Procedural Sovereign Distinction

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ABSTRACT

US law differentiates between two categories of foreign defendants—sovereign and private. On one level, whether a foreign entity is sovereign determines whether they are presumptively entitled to immunity in domestic courts, and this is justified by the nature of sovereignty as articulated in US and international law. However, different procedural rules also apply to these parties, meaning the "sovereign or not" determination also impacts other rules of the game. This Article proposes conceiving of the ways procedural rules do or do not differ between foreign sovereign and foreign private defendants as "procedural sovereign distinction," outlining treatment of these defendants across personal jurisdiction, service of process, and injunctive relief. Current procedural sovereign distinction has lost track of the concept of sovereignty, creating a mismatch between the distinction's justification and the way it is applied. At a minimum, we should acknowledge this mismatch exists. But we also might consider revising the doctrine of procedural sovereign distinction to promote the value of legal rules fitting and being justified by the principles underlying the legal system.

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I. INTRODUCTION

US law differentiates between two categories of foreign defendants—sovereign and private. This distinction can introduce delays, increase litigation costs, and even impede the just resolution of disputes,[1] yet the distinction is not obviously required. Foreign

1. In this sense, the distinction challenges the foundational aims of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 1 (declaring the rules should be "construed, administered, and employed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding"). Litigation in US courts often falls short of this standard, and indeed the components of justice, speed, and expense may be inextricably in tension with one another. *See, e.g.*, Harold Hongju Koh, "*The Just, Speedy, and Inexpensive Determination of Every Action?"*, 162 U. PA. L. REV. 1525, 1527 (2014) ("Is today's civil process just? Sometimes no. Is it speedy? Relatively. Inexpensive? Not really. Are there determinations of every action? Terminations, yes, but not necessarily 'determinations.'"); John L. Kane, *Sua Sponte: A Judge Comments*, LITIG., Summer 2011, at 33, 33 ("Courts have failed miserably to fulfill the promise of Federal Rule of Civil Procedure 1 . . . ."); Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 288 (2010) (describing Rule 1 as "misleading insofar as it suggests that all three goals can be achieved at the same time without making value choices or difficult tradeoffs"); *see generally* Roger Michalski, *The Clash of Procedural Values*, 22 LEWIS & CLARK L. REV. 61 (2018) (analyzing results of a survey regarding

sovereign and foreign private defendants have much in common, after all. They are all foreign and, focusing on private entities rather than individuals, all composite in some sense.[2] What makes them different, then, is that some possess "sovereignty" while others do not.

Proceduralists are, of course, familiar with the concept of sovereignty and accustomed to discussing it in the context of courts' competing claims to sovereign authority over particular defendants,[3] the extraterritorial application of US law,[4] and so on. Much less remarked upon, however, is the concept's expansive role in distinguishing between types of foreign defendants. The mere fact of the distinction invites litigation over whether particular entities are appropriately considered sovereign—litigation that would not exist absent the distinction, and which can be lengthy, costly, and deprive worthy plaintiffs of remedies. Nowhere is this clearer than in litigation regarding the status of entities with some connection to a foreign State, as demonstrated in one seemingly intractable case in the Eastern District of New York.

The allegations in *Funk v. Belneftekhim* are grave: On March 11, 2008, two US citizens—an attorney, Emanuel Zeltser, and his legal assistant, Vladlena Funk—met at a London café with an opposing party, Russian oligarch Boris Berezovsky, to discuss an ongoing dispute.[5] During the meeting, Zeltser and Funk were drugged, driven to the oligarch's private plane, and flown to Belarus where they were immediately detained.[6] They were strip-searched and beaten.[7] They were tortured, pressured to sign coerced confessions, and deprived of food and water.[8] They were denied regular access to essential

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which values within Rule 1 litigants and judges care most about). But, keeping these aims in mind, procedures or approaches that stand in their way should give US lawyers pause.

2. For the sake of clarity, this Article sets to the side the matter of foreign private individuals and individuals who are currently or have previously exercised sovereign power in foreign States. Different sets of rules and considerations apply to these individuals.

3. *See generally, 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 (2012).

4. *See, e.g.*, William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1589–95, 1625–26 (2020) (describing interpretations of the presumption against extraterritoriality grounded in respect for other sovereigns, whether mandated by international law or as an exercise of international comity).

5. Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC), 2015 WL 6160247, at *2 (E.D.N.Y. Oct. 20, 2015), *aff'd in part*, *vacated in part*, *remanded to* 861 F.3d 354 (2d Cir. 2017); Amended Complaint at 5, 8, 18, Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC) (E.D.N.Y. Apr. 11, 2014)).

6. Amended Complaint, *supra* note 5, at 18–19.

7. *Id.* at 19.

8. *Id.* at 19–20.

medications and consular visits,[9] yet they were never criminally charged, let alone tried before a court of law.[10] Funk was released on March 20, 2009, after being detained in these conditions for just over a year.[11] Meanwhile, Zeltser remained in detention, his health rapidly deteriorating, for another three months while Belarus attempted to strike a deal with the United States for his freedom.[12] In 2012, Zeltser filed a case on behalf of himself and Funk in New York state court against two entities, the Belarusian State Concern for Oil and Chemistry (Belneftekhim) and its US affiliate, alleging they had played a role in this harrowing tale.[13]

Emanuel Zeltser died in 2021,[14] but there still has not been resolution in the dispute, in part because of how difficult it was to determine which rules applied.[15] One particular question vexed the

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9. *Id.* at 20–23.

