343; *see also* 2 POLLOCK & MAITLAND, *supra* note 104, at 594–95 ("Our law would not give judgment against one who had not appeared."); Levy, *supra* note 22, at 58 (similar); MARTIN, *supra* note 92, § 12, at 11 (similar).

156 *See* Levy, *supra* note 22, at 58.

authority to bind the defendant with a judgment, as a king that could rightfully command the defendant to appear clearly had authority over him.

However, as the next Section will make clearer, the requirement that the plaintiff get the defendant to appear also added a third constraint that largely overlapped with authority: power.

### *D. Judicial Writs and Personal Jurisdiction*

Because getting a defendant to appear was essential to getting a judgment in a personal action, one of the key procedural hurdles in a common law case was finding a way to secure the defendant's appearance. A defendant could, of course, voluntarily appear and submit to the court's authority to decide a case. But when he did not, the plaintiff and the court needed a way to force him to make an appearance. Judicial writs were the tool used to do this.[157] As Blackstone explained, judicial "process" was "the means of compelling the defendant to appear in court."[158]

#### 1. Using Judicial Writs to Secure the Defendant's Appearance

Judicial writs were different from the original writs that issued from the king's chancery office and were used to open a case.[159] Unlike original writs, judicial writs issued directly from the courts themselves and were used to take various intermediate steps—ranging from seizing persons or property to executing final judgments.[160] One such intermediate step was getting the defendant to appear.[161]

Many judicial writs existed to secure the defendant's appearance, but the arrest or *capias* writ was by far the most effective.[162] Other types of judicial writs were designed to pressure a defendant to appear: They

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157 *See* BAKER, *supra* note 20, at 71–72.

158 3 BLACKSTONE, *supra* note 25, at *279.

159 VAN CAENEGEM, *supra* note 99, at 111–12 (noting the distinction between original and judicial writs); 3 BLACKSTONE, *supra* note 25, at *279 (similar). *See generally* BAKER, *supra* note 20, at 60–73 (separately describing original and judicial writs).

160 *See* BAKER, *supra* note 20, at 60–61, 71–72; *see also* EARLY REGISTERS OF WRITS, *supra* note 111, at xii & n.5 (noting judicial writs issued under the court's seal). Original writs and judicial writs were not completely disconnected, however. The original writ that a plaintiff selected dictated which judicial writs were available for the court to use during the course of the case, including which writs were available to secure the defendant's appearance. *See* BAKER, *supra* note 20, at 66, 72 & n.70; 2 POLLOCK & MAITLAND, *supra* note 104, at 568–70; LANGBEIN, LERNER & SMITH, *supra* note 21, at 96–97.

161 *See supra* notes 155–56 and accompanying text.

162 BAKER, *supra* note 20, at 72; *see also* MARTIN, *supra* note 92, § 13, at 11 (noting much *mesne* process fell into disuse once the plaintiff no longer needed to secure the defendant's appearance).

attached his property, distrained it, or ultimately outlawed him.[163] But to plaintiffs, these writs were not as desirable as the *capias* writ because they focused on punishing the defendant's breach of allegiance to the king rather than ensuring justice for the plaintiff.[164] For example, when sheriffs attached or distrained the defendant's property, the property obtained would be fined or forfeited to the king for disobeying his writ; it was not given to the plaintiff to remedy his harm.[165] Likewise, a plaintiff could pursue outlawry of the defendant, but this did not give him a remedy; instead, it ended his case and imposed a penalty on the defendant for his disobedience to the Crown.[166]

Arrest, by contrast, either ensured the defendant's appearance so that the plaintiff could get a remedy from the court or, at the very least, forced the defendant to post bail from which the plaintiff could recover if the defendant absconded.[167] Plaintiffs thus increasingly attempted to fit their claims into one of the forms of action that allowed for arrest.[168] And the English courts—competing for the business of plaintiffs—used fictions to make arrest an available procedure in more forms of action.[169] Actions that allowed for arrest thus eventually displaced all other common law actions.[170]

### 2. Arrest Through Writs as the Basis for Modern Personal Jurisdiction

Ultimately, the popularity of the *capias* writ as a means of ensuring the defendant's appearance meant that arrest became the basis for personal jurisdiction.[171]

The widespread use of arrest in civil actions led to the injustice of "frivolous and vexatious arrests," and Parliament sought a way to temper the harshness of the civil arrest system.[172] The result was the

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163 *See* Levy, *supra* note 22, at 60; *see also* 2 POLLOCK & MAITLAND, *supra* note 104, at 591 (explaining "[v]ery slowly [mesne process] turns the screw which brings pressure to bear upon the defendant" to try to force him to appear).

164 *See* Levy, *supra* note 22, at 60.

165 *See* 2 POLLOCK AND MAITLAND, *supra* note 104, at 595 ("The contumacious defendant has broken the peace, is defying justice and must be crushed. Whether the plaintiff's claim will be satisfied is a secondary question.").

166 *See* Levy, *supra* note 22, at 57–58.

167 *See id.* at 62–67.

168 *See id.* at 62 (explaining that the King's Bench took much business from Common Pleas because plaintiffs preferred the arrest procedure it made available).

169 *See id.* at 62–63.

170 *See id.* at 63.

171 *See id.* at 61–63.

172 *Id.* at 61 (quoting Frivolous Arrests Act 1725, 12 Geo. 1 c. 29 (Gr. Brit.)); *see also id.* at 68 ("The harshness of arresting a defendant on trumped-up charges and forcing him to

Frivolous Arrest Act of 1725, which "created the power of the superior courts to render default judgments against nonappearing defendants not within their custody, but upon whom process had been served."[173] The Act did this by allowing plaintiffs to enter a fictitious appearance for a defendant so long as the defendant had been properly served with a writ summoning him to court where the king's agents had the power to arrest him—that is, within the territory subject to the king's sovereign power.[174] As Blackstone described, "the sheriff or his officer can now only personally serve the defendant with a copy of the writ or process . . . . [I]f the defendant does not appear upon the return of the writ . . . the plaintiff may enter an appearance for him, as if he had really appeared . . . ."[175]

This fiction was the birth of modern jurisdiction over persons. Starting in the early eighteenth century, if the king's agents could find and serve a defendant with the writ in England—where they had the power to use force to make him appear—then the courts acted as though they had constructive custody of the defendant and had jurisdiction to reach a judgment against him personally.[176] In other words, courts began to exercise personal jurisdiction over defendants so long as they were constructively arrested through proper service of a writ within the nation's borders.

### 3. The Reach of the Writ as the Limit on Personal Jurisdiction

If arrest was the basis for modern personal jurisdiction, then the ultimate question is: What limited the reach of arrest? The answer is both the authority of the king to command an appearance and his power to arrest a defendant who disobeyed the command. These dual limits effectively meant that writs had force only within the kingdom's territorial boundaries and thus that the kingdom's borders limited the jurisdiction of courts over persons.

Judicial writs, like original writs, were drafted and understood as formal commands from the king.[177] This meant that these writs derived

raise bail, especially in small cases, brought about the development of procedures which helped to mitigate the rigors of the arrest system.").

173 *Id.* at 57 (emphasis omitted).

174 *See id.* at 76.

175 3 BLACKSTONE, *supra* note 25, at *287.

176 *See* Levy, *supra* note 22, at 79. The American colonies passed similar laws around the same time. For instance, in 1701, the Massachusetts colony enacted a law that allowed the courts to enter default judgments against defendants so long as a *capias* or attachment writ was properly served on them. COLONIAL JUSTICE IN WESTERN MASSACHUSETTS (1639–1702): THE PYNCHON COURT RECORD 193 (Joseph H. Smith ed., 1961).

177 *See supra* notes 99, 122 and accompanying text.

their authority from the king's authority and had no force where the king had no power to enforce them.[178]

The king's authority to command persons with writs derived from his compact of protection with them. As Blackstone explained, "Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject."[179] Citizens owed perpetual allegiance because they had accepted the king's protection since birth.[180] Aliens owed allegiance only so long as they were present in the king's territory because, for that period of time, they were "within the king's dominion and protection."[181]

A person who owed the king allegiance was expected to faithfully obey the king—including by complying with any writ summoning her to court.[182] A subject's failure to obey the writs was viewed as a breach of allegiance to the Crown and could result in serious penalties.[183]

The consequences for failing to obey a writ made clear that the writ's authority was understood to derive from the king's social compact with the people under his protection. The punishments for failing to obey a writ at common law included fines or forfeiture of property to the Crown for disobedience.[184] And the final punishment was outlawry—literally to be placed outside the protection of the law or outside the social compact.[185] Similarly, if a defendant failed to respond to the first subpoena and attachment issued from Chancery in an equity case, the sheriff would issue a public proclamation "to summon the defendant, *upon his allegiance*, personally to appear and answer."[186] If he failed to do so "a commission of rebellion [would be] awarded against him, *for not obeying the proclamations according to his allegiance*" and "refusing to attend his sovereign when thereunto required."[187] Writ practice at both common law and in Chancery thus made clear

178 *See* VAN CAENEGEM, *supra* note 99, at 179 (noting that because writs had the authority of the monarch behind them, it was expected that these "[r]oyal writs [would] be respected and obeyed" by anyone subject to the king's authority).

179 BLACKSTONE, *supra* note 25, at *354.

180 *See id.*

181 *Id.* at *358.

182 *See id.* at *356–57.

183 *See* VAN CAENEGEM, *supra* note 99, at 140, 148 n.1; *see also id.* at 171 (noting that "contempt of the king's writ was a grave matter").

184 *See* Levy, *supra* note 22, at 60.

185 *See id.* at 81; POLLOCK & MAITLAND, *supra* note 104, at 49 & n.3; *see also id.* at 43 (describing outlawry as being "put out of the protection of the law").

186 3 BLACKSTONE, *supra* note 25, at *444 (emphasis added).

187 *Id.* (first emphasis omitted) (second emphasis added).

that the defendant's allegiance gave the writ authority—that is, allegiance was the reason that the writ ought to be obeyed.[188]

Though writs had authority to command individuals because of their allegiance, the power to enforce obedience to the writ through arrest depended on a second limitation: the king's ability to put force behind the law. And this ability was by and large limited to territory the king had the ability to control with physical force.[189] If a person decided not to obey a sovereign command, then an agent of the king (typically the sheriff) had to enforce it, and absent special agreement, these agents acted only within the king's domain where his authority and power were supreme.[190]

This principle was eventually embodied in international law norms of the eighteenth century which recognized that, as coequal sovereigns, each nation had the right to "possess[] and exercise[] exclusive sovereignty and jurisdiction throughout the full extent of its territory."[191] Celebrated eighteenth-century scholars of international law, like Emer de Vattel, explained that each nation had the supreme and exclusive right to govern its internal affairs without interference from foreign sovereigns.[192] The converse, however, was also necessarily true: "[N]o State can, by its laws, directly affect, bind, or regulate property

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188 *See* Levy, *supra* note 22, at 60 ("The failure of the defendant to appear seems to have been considered more an affront to the King's Court than to any principle of justice to the plaintiff.").

189 Two notable exceptions to the territorial limits of law were the king's power over ships flying his nation's flag on the high seas and ambassadors of the king located in other nations. *See* The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 126 (1812) (argument by advocate) (noting that ambassadors were "supposed to be . . . within the territorial jurisdiction of his sovereign"); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 96, at 154–55 (Richard Henry Dana, Jr. ed., Boston, Little, Brown & Co., 8th ed. 1866). The former is likely a consequence of the absence of any competing sovereign power on the high seas; thus, the allegiance of the ship and its crew determines what law applies to it. The latter is likely a consequence of comity among nations.

190 *See* 2 POLLOCK & MAITLAND, *supra* note 104, at 584 ("[A] sheriff could not pursue malefactors who had fled beyond his territory."); MCGOVERN, *supra* note 143, at 82 (explaining that serving writs was the sheriff's key responsibility and he did so within his bailiwick or district); *see also* WHEATON, *supra* note 189, § 78, at 133 (noting that the law of one sovereign could extend into another sovereign's territory by mutual agreement).

191 WHEATON, *supra* note 189, § 78, at 133. A good example of how physical force was understood to determine when the law had force is the cannon-shot rule: The distance that a cannon could shoot from land determined which waters were subject to the nation's control. *See also* The Anna (1805) 165 Eng. Rep. 809, 814; 5 C. Rob. 373, 385 (Adm.) (noting that the rule of law regarding international waters is "*terræ dominium finitur, ubi finitur armorum vis*" which means the dominion of the land ends where the range of weapons ends). *See generally* H.S.K. Kent, *The Historical Origins of the Three-Mile Limit*, 48 AM. J. INT'L L. 537 (1954).

192 *See* DE VATTEL, *supra* note 29, at lxii–lxiv.

beyond its own territory, or control persons who do not reside within it, whether they be native-born subjects or not."[193]

Because "[t]he binding effect" of law derived from "the command or sanction of the sovereign power of the State,"[194] this meant the power of any law—including the power of writs—was limited to the nation's borders. As English courts recognized, "[t]o foreign dominions . . . th[e] Court has no power to send any writ of any kind."[195] The nation's borders thus constrained the reach of the writ.

### *E. Writs and Equity Courts*

The writ procedure described above applies to the common law courts; equity courts had some differences. Most notably, equity courts did not require use of an *original* writ to begin a case.[196] Instead, an equity case started when an injured party filed a bill or plea with chancery seeking some form of equitable relief.[197]

This makes sense given the function of the original writ. At common law, original writs were used to delegate adjudicative authority from the king to the courts.[198] But because pleas made in equity were made directly to the Chancellor—as the possessor of the king's seal—and treated functionally as direct pleas to the Crown for extraordinary relief, the delegation of authority found in the original writ was deemed unnecessary.[199]

Moreover, equity courts existed precisely to allow claimants to seek relief when they could not obtain it through the strict forms of action and procedures applicable at common law.[200] It would make no sense to constrain equity courts to deciding cases that fit within the particular forms of action that the original writs represented when equity existed to circumvent these strict forms.

Despite their freedom from the constraints that original writs imposed, equity courts faced the same limitations as common law courts

193 WHEATON, *supra* note 189, § 78, at 133.

194 MARTIN, *supra* note 92, § 1, at 7.

195 Rex v. Cowle (1759) 97 Eng. Rep. 587, 599–600; 2 Burr. 834, 856 (KB).

196 *See* BAKER, *supra* note 20, at 111.

197 *Id.*; *see also* 3 BLACKSTONE, *supra* note 25, at *442 (actions in equity originated with a bill petitioning for relief).

198 *See supra* notes 121–25 and accompanying text.

199 *See* 3 BLACKSTONE, *supra* note 25, at *444 (noting that "matters of equity were originally determined by the king in person, assisted by his council . . . [but] that business is now devolved upon his chancellor").

200 *See* BAKER, *supra* note 20, at 106, 111–12; *see also id.* at 118 ("The essence of equity as a corrective to the rigour of laws was that it should not be tied to rules."); 3 BLACKSTONE, *supra* note 25, at *430 ("[T]he business of a court of equity in England [is] to abate the rigour of the common law.").

did when it came to exercising authority over persons. Once a case originated in equity with a bill or plea, equity courts had to use writs to secure the defendant's presence and exercise power over his person much like common law courts did.[201] They faced the same concerns about notice and proper exercise of sovereign power to bind defendants to their decisions. And they used the same rule in personal actions, requiring a defendant to appear to bind him with their judgment.[202]

This meant that equity courts also depended on the reach of their writs to define the scope of their personal jurisdiction. Equity courts could issue a writ of subpoena demanding that the defendant present himself and answer the complaint and threatening penalties if he did not answer.[203] Defendants who did not appear in response to the initial subpoena were held in contempt and would be subject to a writ of attachment, which functioned much like the *capias* writ at common law, allowing the sheriff to arrest the defendant and force his appearance.[204] Effectively, this meant that an equity court's authority and power to issue binding judgments was also confined by their ability to reach defendants with writs. And the limits on their ability to reach defendants with writs were the same limits that applied in common law courts—the defendant had to owe allegiance to the king and the king had to have the power to put the force of law behind the writ.[205] In other words, equity courts also could only exercise jurisdiction over persons found within the nation's borders.

### *F. Quasi in Rem Jurisdiction*

One final form of early jurisdiction deserves mention: quasi in rem jurisdiction. Jurisdiction over property and persons in the manner previously described worked well in most cases. But in some instances, it still led to injustice if a defendant deliberately absconded to avoid being served with the writ. The law thus developed a way to handle

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201 *See* 3 BLACKSTONE, *supra* note 25, at *443–44.

202 *See id.* at *443 (describing the use of process to compel the appearance of a defendant in equity, including the "process of subpoena . . . which is a writ commanding the defendant to appear and answer" the complaint against him and the "processes of contempt" which include "a writ in the nature of a *capias*, directed to the sheriff, and commanding him to attach, or take up, the defendant").

203 *Id.*

204 *Id.* at *443–44. Notably, equity courts could "direct[] [their process] only against the person" and thus lacked the power of common law courts to use process to initiate an action against land. *Id.* at *445. Equity courts did, however, have the power of sequestration, which allowed them to seize land as a means of executing already existing judgments. *See* 1 SYDNEY EDWARD WILLIAMS & FRANK GUTHRIE-SMITH, DANIELL'S CHANCERY PRACTICE 809–10 (8th ed. 1914).

205 *See supra* Section II.D.

these cases: It allowed plaintiffs to bring the absconding defendant's property to court to answer for claims against him personally. The principles that governed this form of jurisdiction and the reasons courts chose to adapt these principles in particular ways provide insight into the principles that limited courts' jurisdiction.

The earliest form of this jurisdiction originated as part of the Law Merchant in the Mayor's and Sheriff's Courts in London and was called "foreign attachment."[206] Dating back to before the fourteenth century, this procedure was originally designed to protect English merchant creditors from primarily foreign debtors who were apt to flee the jurisdiction if they were unable to pay their debts.[207] It allowed the plaintiff to seize and sell the defendant's property located within the jurisdiction of the court, or to garnish money that a creditor within the jurisdiction of the court owed the defendant to satisfy debts to the plaintiff.[208]

This form of jurisdiction differed from traditional jurisdiction over persons or property for two main reasons: It allowed the court to exercise jurisdiction in a transitory action against the defendant using constructive (as opposed to actual) notice, and it allowed the plaintiff to bring a claim against seized or garnished personal property without having the defendant appear.[209] It thus was somewhat of a hybrid between a real property action and a personal action.

The reasoning behind allowing this hybrid form of action provides insights into the principles governing jurisdiction over persons and property. Take the absence of personal notice. Personal notice was not required precisely because this form of jurisdiction was designed to provide the plaintiff relief when the defendant could not be found in the king's territory—presumably because he was avoiding service.[210] In place of finding the defendant, the plaintiff would have the court use writs to seize property found in the jurisdiction or to constructively seize a third party that held property of the defendant.[211] Courts accepted this form of notice because they operated on the presumption that seizure of personal property would give a defendant a reasonable

206 Nathan Levy, Jr., *Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in the Light of the English Experience*, 5 CONN. L. REV. 399, 405 (1972); *see also* Ownbey v. Morgan, 256 U.S. 94, 104 (1921) (recognizing the history of this procedure in the London merchant courts).

207 Levy, *supra* note 206, at 405–06, 408; *see also* Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and in Personam Principles*, 1978 DUKE L.J. 1147, 1154–62 (describing the historical development of quasi in rem jurisdiction as a means of protecting creditors from absconding debtors).

208 Levy, *supra* note 206, at 407.

209 *See id.* at 418–20.

210 *See id.* at 419–20.

211 *See id.* at 418.

chance of learning about the action. Specifically, they presumed that the defendant would take steps to secure his ownership of personal property, just as he would with real property, and thus would quickly find out about the action once his property was seized—especially given the property likely would have been valuable mercantile goods and the party a sophisticated merchant.[212] In other words, courts allowed for something other than personal notice if notice was reasonably calculated under the circumstances to reach the defendant.

With respect to authority and power, the court based its jurisdiction on the theory that it had both the right and the power to proceed against attached property or a third party within its territorial reach.[213] The theoretical basis for authority was largely the same as in personal actions: A defendant who had chosen to place his property under the protection of the king's law had also implicitly agreed to allow that property to be subject to the force of the king's law.[214] In essence, the defendant had placed his property in a kind of social compact with the king. Moreover, the king had the physical power to seize the property and hold it to answer for claims.[215] Thus, the defendant did not need to be present for the court to adjudicate the right to the property itself.[216]

Notably, when courts exercised this form of jurisdiction, the judgment would apply only against the personal property that they were able to seize.[217] This is consistent with the theory of authority and power that courts viewed as justifying this form of jurisdiction. The Court's reach was constrained to property actually in the king's territory and subject to the king's authority. It did not reach further and act on the defendant personally, as he was not before the Court. This suggests that the rules that limited the court's authority and power were more fixed than the rules that governed notice requirements.

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212 *See id.* at 419–20 (explaining that the defendant, often a merchant, would be expected to learn about any seizure of his goods or debts); *see also id.* at 417 (noting that the law proceeded on the presumption that a debtor to the defendant seized in a foreign attachment proceeding would notify the defendant of the action).

213 *See id.* at 407 (noting jurisdiction was limited to goods or debtors within the city of London). Eventually, English common law courts embraced a collection of procedures that were similar to the foreign attachment procedures used in the merchant courts and American courts. *See* Levy, *supra* note 22, at 84–87, 90–94.

214 *See* Levy, *supra* note 206, at 402, 407; *see also* Kalo, *supra* note 207, at 1148 (noting quasi in rem jurisdiction was justified because of "the ability to seize under judicial process the property of the defendant").

215 *See* Levy, *supra* note 206, at 407.

216 *See id.* at 418–20.

217 *See* Levy, *supra* note 206, at 423 ("[T]he property of the non-appearing debtor was devoted to payment of the creditor's claim . . . ."); *see also infra* note 255.

In sum, around the time of the Founding, writs had two basic functions related to courts' powers. They vested courts with judicial power and they allowed courts to acquire the authority and power necessary to bind persons and property to their decisions.

The next Part explores how American courts conceptualized these two types of jurisdictional limits and how those conceptualizations fit with constitutional due process protections.

## III. JURISDICTION IN EARLY AMERICAN COURTS

Americans—as former Englishmen—used the English writ system (albeit with some simplifications) from the early colonial days.[218] By the time of the Founding, the United States and the various states issued writs[219] to initiate a lawsuit, to perform various intermediate procedural steps, and to execute final judgments.[220]

In using writs, Americans inherited the concepts of jurisdiction that derived from the writ's historical pedigree in England.[221] These

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218 *See* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784, 786 (2004) (noting most states adopted English common law, including the writ-based forms of action with some simplifications); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1573 (2002) ("The court systems of the young American states tended to be more streamlined than their English counterparts, and their procedures frequently mixed together those used in different English courts." (footnote omitted)). The simplification is likely at least partially attributable to the absence of English-trained lawyers and the less onerous requirements for legal education in the United States. *See generally* Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L.J. 775 (2004) (describing early American legal education and practice); *see also* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 794 (1951) ("Few persons trained in the legal profession were to be found in the various colonies during the 17th century . . . .").

219 The American people's evolving idea of who possessed legal authority over them can be seen in the evolution of colonial writs. Initially, for instance, Massachusetts's writs required the defendant to appear "in His Majesties Name." COLONIAL JUSTICE, *supra* note 176, at 161, 160–61; *see also* STORY, *supra* note 28, § 59, at 33 (noting that in Plymouth Colony "[a]ll processes were directed to be in the king's name"); *id.* § 93, at 60 (same for Connecticut). But after the Founding, the writs were issued to the sheriff in the name of the state that issued them. For example, one early writ is addressed to the sheriff from "Commonwealth of Massachusetts. Suffolk, ss." Rice v. Hale, 59 Mass. (5 Cush.) 238, 242 (1849); *see also* Kibbe v. Kibbe, 1 Kirby 119, 121 (Conn. 1786) (quoting a similar writ); DEL. CONST. OF 1776, art. 20 (requiring "[w]rits [to] run" in "the name of 'The Delaware State'").

220 *See, e.g.*, Picquet v. Swan, 19 F. Cas. 609, 609 (C.C.D. Mass. 1828) (No. 11134) (noting that the "suit was commenced by a writ"); Pawling v. Willson & Smith, 13 Johns. 192, 192 (N.Y. Sup. Ct. 1816) (action "commenc[ed] with the writ").

221 In this sense, jurisdiction is used broadly to encompass what modern courts have now divided into the distinct concepts of subject-matter and personal jurisdiction. Well into the nineteenth century, courts discussed the problem of jurisdiction using categories that differ from these modern concepts. *See* Kinnaird, *supra* note 44, at 1061 (recognizing that "Founding-era lawyers broke down the concept [of jurisdiction]" differently than we do

concepts included the dual power requirements in the writ system: Courts had to be properly vested with judicial power and had to use process to acquire power over persons or property. For personal jurisdiction specifically, this meant that constitutions or statutes could limit courts' jurisdiction by defining when and how far they could send process.[222] And it also meant that the general law bounds of the state's authority and power could independently restrict jurisdiction.[223]

These two limits were enforced in different ways. Local courts generally would attempt to adhere to the limits that their own state had set for them by statute and would entertain arguments that they had exceeded those limits.[224] But local courts would not accept arguments that the state had given them jurisdiction via statute that exceeded the reach of its authority and power under the general law.[225] To their view, the statute displaced the general law.[226]

Defendants thus rarely challenged jurisdiction prior to judgment and instead depended on other states or nations to enforce the general law limits on a court's power and authority when the plaintiff later brought the judgment to a second court in an effort to enforce it.[227] This odd procedure developed because of the differing conflict of law rule applicable in the second, foreign court. From the foreign court's perspective, the first state's local statute could *not* displace the general law.[228] The foreign court's different perspective makes sense when viewed in light of the logical root of the general law rule: Because only one supreme power could exist in each state, any sovereign or supreme legal power had to end at the border so that its sister state's sovereign or supreme legal power could begin.[229] If a foreign court conceded that another state's legislature could override this rule by statute, it would be effectively conceding that another state's legislature could unilaterally expand its own borders. The upshot of all this is that a foreign court would give effect to general law limits on territorial power over

today). As the Supreme Court explained in the late nineteenth century: "Th[e] right [to exercise jurisdiction] has reference to the power of the court over the parties, over the subject-matter, over the *res* or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make." Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 316 (1870).

222 *See infra* Section III.B.1.

223 *See infra* Section III.B.2.

224 *See infra* Section III.B.1.

225 *See infra* Section III.B.3.

226 *See infra* Section III.B.3.

227 *See infra* Section III.B.3.

228 *See* Baude, Campbell & Sachs, *supra* note 35, at 1194.

229 *See, e.g.*, DE VATTEL, *supra* note 29, at lxii–lxiv (recognizing that laws regarding the limits of sovereign power resulted from the need to resolve conflicts regarding the reach of sovereign power); *see also supra* Section II.D.3.

the conflicting local law by refusing to enforce judgments rendered against defendants who were served with process extraterritorially—declaring these judgments void or "waste paper" because the local court had never properly acquired the power necessary to legally bind the defendant to its judgment.[230]

The difference in how the power limitations on process were enforced in local and foreign courts had important implications for application of the Due Process Clauses. Specifically, it made the Fourteenth Amendment's unique structure important to constitutional enforcement of general law limits on a court's jurisdiction.[231] Because the Fourteenth Amendment provides a *federal* "due process" right against *state* action, it allows federal courts to assess whether states are properly using process to acquire judicial power over defendants.[232] And because the United States is a separate sovereign entity from the states, when making this assessment, it may and would enforce the general law, territorial limits on sovereign power against the states over conflicting state statutes that claimed extraterritorial power.[233] This is what results in constitutional limits on state jurisdiction. Because of the structural differences in the Fifth Amendment and state due process clauses—namely, the fact that they provide local constitutional guarantees against local government action—they do not obviously incorporate the same general law protection against statutory overreach.[234]

### A. *Essential Functions of Process*

Courts in the United States—like their English counterparts—viewed writs or process as essential to their jurisdiction.[235] As Chief Justice Marshall stated in an early case about personal jurisdiction, "the process of the court must be executed in order to give it the right to try the cause."[236]

Consistent with the history of the writ in England, Americans viewed process as serving two basic functions that were considered

230 Voorhees v. Jackson, 35 U.S. (10 Pet.) 449, 475 (1836); *see also infra* Section III.B.3.

231 *See infra* Section III.C.

232 *See infra* Section III.C.2.

233 *See infra* Section III.C.2.

234 *See infra* Section III.C.

235 *See* 3 BLACKSTONE, *supra* note 25, at *279; *see also, e.g.*, Smith v. Miln, 22 F. Cas. 603, 607 (S.D.N.Y. 1848) (No. 13081) (noting that the defendant must be "brought within the jurisdiction of the court by service of proper process upon him").

236 Livingston v. Jefferson, 15 F. Cas. 660, 665 (C.C.D. Va. 1811) (No. 8411) (opinion of Marshall, Circuit Justice).

essential to a just deprivation of private rights.[237] First, process provided the defendant with notice of the claim against him and thus the opportunity to appear to defend his rights. And second, process subjected either the defendant or the defendant's property to the state's judicial power by constructively seizing them.

### 1. Notice

Giving the defendant notice was one of the two functions of process. Notice was important because depriving someone of private rights without notice was deemed an affront to "immutable principle[s] of natural justice."[238] For this reason, as Justice Story recounted, the common law had long been "anxious . . . to guard the rights of private persons from judgments obtained without notice, and regular personal appearance in court."[239]

The notice function of process imposed some limitations on the scope of courts' powers. As Chief Justice Marshall explained, "principle[s] of natural justice" required a person to receive some notice "before the rights of [that] individual be bound by a judicial sentence."[240] Notice is what gave defendants the opportunity to defend their rights against a judgment that might take those rights away.[241] The absence of notice reasonably calculated to reach the defendant was therefore sufficient to render a judgment, "irregular and void."[242]

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237 *See* Whitten, *supra* note 12, at 803 (noting that process both gave notice to the defendant and exercised power over the defendant or his property and that these functions were distinct).

238 Hollingsworth v. Barbour, 29 U.S. (4 Pet.) 466, 475 (1830); *see also Smith*, 22 F. Cas. at 607 (acting "without notification of [the] proceedings . . . manifestly, would be a violation of the first principles of personal rights and rights of property").

239 Picquet v. Swan, 19 F. Cas. 609, 613 (C.C.D. Mass. 1828) (No. 11134). In making this comment, Justice Story further explained the history of the appearance requirement in England and thus tied jurisdiction to this concept. *Id.* at 612–13.

240 The Mary, 13 U.S. (9 Cranch) 126, 144 (1815); *see also* Borden v. Fitch, 15 Johns. 121, 133–34 (N.Y. Sup. Ct. 1818) ("[T]o bind a defendant personally by a judgment, when he had not been personally summoned, nor had notice of the proceedings, would be contrary to the first principles of justice."); Kilburn v. Woodworth, 5 Johns. 37, 41 (N.Y. Sup. Ct. 1809) (same); Robinson v. Ex'rs of Ward, 8 Johns. 86, 91 (N.Y. Sup. Ct. 1811) (same).

241 *Hollingsworth*, 29 U.S. at 475 ("[It is an] immutable principle of natural justice, that no man's right should be prejudiced by the judgment or decree of a court, without an opportunity of defending the right" and that "[t]his opportunity is afforded, or supposed in law to be afforded, by a citation or notice to appear, actually served; or constructively, by pursuing such means as the law may, in special cases, regard as equivalent to personal service.").

242 *Kilburn*, 5 Johns. at 40; *see also, e.g.*, *Hollingsworth*, 29 U.S. at 472 ("[N]o court is authorised to render a judgment or decree against any one or his estate, until after due notice by service of process to appear and defend."); Mills v. Duryee, 11 U.S. (7 Cranch)

Although *some* notice was required for an action to be valid, the type of notice required varied depending on the circumstances. Following the pattern of historical writ practice, courts generally required something close to actual notice to obtain jurisdiction over the defendant personally.[243] But constructive notice through seizure of property was sufficient in cases where the court exercised jurisdiction over property.[244]

Like their English ancestors, American courts treated the notice requirement as a flexible one that could vary based on reasonableness and necessity. The notice required for jurisdiction over personal property provides a good example. Courts assumed that a sheriff's seizure of personal property through judicially issued writs gave sufficient notice to the property's owner of an action against it.[245] As courts saw it, it was "reasonable" to assume notice based on seizure of property through writs "because it is the part of common prudence for all those who have any interest in [a thing], to guard that interest" including by giving control of the thing to "persons who are in a situation to protect it."[246] And it was also necessary to provide this substitute for actual notice because it protected plaintiffs from defendants who attempted to avoid personal service.[247] "[A] property owner who absents himself from the territorial jurisdiction of a State, leaving his property within it, must be deemed *ex necessitate* to consent that the State may subject such property to judicial process to answer demands made against him in his absence . . . ."[248]

Because the notice function of process was judged through a standard that changed based on reasonableness and necessity, it did

481, 484 (1813) (finding jurisdiction because "the Defendant had full notice of the suit, for he was arrested and gave bail").

243 *See Hollingsworth*, 29 U.S. at 475. Some courts deemed service on the defendant's residence as sufficient to constitute "actual" notice of an action occurring within his home state even though the defendant may not have personally received this notice. *See* Sturgis v. Fay, 16 Ind. 429, 431 (1861); Ames v. Winsor, 36 Mass. (19 Pick.) 247, 248 (1837).

244 *Hollingsworth*, 29 U.S. at 475.

245 *Id.* ("[T]he law regards the seizure of the thing as constructive notice to the whole world . . . ."); *see also The Mary*, 13 U.S. at 144 ("Every person, therefore, who could assert any title to the Mary, has constructive notice of her seizure . . . .").

246 *The Mary*, 13 U.S. at 144.

247 Smith v. Miln, 22 F. Cas. 603, 606 (S.D.N.Y. 1848) (No. 13081) (noting that attachment of goods in personal actions—or quasi in rem jurisdiction—originated to protect plaintiffs "in case a debtor is concealed or absconded, and in case his goods are held by others, in order to compel his appearance in court, and also to appropriate his effects to the satisfaction of his debts"); *see also* Manro v. Almeida, 23 U.S. (10 Wheat.) 473, 491 (1825) (tracing the origins of this and a similar admiralty procedure and noting that they were a means of protecting the plaintiff where a "defendant has concealed himself, or has absconded from the kingdom").

248 Ownbey v. Morgan, 256 U.S. 94, 111 (1921).

not impose significant constraints on courts' judgment powers. The more significant constraint was power, as the next Section describes.

### 2. Power

Process was not only an instrument for giving notice, but also an instrument of power. The process was fundamentally a command to appear. Through this command, the process was understood to constructively seize the defendant or his property to subject it to the court's jurisdiction.[249] As one early decision put it, process was necessary to "get hold of the defendants."[250] And for property, process "represent[s] the dominion of the court over the thing, and in effect subject[s] it to the control of the court."[251]

Because process was understood to exercise power, it defined the scope of power that a court acquired. Process directed against a particular person, when properly served, allowed a court to acquire broad power to order that person to remedy the plaintiff's wrong.[252] The court had power over the defendant's "conscience"[253] and could order the defendant to do anything that he had the ability to do to provide a remedy to the plaintiff: to transfer title to property, to perform a specific act, or to pay damages from any assets under his control.[254]

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249 *See* Nelson, *supra* note 218, at 1573 (recognizing that jurisdiction over a nonconsenting defendant required constructive seizure through proper service of process); *see also* Sachs, *supra* note 50, at 1713–14 ("The territorial limit on process functioned as a limit on personal jurisdiction. That wasn't because a federal court would lack authority to hear the cause, but because it couldn't issue a lawful command to the defendant to appear, which was a potential precondition to the exercise of its authority." (emphasis omitted)).

250 Hart v. Granger, 1 Conn. 154, 168 (1814). A court could also "get hold" of defendants if they chose to appear and answer the claims voluntarily. Nelson, *supra* note 218, at 1573. As Chief Justice Marshall explained in dismissing a jurisdictional challenge, "[b]y appearing to the action, the defendants in the court below placed themselves precisely in the situation in which they would have stood, had process been served upon them." Pollard v. Dwight, 8 U.S. (4 Cranch) 421, 428–29 (1808); *see also* Mayhew v. Thatcher, 19 U.S. (6 Wheat.) 129, 130 (1821) (same). In other words, process's power was only needed when the defendant was unwilling to voluntarily submit to the court's judicial power.

251 Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 317 (1870).

252 This principle is unsurprising as the origins of jurisdiction were the state's or nation's exercise of physical power to force a personal appearance and later compliance with judicial decrees. Mitchell v. Bunch, 2 Paige Ch. 606, 615 (N.Y. Ch. 1831) ("The jurisdiction of the court was exercised for several centuries by the simple proceeding of attachment, against the bodies of the parties, to compel obedience to its orders and decrees.").

253 Picquet v. Swan, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828) (No. 11134).

254 *Mitchell*, 2 Paige Ch. at 615–16 (explaining that personal jurisdiction gave indirect jurisdiction over the defendant's property because a court with personal jurisdiction could order the defendant "either to bring the property in dispute . . . within the jurisdiction of the court; or to execute such a conveyance or transfer thereof, as will be sufficient to vest the legal title, as well as the possession of the property").

By contrast, when process was served on property, a court's judgment would have "no effect beyond the property attached in that suit."[255] This meant that, if the value of the property attached was insufficient to satisfy the plaintiff's judgment, the plaintiff could not recover the shortfall from the defendant's other assets.[256] Nor could the plaintiff rely on the judgment to prove the defendant's personal liability in another proceeding.[257] As one court put it, when "the foundation of jurisdiction [was] attachment of property," then no judgment could "reach[] beyond the property itself."[258] Plaintiffs who attached property were thus often left with nothing more than the "blanket," "hay-knife,"[259] "bedstead,"[260] or "handkerchief"[261] that they had managed to attach with process prior to judgment.

The fact that the process exercised power *as a command* also mattered in determining its effect. For example, as a command, the process only exercised power against the particular person commanded to appear. Naming the wrong person in the writ thus could be fatal to the plaintiff's claim. For instance, in one case a plaintiff tried to recover wages from the shipmaster that employed him but could not reach the shipmaster with process.[262] The plaintiff thus served a copy of the process compelling the shipmaster's appearance to a second person who owed the shipmaster money, in the hopes of garnishing the debt.[263] The court dismissed the plaintiff's case because the plaintiff had not

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255 Pennoyer v. Neff, 95 U.S. 714, 726 (1878), *overruled by*, Shaffer v. Heitner, 433 U.S. 186 (1977); *see also* Steel v. Smith, 7 Watts & Serg. 447, 449 (Pa. 1844) ("[T]here can be no rightful action by the tribunals on the foundation of jurisdiction acquired by the attachment of property, which reaches beyond the property itself."); *Picquet*, 19 F. Cas. at 615 (noting that "proceedings in rem" allow judgment only "to the extent of the property attached, whether it be a chip, or a bale of goods"); Kilburn v. Woodworth, 5 Johns. 37, 40 (N.Y. Sup. Ct. 1809) (refusing to enforce a judgment against the defendant personally because "[t]he attachment of an article of his property could not bind [the defendant personally]; it could only bind the goods attached, as a proceeding *in rem*").

256 Bissell v. Briggs, 9 Mass. (9 Tyng) 462, 469 (1813) ("If however those goods, effects and credits are insufficient to satisfy the judgment, and the creditor should sue an action on that judgment in this state to obtain satisfaction, he must fail; because the defendant was not personally amenable to the jurisdiction of the court rendering the judgment."); *Cooper*, 77 U.S. at 318 ("No general execution [could] be issued for any balance unpaid after the attached properly is exhausted.").

257 *Cooper*, 77 U.S. at 318 ("No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit.").

258 *Steel*, 7 Watts & Serg. at 449.

259 Robinson v. Ex'rs of Ward, 8 Johns. 86, 90 (N.Y. Sup. Ct. 1811).

260 *Kilburn*, 5 Johns. at 38.

261 Kibbe v. Kibbe, 1 Kirby 119, 123 (Conn. 1786).

262 *See* Smith v. Miln, 22 F. Cas. 603, 604 (S.D.N.Y. 1848) (No. 13081).

263 *See id.*

properly commanded *the debtor* to appear in court, but rather served the debtor with process that only commanded the *shipmaster* to appear:

> The warrant of arrest . . . gave no direction to bring the [debtor] into court by monition or capias; and accordingly furnished no authority for entering an order against him for contumacy or default, in not appearing upon its return. He was not brought within the jurisdiction of the court over the cause in such manner as entitled the [plaintiff] to a decree touching his property or person.[264]

The same principle limited courts' power in other types of cases. For instance, courts held that a plaintiff who had only properly served one member of a partnership or joint venture with process could not use any judgment obtained to recover from any of the other members because the court had never acquired power to determine their rights.[265] Because the process was understood as a command to appear that constructively seized its subject, its power extended only to the person named in and served with the writ. In other words, for process to effectively exercise power over defendants, they had to be "within the jurisdiction of the court . . . [so] that they can be commanded . . . to appear and answer . . . [and] they [must then be] so commanded."[266]

Serving the process on something was crucial to making the court's judgment a valid one. A court had to have power over something—either the defendant or the defendant's property—to have authority to issue a judgment. The Supreme Court made this point plainly in a mid-nineteenth-century jurisdictional dispute. After noting that the state could not reach the defendant personally with process, the Court explained that: "[T]he court, in such a suit, cannot proceed unless the [sheriff] finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction . . . ."[267] Thus, if the sheriff returned the writ without finding either the defendant or his property within the territorial boundaries of the court, then a court would dismiss the case for lack of power to issue a judgment binding

264 *Id.* at 604; *see id.* at 607; *see also* Fenton v. Garlick, 8 Johns. 194, 197–98 (N.Y. Sup. Ct. 1811) (similarly dismissing action against a debtor of the defendant for failure to properly serve the debtor personally with process).

265 *See* D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 174 (1851) (New York judgment did not bind joint debtors who were residents of Louisiana and were not served with process in New York.); Steel v. Smith, 7 Watts & Serg. 447, 449–51 (Pa. 1844) (explaining that the judgment of Louisiana court did not bind partners never served with process and located in Pennsylvania); Phelps v. Brewer, 63 Mass. (9 Cush.) 390, 394–96 (1852) (service on one partner did not result in jurisdiction over other partners who resided outside the state).

266 Hart v. Granger, 1 Conn. 154, 169 (1814) (emphasis omitted).

267 Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 318–19 (1870).

anyone or anything.[268] Any judgment issued without properly acquiring power over the defendant was "null and void"[269] or "waste paper."[270]

In short, the writs or process of the court were key instruments used to give notice to defendants and to exercise power over their person or property. Courts' ability to reach persons or property with process thus constituted the reach of their jurisdiction.

### *B. Limits on the Power to Issue Process*

Whether a court could issue process that actually acquired power over a person or property depended on two factors: whether the state delegated power to the court and whether the state possessed the power it presumed to delegate. As Justice Story put it, a court's power might be limited because "the sovereign has chosen to assign [a] special limit, short of his general authority" or because its power is "necessarily bounded and limited by the sovereignty of the government itself, which cannot be extra-territorial."[271] Both the choice to limit the delegation of adjudicative power and the scope of sovereign power that a state could delegate thus worked to limit the reach of the courts' process and thus its jurisdiction.

#### 1. Statutory Limits on the Power to Issue Process

Originally, in England, the king was the source of all sovereign power, and he delegated his judicial power to the courts using the original writs.[272] In the United States, however, the American "Lockean twist" on government meant that sovereign power was vested in the people.[273] Thus, the people had the authority to delegate power to courts.

The general delegation of judicial power was effectuated through constitutional vesting clauses.[274] But both state and federal courts

268 *See id.*; *see also* Picquet v. Swan, 19 F. Cas. 609, 616 (C.C.D. Mass. 1828) (No. 11134) (refusing to grant a default judgment against an absent defendant because "there has been no sufficient service of the process to compel [his] appearance" as he was located out of the country).

269 Borden v. Fitch, 15 Johns. 121, 141 (N.Y. Sup. Ct. 1818); *accord* Bigelow v. Stearns, 19 Johns. 39, 40–41 (N.Y. Sup. Ct. 1821) ("[I]f a Court . . . undertakes to hold cognizance of a cause, without having gained jurisdiction of the person [of the defendant], by having him before them, in the manner required by law, the proceedings are void . . . .").

270 Voorhees v. Jackson, 35 U.S. (10 Pet.) 449, 475 (1836).

271 *Picquet*, 19 F. Cas. at 611.

272 *See generally supra* Part II.

273 Kinnaird, *supra* note 44, at 1059; *see also* Henkin, *supra* note 41, at 1413 (noting that in the American system "sovereignty was in 'the people' collectively").

274 *E.g.*, U.S. CONST. art. III, § 1.

recognized that the people—acting through their elected representatives—had to delegate power to them to decide particular kinds of disputes or forms of action. In one of its early decisions, the Court declared that the federal courts "possess no jurisdiction but what is given them by the power that creates them."[275] Justice Chase put the matter even more explicitly:

> [T]he political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we posess [sic] it, not otherwise: and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal.[276]

Chief Justice Marshall later declared it obvious that federal courts, as "courts which are created by written law" were also necessarily "defined by written law."[277] Thus, the Court "disclaim[ed] all jurisdiction not given by the constitution, or by the laws of the United States."[278]

State courts also generally looked to legislation to determine the scope of their jurisdiction to decide specific forms of action.[279] The Virginia Supreme Court, for instance, recognized that even if the state constitution created courts, "[l]egislation would have been still necessary to give it jurisdiction over the case submitted, and prescribe the manner in which it should be exercised."[280] This is because "jurisdiction is given . . . by law authorizing and requiring judicial functionaries to exercise their jurisdiction over cases brought before them in the

275 United States v. Hudson, 11 U.S.(7 Cranch) 32, 33 (1812).

276 Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8, 10 n.1 (1799) (Chase, J.); *see also id.* (Ellsworth, C.J.) (suggesting the legislature has the authority to distribute and regulate the power of the federal courts); 1 KENT, *supra* note 89, at 343 (New York, William Kent, 8th ed. 1854) ("[T]he [federal] courts cannot exercise jurisdiction in every case to which the judicial power extends, without the intervention of congress . . . ."). The reference to a few specified instances where the judicial power is not Congress's to delegate is likely a reference to the cases in which the Constitution vested the Supreme Court with original jurisdiction, as Congress was not given the power to impose exceptions or regulations limiting that jurisdiction. *See* U.S. CONST. art. III, § 2.

277 *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807).

278 *Id.*

279 Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 29 (2009) ("After declaring independence, states adopted the common law of England and, by incorporation, the law of nations."); *accord* United States v. Worrall, 2 U.S. (2 Dall.) 384, 394–95 (C.C.D. Pa. 1798); *see* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834) (recognizing that each of the states inherited some English common law, though their acceptance and understanding of the common law sometimes differed); *see also* Hall, *supra* note 218, at 794–800 (tracing adoption of the common law in the states through both custom and general statutes).

280 Sharpe v. Robertson, 46 Va. (5 Gratt.) 518, 625 (1849).

mode prescribed."[281] State courts thus routinely turned to state statutes to determine the scope of the powers that they could exercise.[282]

Both state and federal legislatures' authority to define the scope of courts' powers included the authority to define the scope of courts' power to issue judicial process.[283] And given the importance of process to courts' ability to acquire the power to decide cases, process was a frequent subject of early state and federal legislation. In the states, such legislation dated back to the colonial era, with some of the earliest colonial enactments addressing the use of process.[284] After the colonies became states, they continued to pass laws that dictated how and when defendants or their property would be subject to process.[285] And on the federal side, one of Congress's first orders of business after the Constitution created the federal courts in 1789 was to authorize those courts to issue process so that they could acquire jurisdiction to resolve disputes.[286] Congress continued to pass and refine the legislation governing process in subsequent years.[287]

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281 *Id.* at 632; *see also* Chambers v. Balt. & Ohio R.R. Co., 207 U.S. 142, 148 (1907) ("[S]ubject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them.").

282 *See, e.g.*, Commonwealth v. Messenger, 4 Mass. (4 Tyng) 462, 467–71 (1808) (interpreting various state statutes to determine the scope of the court's jurisdiction); Freeman v. Guion, 19 Miss. (11 S. & M.) 58, 63–65 (1848) (affirming jurisdiction based on a statutory change in traditional equity jurisdiction); Tripp v. Leland, 39 Vt. 63, 64–65 (1866) (recognizing that adoption of new statutes expanded jurisdiction that justices of the peace could exercise). States even determined that the political community had to accept and delegate power to courts to determine the English common law forms of action. *See* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1027 & n.307 (2002); *see also* Bellia & Clark, *supra* note 279, at 29.

283 *E.g.*, Ham v. Rogers, 6 Blackf. 559, 560 (Ind. 1843) (noting "process can only be so sent . . . when there is a statute authorizing it"); Williams v. Monroe, 28 S.W. 853, 855 (Mo. 1894) (similar); *see also* Hall, *supra* note 218, at 795 (noting "early codification in every colony except Maryland of the legal principles most essential to the settlement of disputes").

284 During the 1640s, for instance, Massachusetts passed several laws that regulated when and against whom the local clerk of writs could issue writs of attachment. *See* COLONIAL JUSTICE, *supra* note 176, at 174.

285 Picquet v. Swan, 19 F. Cas. 609, 610–11 (C.C.D. Mass. 1828) (No. 11134) (describing Massachusetts process statutes).

286 Congress authorized federal courts to use the process that the state in which they sat "used or allowed." Act of Sep. 29, 1789, ch. 21, 1 Stat. 93 (repealed 1792); *see also* Act of May 8, 1792, ch. 36, 1 Stat. 275. This delegation was necessary to give the federal courts the ability to acquire jurisdiction over persons or property because, as Justice Story explained, the modes of process authorized by state legislatures "[o]f their own force . . . have no validity in the courts of the United States" given its separate sovereignty. *Picquet*, 19 F. Cas. at 610.

287 *See Picquet*, 19 F. Cas. at 610–11 (collecting various federal statutes governing process).

Ultimately, for a variety of reasons, federal and state legislatures took different approaches in empowering courts to issue process. Congress largely limited the lower courts' ability to send process—and thus their jurisdiction—to state boundaries, though it could have authorized process to run anywhere in the United States.[288] By contrast, state legislatures more often pushed the limits on the reach of their process, in an effort to obtain maximum relief for their citizens. This led to a unique conflict of law problem in the states, where state statutory law sometimes defined the reach of state courts' process in ways that defied the general law rules that territorially limited state sovereign power.

### 2. General Law Limits of Sovereign Power as a Limit on Process

Even if a state legislature authorized a court to issue process, that process still might not have binding force if the state legislature tried to grant more sovereign power than the state had. As Chief Justice Marshall so aptly put it, "The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power."[289] In other words, even if a state authorized its courts to issue process, it still had to possess the authority and power to enforce the command in the process for the writ to constructively "get hold" of the defendant[290] or to exercise "dominion" or "control" over the defendant's property.[291]

Americans, like their English ancestors, believed that the allegiance of persons and the territorial limits of law both limited a state's ability to compel a court appearance with process. Taken together, these limits meant that process only exercised power within the state's

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288 *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79 (limiting arrest and service of process to the district—or state—where the court was located); *Picquet*, 19 F. Cas. at 611 ("It was doubtless competent for congress to have authorized original as well as final process, to have issued from the circuit courts and run into every state in the Union. But it has conferred no such general authority."); *see also* Sachs, *supra* note 50, at 1710–11 ("Starting with the Judiciary Act of 1789, and for almost a century afterwards, Congress strictly limited the venues in which a federal civil suit could be brought."). There were likely practical reasons for such restraint. Beyond the difficulty of forcing defendants to travel long distances, states had varied statutory rules governing use of process. Riggs v. Johnson County, 73 U.S. (6 Wall.) 166, 190 (1868) ("Forms of process, mesne and final, and the modes of process . . . were different in the different States."). Given Congress's choice to adopt state forms and modes of process in the federal courts, it was likely impractical to allow lower federal courts to exercise jurisdiction beyond state boundaries.

289 The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (emphasis omitted).

290 Hart v. Granger, 1 Conn. 154, 168 (1814).

291 Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 317 (1870). As the Supreme Court succinctly explained, "[t]he foundation of jurisdiction is physical power." McDonald v. Mabee, 243 U.S. 90, 91 (1917). Thus, the writ only worked where the sovereign had historically had physical power—through arrest or seizure—to enforce compliance with it. *See supra* Section I.D.

territorial boundaries.[292] A state's efforts to extend its process beyond its borders was viewed as "utterly void, [and] as an usurpation of general sovereignty over independent nations and their subjects."[293] As Justice Story explained, "[N]o sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions."[294] Any effort to do so was a "mere nullity"[295] and "an illegitimate assumption of power"[296] that could properly be "resisted as mere abuse."[297]

American courts tied the territorial limits on the power of process to the same ideas about allegiance and power that had influenced English courts before them. The state's sovereign power over real property was a function of the feudal origins of property rights and the ancient idea that the sovereign was the ultimate "owner" of the land in its domain.[298] Because of this history, legal commentators agreed that a state or nation had the exclusive power to govern real property found within its borders, including the exclusive power to exercise jurisdiction over it.[299]

The state's legal power over persons was a function of both their personal allegiance and the territorially limited power of law. Process thus could not compel a noncitizen found outside the state to appear because that noncitizen "ow[es] no allegiance to the country or obedience to its legislation."[300] For citizens, any territorial limits on process

292 Borden v. Fitch, 15 Johns. 121, 143 (N.Y. Sup. Ct. 1818) (defendant had to be "amenable to the sovereignty of the state" at the moment the process was served for the process to be valid); *Hart*, 1 Conn. at 169 (explaining that "defendants could not be commanded to appear and answer" when they were outside the territorial jurisdiction of the court); D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 176 (1851) (noting "neither the legislative jurisdiction, nor that of courts of justice, had binding force" outside the sovereign's territorial boundaries); Kibbe v. Kibbe, 1 Kirby 119, 126 (Conn. 1786) (finding the Court had "no legal jurisdiction of the cause" because the defendant "was an inhabitant of the state of Connecticut, and was not within the jurisdiction" of the Massachusetts court at the time of service of the writ).

293 *Picquet*, 19 F. Cas. at 612; Fenton v. Garlick, 8 Johns. 194, 197 (N.Y. Sup. Ct. 1811) (writ from a Vermont court served on a defendant residing in New York was "void" and could not validly compel the defendant to appear); *see also Hart*, 1 Conn. at 169 (writ served outside the jurisdiction was "inoperative"). Extending one sovereign's process into another sovereign's territory was a violation of "principles of separate sovereignty." Steel v. Smith, 7 Watts & Serg. 447, 451 (Pa. 1844).

294 *Picquet*, 19 F. Cas. at 612.

295 *Id.*

296 *D'Arcy*, 52 U.S. at 174.

297 *Id.*

298 *See supra* Section II.C.1.

299 *E.g.*, STORY, *supra* note 28, § 490, at 358 (noting general consensus on this point).

300 Steel v. Smith, 7 Watts & Serg. 447, 449 (Pa. 1844); *see also* Bissell v. Briggs, 9 Mass. (9 Tyng) 462, 470 (1813) (noting jurisdiction may be exercised over a foreigner who is

resulted solely from the territorial limits of law itself because citizens always owed allegiance to their home state. Because the territorial limits on legal power derived from a general law rule that could be overcome via statute in domestic courts, the fact that territorial power was the only limitation on power over citizens meant that citizens could be subject to forms of service in their home state that might not be acceptable against foreigners.[301]

Finally, with respect to personal property, the theory of state legal power was similar to the theory of power over persons—courts held that a person who chose to send his property into a particular state and accept the protection of that state's laws also had to accept that the state's law would apply to the property. As an early state court decision explained, an "owner of property who sends it abroad subjects it to the regulations in force at the place as he would subject his person by going there."[302] These regulations included any process or judgment that the state might issue against it.[303]

In short, the general law limited courts' power to exercise jurisdiction over persons or property through process to the borders of their home state because that is where the state's authority and power ended.[304]

### 3. Resolving Conflicts Between Statutory Grants of Power and General Law Limitations on the Power to Issue Process

When a state passed a statute allowing its courts to exercise jurisdiction over persons who were not served with process within the state's territorial boundaries, a conflict of law issue arose: Should the court apply the rules set forth in the state statute or the general law rule territorially limiting the state's power?

Courts answered this question in different ways depending on whether their own legislature had passed the statute or whether a foreign state's legislature had done so. If the state court's own legislature had passed the statute allowing it to exercise extraterritorial jurisdiction, it typically followed the statute over general law that prescribed

temporarily in the state because while within the state's borders she "owes a temporary allegiance to that state, is bound by its laws, and is amenable to its courts").

301 *See, e.g.*, Weaver v. Boggs, 38 Md. 255, 261 (1873) (noting that constructive service may "bind[] . . . persons domiciled within the State where such law prevails" but not foreign citizens); Sim v. Frank, 25 Ill. 125, 127 (1860) ("If statutes authorizing a judgment without appearance, or actual or constructive notice, can have force upon the citizens of the States where they are passed, they cannot bind citizens of another State.").

302 *Steel*, 7 Watts & Serg. at 449.

303 *Id.*

304 Picquet v. Swan, 19 F. Cas. 609, 611 (C.C.D. Mass. 1828) (No. 11134).

territorial limits on sovereign power.[305] But other states' courts would follow general law that prescribed territorial limits on state power over any foreign state's statute to the contrary.[306] So too would federal courts, as they were courts of a separate government and not bound to apply the state statute over general law rules governing the limits on sovereign power.[307]

Justice Story succinctly described this practice in an early jurisdictional opinion:

> If a state were to pass an act declaring, that upon personal notice of a suit brought against a foreigner, resident in a foreign country, proceedings might be had against him, and a judgment obtained in invitum, for aught I know, the *local* tribunals might give a binding efficacy to such judgments. But *elsewhere* they would be utterly void, as an usurpation of general sovereignty over independent nations and their subjects.[308]

This conclusion is the logical result of the nature of general law and the court's role as a vested instrument of the state's legal power.

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305 *See, e.g.*, *id.* at 612 (explaining that "local tribunals might give a binding efficacy to . . . judgments" obtained without proper territorial service of process); Dearing v. Bank of Charleston, 5 Ga. 497, 515 (1848) (hypothesizing that, if Georgia's legislature authorized a broader-than-usual jurisdiction, "the local tribunals might give effect to it"); *see also* Sachs, *supra* note 50, at 1711 ("Within its own courts, a sovereign might override [general law limits on sovereign power] by statute."); Whitten, *supra* note 12, at 802 (noting that municipal rules might bind domestic courts even if their validity would not be recognized internationally).

306 *E.g.*, Rose v. Himely, 8 U.S. (4 Cranch) 241, 276–77 (1808) (recognizing that judgments exceeding territorial jurisdictional limits might be recognized domestically but not by foreign courts); *Picquet*, 19 F. Cas. at 612 (recognizing that "no sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions" and other sovereign's courts would recognize this effort as a "mere nullity, and incapable of binding such persons or property in any other tribunals"); Phelps v. Brewer, 63 Mass. (9 Cush.) 390, 395–96 (1852) ("But it is a matter now too well settled to admit of discussion, that when a party is not within the jurisdiction of the court, and is not served with process, and does not voluntarily appear and answer to the suit, by himself or his attorney, the judgment cannot be enforced against him *out of the local jurisdiction*." (emphasis added)); *see also* Sachs, *supra* note 50, at 1711 ("[T]he resulting judgments might go unrecognized in *other* sovereigns' courts—unless those courts also recognized the statute as valid and applicable, as a matter of choice of law.").

307 M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 326–27 (1839) (federal courts could inquire into "the right of the state itself to exercise authority over the persons or the subject matter" before giving effect to those state decisions); D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 175–76 (1851) (concluding courts both state and federal did not have to honor judgments where process was not served on the defendant in compliance with general law rules that territorially limited legal power); *see also* Sachs, *supra* note 9, at 1294 ("[A] federal court wasn't required to take a state's jurisdictional statutes at their word—and it would give state judgments the recognition they were due, not as a matter of state law, but as a matter of *general* law.").

308 *Picquet*, 19 F. Cas. at 612 (emphasis added).

General law was unwritten law and not derived from or subject to the power of any particular state or nation.[309] Thus, no state or nation could change the content of general law.[310] But a state or nation could pass local legislation that superseded the general law domestically and, in doing this, could require its own courts to apply a rule that conflicted with general law.[311]

With respect to personal jurisdiction, this meant that domestic courts would be obliged to follow local statutes that claimed the power to adjudicate cases against defendants found outside the state's territory—even if the court knew that no other state or nation would recognize this exercise of judicial power as legitimate or binding. Defendants thus usually relied on other governments' courts—either foreign states' courts or the federal courts—to protect them from state statutes that exercised jurisdiction in violation of the general law limits on legal power.[312] And because of this, most jurisdictional disputes were not litigated until after judgment, when the plaintiff attempted to enforce it against the defendant in a foreign state, as the next Section describes.

### C. *Due Process and Personal Jurisdiction*

#### 1. Due Process and Personal Jurisdiction Before the Fourteenth Amendment

Even though early decisions agreed that courts needed jurisdiction to validly enter a judgment, almost no federal or state decision associated due process clauses with territorial limits on jurisdiction before *Pennoyer*.[313] In early court decisions, territorial limits on

309 Baude, Campbell & Sachs, *supra* note 35, at 1194.

310 *Id.*; *see also* DE VATTEL, *supra* note 29, at lviii (describing the "law of nations" which defined the limits of sovereign power as "*immutable*").

311 *See supra* note 305; *see also, e.g.*, John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 529 (2000) (describing the features of general law and noting that one of the features was the ability of statutory law to supersede it).

312 The defendant's home state would protect him against unjustified foreign efforts to exercise power over him, as it was obligated to provide him with the protection of the law. As one court explained, the rule territorially limiting the reach of process is "based upon international law, and upon that natural protection which every country owes to its own citizens." Weaver v. Boggs, 38 Md. 255, 256 (1873).

313 Pennoyer v. Neff, 95 U.S. 714 (1878), *overruled by*, Shaffer v. Heitner, 433 U.S. 186 (1977); Sachs, *supra* note 50, at 1712 ("[N]ot until the Civil War did a single court, state or federal, hold a personal-jurisdiction statute invalid on due process grounds."); Redish, *supra* note 12, at 1115 (noting *Pennoyer* was "the first decision to assert the relevance of the due process clause to personal jurisdiction"); Drobak, *supra* note 12, at 1032 (noting *Pennoyer* "made the common-law doctrine of personal jurisdiction part of the fourteenth amendment" for the first time); Kreutzer, *supra* note 12, at 236 (noting that "[i]t is difficult to contradict the claim that the *Pennoyer* Court was doing something new" in enforcing

jurisdiction were addressed when the plaintiff sought to enforce a judgment that had already been entered in a forum different from the one that had entered the judgment.[314] The second court would apply the general law rules regarding the limits on legal power and authority discussed above to determine if the first court had jurisdiction.[315]

Due process was not at issue in these decisions. The constitutional provision that might become an issue was instead the Full Faith and Credit Clause.[316] And the question was not whether it protected defendants from improper exercises of jurisdiction, but rather whether it required enforcement of a judgment even if a state had entered that judgment without complying with the general law rules that territorially limited the reach of process.[317]

Why was due process not an issue? It seems that there are multiple possible reasons. To start, the need and opportunity to make a due process argument rarely arose because it usually was not necessary or advisable for a defendant to appear and constitutionally challenge jurisdiction prior to judgment.[318] A constitutional due process claim was only necessary if the defendant wanted to appear to contest jurisdiction within the forum state prior to judgment and thus needed a way to trump a state statute within the state's own courts. If the defendant never appeared prior to judgment in the forum state, he had no need to trump the state statute with a state constitutional provision because

jurisdictional requirements through the Due Process Clause). Only two pre-Fourteenth Amendment cases suggested a link between due process and territorial limits on a court's personal jurisdiction. *See* Beard v. Beard, 21 Ind. 321, 324 (1863); *see also Ex parte* Woods, 3 Ark. 532, 536–37 (1841) (suggesting in dicta that a personal jurisdiction statute could violate the state constitution's "law of the land" clause).

314 *See* Sachs, *supra* note 9, at 1252–53 (noting jurisdictional challenges were generally raised after judgment when the plaintiff sought to enforce it); Sachs, *supra* note 50, at 1725 (recognizing that personal jurisdiction challenges were generally raised in a "subsequent recognition action" prior to the Fourteenth Amendment and *Pennoyer*); *see also* Whitten, *supra* note 136, at 570–89.

315 *See e.g.*, Bissell v. Briggs, 9 Mass. (9 Tyng) 462, 468 (1813) ("In order to entitle the judgment rendered in any court of the *United States* to the full faith and credit mentioned in the federal constitution, the court must have had jurisdiction, not only of the cause, but of the parties."); Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 3 (1945).

316 *See e.g.*, *Bissell*, 9 Mass. at 468; Jackson, *supra* note 315, at 3; Perdue, *supra* note 51, at 732 (noting the "preexisting Full Faith and Credit Clause cases . . . had long recognized the existence of limits on personal jurisdiction").

317 *See* Sachs, *supra* note 9, at 1280.

318 *See id.* at 1297 (noting that "most out-of-state defendants were probably happy to sit at home and wait for the plaintiff to try to collect" in their home state because of the challenges of seeking relief in the plaintiff's home state); *see also supra* note 305 and accompanying text (noting domestic statutes might trump general law rules in domestic courts).

he could always defeat the judgment at the enforcement stage by relying on the general law.[319]

Taking the latter approach was the advisable course in nearly every circumstance. Beyond the risk that the plaintiff's home state court would be biased in favor of the plaintiff,[320] a defendant took a substantial risk of forfeiting his jurisdictional defense if he appeared before the forum state's court to challenge jurisdiction. This was because appearing before a court to argue anything—including jurisdiction—was generally understood to be consent to that court exercising adjudicative power over the defendant personally (absent the privilege of special appearance, which had its own limitations and risks).[321] This was a natural consequence of the social compact theory of law: Defendants generally had no right to ask a court for the protection of its state's laws, while at the same time arguing to the court that they were not subject to its jurisdiction.[322]

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319 *See supra* notes 306–07 and accompanying text (collecting cases taking this approach).

320 *See* Sachs, *supra* note 9, at 1297 ("Suing abroad, even in federal court, meant the expense of distant litigation and the risk of a hostile jury . . . .").

321 *See* Pollard v. Dwight, 8 U.S. (4 Cranch) 421, 428–29 (1808) ("By appearing to the action [to challenge jurisdiction], the defendants in the court below placed themselves precisely in the situation in which they would have stood, had process been served upon them, and consequently waived all objections to the non-service of process."); Gracie v. Palmer, 21 U.S. (8 Wheat.) 699, 700 (1823) (voluntary appearance to challenge personal jurisdiction waived any challenge to inadequacy of service of process).

To be sure, by the mid-nineteenth century the defendant could obtain a privilege of special appearance to contest the exercise of jurisdiction in many states. *See, e.g.*, York v. Texas, 137 U.S. 15, 20–21 (1890). *See generally* Edson R. Sunderland, *Preserving a Special Appearance*, 9 MICH. L. REV. 396 (1911). But even this carried substantial risks. For one, the privilege was not guaranteed, and not every state chose to offer it. *York*, 137 U.S. at 20–21 (state has no obligation to provide procedure for special appearance to challenge jurisdiction). And even if a state did offer the privilege, it only guaranteed that the defendant could challenge jurisdiction in the trial court; if he lost there, he might face difficulty with maintaining the jurisdictional objection if he then proceeded to defend his case on the merits or sought an appeal. Sunderland, *supra*, at 405 (noting split of authority on whether proceeding to argue the merits after losing a jurisdictional objection constituted a general appearance and waived further jurisdictional challenge); W. Life Indem. Co. v. Rupp, 235 U.S. 261, 271 (1914) (upholding state's ability to declare that appealing a judgment waived any jurisdictional challenge). And it was unclear whether the privilege of special appearance extended to raising domestic constitutional challenges to the reach of domestic statutes, as this went a step beyond challenging jurisdiction directly.

322 *See supra* note 312; *see also, e.g.*, Adam v. Saenger, 303 U.S. 59, 67–68 (1938) ("The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff.").

Moreover, even if the defendant did get a fair shake on the question of personal jurisdiction without forfeiting the claim, it was unclear how a forum state would define due process domestically. As noted above, courts within a state accepted statutory law as displacing general law rules that territorially limited state legal power and thus personal jurisdiction.[323] It is thus unclear whether domestically a court would conclude that due process simply required compliance with state statutory law because domestically those statutes displaced the general law or whether it would hold that the due process guarantee incorporated and elevated the general law rule above statutory law.[324]

For all these reasons, it is not surprising that there is a lack of pre-Fourteenth Amendment caselaw raising due process challenges to state statutes attempting to exercise personal jurisdiction extraterritorially.

### 2. Fourteenth Amendment Due Process and *Pennoyer v. Neff*

The ratification of the Fourteenth Amendment with its Due Process Clause applicable to the states changed the relationship between due process and personal jurisdiction because of the Fourteenth Amendment's unique structure: It created a direct federal constitutional limit on every state court's use of process.

This asymmetrical structure solved the problems that typically made it inadvisable and potentially impossible for a defendant to challenge extraterritorial exercises of jurisdiction pre-judgment. Because the due process right derived from the Federal Constitution, a person could possess and claim that right without having to submit to a particular state's laws. And, because federal courts were not instruments of the state sovereign power and thus not bound to displace general law with state statutory law, it also made it clear that the meaning of "due process" included the requirement that a state's exercise of personal jurisdiction comport with the general law rules that territorially limited a state's sovereign authority and power.

*Pennoyer*—the key case interpreting the Due Process Clause of the Fourteenth Amendment after ratification—made this understanding clear.[325] *Pennoyer* began as a traditional effort to challenge jurisdiction

323 *See supra* note 305.

324 *See* Sachs, *supra* note 9, at 1303 (noting that state courts may have interpreted due process to simply require compliance with their statutes, even if they conflicted with the general law); *see also* Beard v. Beard, 21 Ind. 321, 328 (1863) (concluding that, although a judgment was obtained in compliance with state statutory law it violated the state "due course of law" constitutional provision in providing for service against non-resident defendants by publication, contrary to the principles of the general law).

325 *See* Whitten, *supra* note 136, at 500 (recognizing *Pennoyer* as the first case to directly connect due process and personal jurisdiction).

in a separate forum post-judgment. Marcus Neff filed an ejectment action in federal court against Sylvester Pennoyer to recover land he had lost as a result of a default judgment in Oregon state court.[326] And Neff argued that he was the rightful owner of the Oregon land because the Oregon judgment that gave Pennoyer title was void for lack of jurisdiction.[327]

In deciding the case, the Court relied on the general law rules regarding the territorial limits on sovereign power to displace an Oregon statute that allowed for extraterritorial exercise of jurisdiction. It explained that Oregon lacked power to enter a personal judgment against Neff because he was never served with process in the state.[328] As the Court made clear, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," but "no State can exercise direct jurisdiction and authority over persons or property without its territory."[329] Process, as a sovereign command, thus had no power to "run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them."[330] Put succinctly, the Oregon court's process had no power to constructively seize Neff—who resided outside the state—and subject him to its jurisdiction. And because it had not properly used process against Neff, the Oregon court had no authority to compel his appearance and adjudicate his rights.[331]

(Of course, Neff's property was in Oregon, so the Oregon court could have properly exercised quasi in rem jurisdiction over it under the general law.[332] But the Court held that any claim of quasi in rem jurisdiction failed for lack of notice because the court failed to serve a writ of attachment on Neff's property *before* issuing a judgment.[333])

After the Court had resolved the case on general law grounds, however, it went further, explaining how the Fourteenth Amendment had transformed this issue into a constitutional one. As *Pennoyer* explained, the Fourteenth Amendment's Due Process Clause required that courts properly use process to exercise jurisdiction over persons or property.[334] "[T]he adoption of the Fourteenth Amendment to the

326 Neff v. Pennoyer, 17 F. Cas. 1279, 1279–80 (C.C.D. Or. 1875) (No. 10083), *aff'd*, 95 U.S. 714 (1878), *overruled by*, Shaffer v. Heitner, 433 U.S. 186 (1977).

327 *Pennoyer*, 95 U.S. at 715, 721–22.

328 *Id.* at 721–23.

329 *Id.* at 722.

330 *Id.* at 727 ("[N]o tribunal established by [a sovereign] can extend its process beyond that territory so as to subject either persons or property to its decisions." *Id.* at 722.).

331 *Id.* at 722.

332 *Id.* at 723 ("[T]he State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens . . . .").

333 *Id.* at 721–22.

334 *Id.* at 733.

Federal Constitution" made it so that "the validity of [state] 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."[335]

The Court summed up the basic jurisdictional protections it deemed part of "due process," which were consistent with the historical functions of writs as both instruments used to delegate judicial power and to exercise that power over particular persons. First, the Court held, due process requires the sovereign to vest the Court with the power to adjudicate the dispute.[336] As the Court put it, "there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit."[337] And second, the Court held that due process requires the state to properly acquire power over a person or property. In personal actions, this meant the defendant "must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."[338] And in property actions, this meant "property in the State [must be] brought under the control of the court, and subjected to its disposition by process adapted to that purpose."[339]

The Court recognized that its position as an instrument of a separate sovereign from Oregon was key to allowing it to enforce the general law limits of sovereign power through due process. As it explained, the federal courts could enforce territorial limits on service of process against Oregon because "they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction."[340] In other words, because federal courts were instruments of a different sovereign, they could use the general law to enforce limits on Oregon's sovereign power in a way Oregon courts may not have been able do themselves.[341]

The Court was not the first to reach these conclusions. It cited and adopted the view of respected jurist Thomas Cooley, who had reached the conclusion that Fourteenth Amendment due process incorporated general law rules territorially limiting state jurisdiction a few years earlier—and just three years after adoption of the Fourteenth

335 *Id.*

336 *Id.*

337 *Id.*

338 *Id.*

339 *Id.*

340 *Id.* at 732–33.

341 *See id.* at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed *in every other forum*, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse." (emphasis added)).

Amendment.[342] Cooley explained that "due process of law" with regard to "judicial action" required "[j]urisdiction . . . *first*, of the subject-matter; and, *second*, of the persons whose rights are to be passed upon."[343] And he differentiated between subject-matter jurisdiction, which was set "by the law" of the jurisdiction, and personal jurisdiction, which required "that the thing in controversy, or the parties interested, be subjected to the process of the court," in a way that complied with general law territorial limits on a state's legal authority and power.[344]

## IV. PUTTING TOGETHER THE PIECES

Viewing jurisdiction through the lens of the writ-based system of law and the rights it was designed to protect begins to answer some of the questions about due process and personal jurisdiction that have confounded courts and scholars.

### A. *What Jurisdictional Principles Are Constitutionalized in Due Process*

As it turns out, the answer to what due process requires with respect to jurisdiction is relatively straightforward. It is included in the definition of due process that originalists have long accepted: Due process requires the government to act through a court to deprive someone of private rights.[345]

The key to understanding the tie between due process and jurisdiction is in understanding the original definition of a "court." A court—as originally understood—existed when a state or nation properly vested the institution with judicial power and when that institution could properly exercise that power over the defendant or property on which its judgment purported to act.[346] In other words, a court needed jurisdiction over the subject matter and the person or property subject to the claim in order to be a court.[347] That is why a decision reached without jurisdiction was described as *coram non judice*—not before a judge.[348] And the resulting judgment was nothing more than

342 *See id.* at 733; COOLEY, *supra* note 33, at 402–03.

343 *See* COOLEY, *supra* note 33, at 397–98.

344 *Id.* at 398, 402.

345 *See supra* notes 44–45 and accompanying text.

346 *See* COOLEY, *supra* note 33, at 397–405; *see also supra* Parts II–III.

347 *See Pennoyer*, 95 U.S. at 733 (explaining that judicial proceedings only have "validity" as judicial proceedings if there is "a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit" and if the defendant is "brought within its jurisdiction by service of process within the State, or his voluntary appearance"); *see also, e.g.*, COOLEY, *supra* note 33, at 397 ("The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act.").

348 *See* Voorhees v. Jackson, 35 U.S. (10 Pet.) 449, 474 (1836) (describing judgments entered without jurisdiction as "properly . . . deemed to have been done *coram non*

"waste paper" that could not affect legal rights.[349] If a court lacked judicial power to decide a dispute or the legal power to bind a particular person or piece of property to its decision, then its effort to issue a judgment was no more effective in changing legal rights than a random declaration from an average person standing on a street corner—that is, it did nothing at all.

At its heart, therefore, jurisdiction was about the scope of sovereign power.[350] But it involved two different questions about sovereign power that were governed by two different kinds of law. First, the court had to be vested with judicial power, which was a question for domestic, positive law.[351] The court had to be able to find a source of constitutional or statutory delegation to have judicial power to act in any case.[352] Second, the court also had to be able to acquire power over a particular person or property, which was a question that turned on general law limits on the state's power—limits defined by social compact theory and the relations between states as independent sovereign powers.[353]

The constitutional rules of jurisdiction, moreover, were the result of a combination of the rules governing power and the rules governing conflicts of law. Though a court was obligated to apply limits that its own sovereign imposed on its jurisdiction, it usually would not apply

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*judice*; that is, by persons assuming the judicial function in the given case without lawful authority"); *see also, e.g.*, Marshall v. Marshall, 2 Greene 241, 242 (Iowa 1849) (noting a judgment reached without properly serving process on the defendant was "*coram non judice,* and void"); Barrett v. Crane, 16 Vt. 246, 250 (1844) ("It is too well settled to need authority, that, in cases in which an inferior court of limited jurisdiction exceeds its powers, having no jurisdiction of the subject matter, or of the person of the defendant, the whole proceedings are *coram non judice*, and void . . . .").

349 *Voorhees*, 35 U.S. at 475; Rose v. Himely, 8 U.S. (4 Cranch) 241, 268–69 (1808) (describing judgments reached without proper sovereign authority as having "no legal effect whatever," *id.* at 269); *see also* Sachs, *supra* note 9, at 1272–73.

350 *See* Joseph H. Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241, 241 (1923) ("The power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court, is called *jurisdiction.*"); Kinnaird, *supra* note 44, at 1061 (noting jurisdiction as originally understood was tied up with notions of sovereignty).

351 *See supra* Sections II.A–B, III.B; *see also, e.g.*, *Pennoyer*, 95 U.S. at 733 (one aspect of jurisdiction is determined "by the law of [the jurisdiction that] creat[ed the court]"); COOLEY, *supra* note 33, at 398 (the "law [must] give [a court] authority" or its proceedings are "altogether void").

352 *See supra* Section III.B.1.

353 *See supra* Sections II.C–D, III.B.2; *see also, e.g.*, Conison, *supra* note 47, at 1103 (noting that non-statutory constraints on jurisdiction were "not a matter of any state's law" but rather "a matter of the law of conflicts, another part of general law"). Notice was also a requirement of due process and a limit on court's authority, but it was separate from the legal power limits on jurisdiction and far more flexible. *See supra* Sections II.C, II.F, III.A; *see also* Sachs, *supra* note 50, at 1712.

the latter, general law rules governing limits on sovereign power against the same sovereign that empowered it.[354] This was a function of the courts' role in relation to the sovereign. A court was an instrument of delegated sovereign power, not a sovereign unto itself.[355] It thus could not question the sovereign's decisions to delegate power to it—regardless of whether the question was one about delegating too little *or* too much power.[356]

Rather than domestic courts, *other* sovereigns enforced limits on a foreign sovereign's power by exercising their own power where it was supreme—that is, within their own territories and as applied to persons subject to their protection.[357] These foreign sovereigns had the power to—and would—refuse to recognize the judgments other courts issued without properly acquiring authority and power over a particular defendant or property.[358]

*Pennoyer* was therefore correct about the limits on states' jurisdiction over persons. They could not exercise such jurisdiction extraterritorially.[359] The courts had no authority to command non-citizens who were not within the territory to appear before the court. And territorial limits on the power of law prevented the command to appear in the process from having legal effect outside the sovereign's borders.

Centering the concept of jurisdiction on power and its historical roots in the writ system also brings to light one underappreciated aspect of *Pennoyer*: Its recognition that the service of process itself was an important component in the exercise of judicial power. Where the process is served is a significant component of the jurisdictional analysis because the command in the process is the attempted exercise of power against an individual or property.[360] That is why "tagging" a defendant with process in the state is sufficient to exercise jurisdiction over her—regardless of the extent of her other connections.[361] Authority and power at the moment that the defendant receives the command to appear before the court is sufficient to give the court the ability to adjudicate the defendant's rights.

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354 *See supra* Section III.B.

355 *See supra* Sections II.A–B.

356 *See supra* Section III.B.3.

357 *See supra* Section III.B.3; *see also* Whitten, *supra* note 12, at 801 ("[T]he usual understanding of the territorial rules as governing the authority of other sovereigns' proceedings on collateral attack, rather than as controlling the authority of a legislature vis-a-vis its own courts.").

358 *See supra* Section III.B.3.

359 *See supra* Sections III.B.2, III.C.2; *see also supra* Section II.D.3.

360 *See supra* Sections II.C–D, III.B.2.

361 *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1878), *overruled by*, Shaffer v. Heitner, 433 U.S. 186 (1977); Burnham v. Superior Ct., 495 U.S. 604, 619 (1990) (plurality opinion) (retaining this rule for modern doctrine).

It is important to note that this does not mean that traditional tag jurisdiction was the only means of holding a defendant to answer for claims against him in court. As *Pennoyer* itself recognized, there were other ways of acquiring power, too.[362] Consent was sufficient for personal jurisdiction, and advance consent could be a powerful tool.[363] A state could, for instance, condition certain public rights and privileges on consent to in-state service of process, which would essentially let it "hold" the defendant to answer for claims related to in-state conduct.[364] Or the state could take custody of real or personal property in the state and hold it in an effort to persuade the defendant to appear or allow it to be used to satisfy claims against a defendant who refused to voluntarily appear in court.[365]

The key principle underlying due process and jurisdiction, however, is testing these efforts to determine the defendant's rights against general law rules regarding proper exercise of sovereign authority and power. The original understanding did not have jurisdiction turn on a freewheeling assessment of how many contacts the defendant had with the state, how significant they were, how much they related to the claim, or how fair it would be to have a distant forum adjudicate the defendant's claim.[366] Instead, it turned on whether the state had properly acquired power over the defendant, thus legitimately obligating him to allow the state to adjudicate his rights.

### *B. Why Fifth and Fourteenth Amendment Due Process Are Different*

Understanding the history of process and the ways it worked to empower courts also helps explain another jurisdictional puzzle: why Fourteenth Amendment Due Process was different.

The key to answering this question is in the structural asymmetry of the Fourteenth Amendment and its place in the American system of dual sovereignty. In the Fifth Amendment, the Constitution provided federal protection against any federal efforts to deprive a person of life,

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362 *See Pennoyer*, 95 U.S. at 735.

363 *See id.*

364 *Id.* at 735–36 (state could condition various privileges on consenting to appointment of an in-state agent for service of process); *see also, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356 (1927) (requiring consent to in-state service for claims related to use of in-state roadways); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1856) (same for privilege of operating as a foreign corporation in the state).

365 *See Pennoyer*, 95 U.S. at 723 ("Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents [and situated within the state] to satisfy the claims of its citizens.").

366 *Cf.* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

liberty, or property without due process of law.[367] Thus, the same government that provided the due process protection was also subject to the due process requirement.[368] State constitutional due process provisions were the same.[369] Thus, pre-Fourteenth Amendment due process clauses were structurally symmetrical in the sense that domestic law provided the due process protection against domestic government actions.

But in the Fourteenth Amendment, the Constitution provided federal due process protection against state efforts to deprive a person of life, liberty, or property.[370] And it did so in the context of our federal system, where the federal government is supreme in its authorized spheres of power.[371] Thus, the Fourteenth Amendment was the first Due Process Clause that was structurally asymmetrical in the sense that the sovereign that provided the due process protection was different from, and superior over, the sovereign against which it protected.[372]

Understanding the historical sources of the limits on personal jurisdiction makes clear why this difference mattered. Two types of law limited a court's jurisdiction: Domestic law defined the scope of a court's vested power and general law defined the scope of sovereign power with which a court could be vested.[373]

The structural asymmetry in the Fourteenth Amendment was crucial to providing a rights protection that included the second limitation. This resulted from the differing conflicts-of-law rules applicable domestically and elsewhere.[374] Domestically, a statute could displace a

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367 U.S. CONST. amend. V.

368 *See* Whitten, *supra* note 12, at 818 (recognizing that before the Fourteenth Amendment, all due process clauses involved the federal court applying a federal protection against a federal legislature or a state court applying a state protection against a state legislature and thus differed from the Fourteenth Amendment).

369 *See id.*

370 U.S. CONST. amend. XIV; *see also* Whitten, *supra* note 12, at 818.

371 *See* Whitten, *supra* note 12, at 817–18 (considering the possibility that the Fourteenth Amendment Due Process Clause's meaning differed from prior due process clauses because it gave the federal sovereign—which had a broader territorial reach—the ability to review state court actions); *cf.* Burnet v. Brooks, 288 U.S. 378, 405 (1933) ("The Constitution creates no such relation between the United States and foreign countries as it creates between the States themselves.").

372 *See* Sachs, *supra* note 9, at 1288 (noting that the Fourteenth Amendment's enactment allowed federal courts to have the final word on whether state courts comported with traditional jurisdictional requirements).

373 *See supra* Section II.D.3; *see also, e.g.*, Fenton v. Garlick, 8 Johns. 193, 197 (N.Y. Sup. Ct. 1811) (process served outside the state was "void"); *see also* Hart v. Granger, 1 Conn. 154, 169 (1814) (same); *see also* D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 174 (1851) (noting "neither the legislative jurisdiction, nor that of courts of justice, had binding force" outside the sovereign's territorial boundaries).

374 *See supra* Section III.B.3.

general law rule.[375] Thus, when a court judged its own jurisdiction, its assessment was limited to the question of whether domestic law authorized it to act, as it would not apply the general law in place of a conflicting local statute.[376] But elsewhere the domestic statute did nothing to change the general law.[377] Thus, when a state or federal court judged another state's jurisdiction, its assessment included both the question of whether the state's statutes had authorized the court to act *and* whether the state legitimately had power under the general law.[378] This meant that the Fourteenth Amendment's grant of power to federal courts to review state violations of due process was essential to clearly incorporate the question whether a state's exercise of jurisdiction comported with general law, territorial limits on sovereign power.

This understanding of Fourteenth Amendment Due Process is consistent with the Amendment's overall structure and purpose. It was designed to allow the federal courts to question whether the states were properly exercising their government power with respect to the newly freed slaves.[379] The Fourteenth Amendment gave the federal government—as the limited, but superior sovereign in our system of dual federalism—the power to enforce certain expectations about proper exercise of sovereign power inherent in "equal protection," "privileges and immunities," and "due process" against the states.[380] It should come as no surprise that it also allowed the federal government to impose well-recognized limits on judicial power, too.

375 *See supra* Section III.B.3.

376 *See* Conison, *supra* note 47, at 1103 ("In the domestic sense of the term, a court's jurisdiction was a matter of statute or state common-law rule."); Whitten, *supra* note 12, at 819 ("Jurisdiction in the 'international law' sense was not associated with limitations on a sovereign's legislative power to bind its own courts.").

377 *See supra* Section III.B.3; *c.f.*, DE VATTEL, *supra* note 29, at lxii–lxiv (explaining that a sovereign's law did not have force outside its territorial boundaries).

378 *See supra* Sections III.B–C.

379 *See* Kelly, *supra* note 41, at 1073 (The Fourteenth Amendment was designed "to place all civil rights under a federal guarantee of equality against state action"). Just before the Fourteenth Amendment was passed, John Bingham reiterated that the key function of the Fourteenth Amendment was "to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State" because previously individuals who had their rights violated were "without remedy" for these unconstitutional state actions. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. John Bingham). Senator Jacob Howard similarly claimed in his speech introducing the amendment in the Senate: "The great object of the first section of [the Fourteenth Amendment] is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766.

380 Sachs, *supra* note 50, at 1709 (noting that the Fourteenth Amendment "enabled direct federal-question review of [state courts'] jurisdictional rulings"); Kelly, *supra* note 41, at 1076 (explaining that the Fourteenth Amendment "created rights which would be enforceable at law through the judicial process").

### C. How Territorial Limits Protect State Sovereignty and Individual Rights

The final jurisdictional puzzle is whether the personal jurisdiction rules found in due process are an individual-rights guarantee or a state-sovereignty protection.[381] Understanding the writ-based system of law that gave rise to jurisdictional rules, the answer is *both*.

To start, it is clear that the notice requirement of process was an individual right—albeit not a particularly significant one. This requirement was nearly always satisfied if the defendant had been properly ordered to appear with process where the process had power.[382] And it could be satisfied even if the defendant had not been properly ordered to appear—as when a non-citizen defendant was personally notified of the proceedings with process while outside the state where the court tasked with deciding the case was located.[383]

Power constraints on the command in the process were therefore the key to jurisdiction. And these constraints involved a mixed protection of state sovereignty and individual rights, as the Courts' decisions indicate.

Understanding the rules that limited the authority and power of process explains why this was so. The power of process was limited to the border of a particular state because the power of a state's law was limited to the border.[384] And the power of a state's law was limited to the border because beyond that border another state's power reigned supreme.[385] But the authority of process was also limited because non-citizens found outside the state's borders owed it no allegiance and had no personal obligation to comply with its laws or commands.[386]

In one sense, therefore, imposing territorial limits on process protected one state from having another state attempt to encroach on its sovereignty by exercising legal power within its borders.[387] And in that

381 *See supra* Section I.D.

382 *Cf.* Whitten, *supra* note 12, at 803 ("The notice rules and the territorial rules followed hand-in-hand, because the forms by which notice was given to a party and a sovereign exercised its territorial power were often the same: personal service of process *within* the territorial limits of a state . . . .").

383 *Cf.* Pennoyer v. Neff, 95 U.S. 714, 727 (1878), *overruled by*, Shaffer v. Heitner, 433 U.S. 186 (1977) ("Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them.").

384 *See supra* Sections II.D.3, III.B.2.

385 *See* DE VATTEL, *supra* note 29, at lxii–lxiv (recognizing that laws regarding the limits of sovereign power resulted from the need to resolve conflicts regarding the reach of sovereign power); *see also supra* Sections II.D.3, III.B.2.

386 *See supra* Section II.D.3.

387 *E.g.*, STORY, *supra* note 77, § 32, at 31–32 ("It is difficult to perceive upon what ground a claim can be rested, to give to any municipal laws an extra-territorial effect, when those laws are prejudicial to the rights of other nations, or to those of their subjects. It would

sense, it protected state sovereignty. But in another sense, imposing these limits protected individual defendants from an overreach of state power and authority. A nation's or state's power to resolve disputes was a function of the social compact and thus only extended to persons in either a permanent or temporary social compact with it.[388] Enforcing territorial limits on process thus protected defendants individually from a state's efforts to exercise sovereign power against them where it had no authority to do so.[389] In this sense, it protected an individual right.

Understanding that both state sovereignty and individual rights rationales support jurisdictional doctrine is important for reasons beyond clarifying precedent. These rules imposed similar limits on the scope of jurisdiction over persons, but did so for different reasons that might affect their application in other contexts. For instance, the Court in *Fuld* suggested that, although the state-sovereignty rationale for personal jurisdiction may not apply under the Fifth Amendment, the individual-rights rationales might still have some force.[390] This would suggest that the United States' power to bind foreign nationals with its judgments is still subject to constraints based on the limited allegiance of non-citizens. Likewise, some have proposed that Congress or common law courts can alter the rules of jurisdiction that are enforced through due process under the Fourteenth Amendment.[391] This may be so, but any argument establishing that point would have to take into account the fact that Congress would need the power to alter both the rules of comity among the states *and* the rules governing the allegiance of individuals. The power to change just one aspect of the rule alone would not be sufficient to alter constitutional jurisdictional rules.

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at once annihilate the sovereignty and equality of every nation which should be called upon to recognize and enforce them, or compel it to desert its own proper interest and duty to its own subjects in favor of strangers, who were regardless of both. A claim so naked of any principle or just authority to support it is wholly inadmissible." (citation omitted)); *see also supra* Sections II.D.3, III.B.2.

388 *See supra* Sections II.D.3, III.B.2.

389 *See generally supra* Sections II.C–D.

390 Fuld v. Palestine Liberation Org., 145 S. Ct. 2090, 2103–06 (2025). The concurrence, however, rejected the idea that the Fifth Amendment imposed any limits—whether grounded in state sovereignty or individual rights. *Id.* at 2110 (Thomas, J., concurring in judgment).

391 *See* Sachs, *supra* note 9, at 1255; *see also* Solum & Crema, *supra* note 2, at 527 (suggesting that it is more likely that the personal jurisdiction requirements in due process were "dynamic" rather than "static").

## CONCLUSION

Understanding the connection between writs, due process, and courts' jurisdiction not only shows that *Pennoyer* was right but also helps begin to unravel many of the mysteries that have surrounded constitutional jurisdictional doctrine.

For nearly a thousand years, English and then American lawyers used and understood writs or process as commands that had power to seize persons or property within a nation's or state's territory to force them to answer claims in its courts. Jurisdiction under the writ-based system thus fundamentally turned on questions of sovereign power—questions about whether the nation or state had properly vested the court with judicial power and about whether the state's power could reach a defendant or his property.

But what constituted "due process"—or proper use of writs—varied depending on whether the court answering the question was a court of the same sovereign trying to exercise jurisdiction or a separate sovereign. Usually, only separate sovereigns would apply the general law rules that limited sovereign power over conflicting state statutes in determining whether process properly caught the defendant and subjected him to courts' powers. This made the Fourteenth Amendment unique among the due process clauses. Because it allowed federal courts to enforce the requirement of due process against the states, it was the first due process clause to clearly incorporate territorial limits on personal jurisdiction.

The question remains what this should mean for the Court's jurisdictional doctrine going forward. The answer is that returning to the process-focused, territorial rules that the Fourteenth Amendment originally mandated would require changes in how courts think about jurisdictional questions, shifting the analysis towards assessing whether the exercise of state judicial power against the defendant was proper under nineteenth-century general law norms. But this new mode of reasoning would not necessarily require radical changes in the outcomes of jurisdictional disputes. It would still be relatively easy to acquire jurisdiction over a defendant in her home state, where she can be found and served with process. And each state's power to condition public rights and privileges or to seize property in the state to satisfy its resident's claims would give states ways—other than traditional "tag" jurisdiction—to protect their residents from out-of-state actors that cause harm while operating within the state's borders.

Nonetheless, returning to *Pennoyer*'s understanding of jurisdiction would have important consequences for jurisdictional doctrine. By focusing on a single contact—service of process—and requiring states to statutorily define when out-of-state defendants must consent to in-state service, the test would eliminate much uncertainty about whether a state court has jurisdiction. This would make it clearer to plaintiffs, defendants, and courts when the court is properly exercising jurisdiction and thus would prevent parties from wasting time and money litigating the threshold question of jurisdiction. And it would re-make state legislatures the primary source of authority defining the scope of their courts' powers.

In short, the Court should take a hard look at the principles of jurisdiction that guided *Pennoyer*. They may hold the key to cleaning up the mess that is the Court's modern jurisdictional doctrine.