10. *Id.* at 6 & n.6.

11. *Id.* at 33.

12. *Id.* at 33–34.

13. *See* Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC), 2015 WL 6160247, at *3 (E.D.N.Y. Oct. 20, 2015); *see also* Verified Complaint at 21–26, Funk v. Belneftekhim, No. 501907/2012 (N.Y. Sup. Ct. July 12, 2012) (listing the causes of action to include assault and battery, intentional infliction of emotional distress, false imprisonment, tortious interference with a contractual relationship, tortious interference with prospective economic advantage, conversion, and a prima facie tort plead in the alternative). The case is now at E.D.N.Y. after the defendants removed on various grounds. *See* Notice of Removal at 1–3, Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC) (E.D.N.Y. Jan. 16, 2014).

14. *See* Statement Noting the Death of a Party, Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC) (E.D.N.Y. Nov. 22, 2021); *see also* Motion to Continue, Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC) (E.D.N.Y. Dec. 27, 2022) (requesting that the court grant an extension for plaintiffs to obtain necessary documentation of plaintiff Zeltser's estate).

15. This is not for lack of effort on the part of E.D.N.Y.'s Judge Cogan. In December 2014, he ordered the parties to submit a discovery plan on the limited question of sovereign immunity that would allow them "to obtain the information necessary to supplement their motions or proceed to a hearing." Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC), slip op. at 3–4 (E.D.N.Y. Dec. 31, 2014) [hereinafter *Funk* 2014]. The defendants, however, refused to comply with any discovery requests, and continued to defy the court's repeated subsequent discovery orders. *See* Funk v. Belneftekhim, 861 F.3d 354, 360–61 (2d Cir. 2017) (describing this history). Judge Cogan then issued a sanctions order in August 2015 against the defendants—$2,000 per day until they complied with discovery orders. *Id.* at 361; Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC), slip op. at 3 (E.D.N.Y. Aug. 13, 2015). In this order, Judge Cogan asserted "Defendants may not use sovereign immunity manipulatively before providing plaintiffs with 'a fair opportunity[] to define issues of fact and law' relevant to this issue." *Id.*; *Funk*, 861 F.3d at 361. Even still, the defendants refused to participate in discovery. Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC), slip op. at 8 (E.D.N.Y. Oct. 20, 2015) [hereinafter *Funk* Oct. 2015]; *Funk*, 861 F.3d at 362.

In October, Judge Cogan took more drastic action. He responded to a request from the plaintiffs for further sanctions by "strik[ing] the defendants' sovereign immunity

case for its first six years: Are the defendants sovereign? If so, the 1976 Foreign Sovereign Immunities Act (FSIA) and its associated procedural regime would govern; the FSIA is the "sole basis for obtaining jurisdiction over a foreign state in [US] courts."[16]

The core of the FSIA is, of course, about immunity. Under the FSIA, foreign States, including their agencies and instrumentalities,[17] are "immune from the jurisdiction of the courts of the United States and of the States" except as provided.[18] But the FSIA and its case law also provide unique rules in various procedural domains—from jurisdiction to post-judgment attachment—when a defendant is considered sovereign. In its years of fighting to claim sovereign status, Belneftekhim was claiming not only entitlement to immunity but also entitlement to this expansive set of procedural rules that apply uniquely to foreign sovereign defendants.

Taking note of the wide-ranging consequences of "sovereign or not" disputes and determinations, this Article advocates for comprehensive

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defense and preclud[ing] them from relying on sovereign immunity." He also ordered the defendants to pay the accrued monetary sanctions of $136,000 to the court and $5,000 to the plaintiffs. *Funk* Oct. 2015, slip op. at 10; *Funk*, 861 F.3d at 362. As with many of Judge Cogan's previous orders, the defendants appealed. In July 2017 the Second Circuit vacated the striking of the sovereign immunity defense. *Funk*, 861 F.3d at 362, 370. Although the defendants' noncompliance with discovery had prevented Judge Cogan from having the information necessary to determine what set of rules applied to the case—whether those applicable to foreign sovereign defendants or those applicable to foreign private defendants—striking the defendants' sovereign immunity defense at this stage risked allowing a case to proceed where the district court had no jurisdiction. *Id.* at 370–71.

Judge Cogan then tried another approach. He created "an evidentiary presumption against defendants," assuming that any evidence the defendants withheld would undermine their immunity claim, as a form of sanction for the defendants' refusal to participate in discovery. Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC), slip op. at 13 (E.D.N.Y. Nov. 20, 2017). By further "prohibit[ing] defendants from offering any further evidence on whether Belneftekhim is an agency or instrumentality of Belarus," *id.*, Cogan effectively foreclosed the defendants' claim to sovereign status. The Second Circuit upheld these sanctions, Funk v. Belneftekhim, 739 F. App'x 674, 677–79 (2d Cir. 2018), and thus the defendants were finally found not to be entitled to the immunity and procedural rules associated with sovereignty on the basis of an evidentiary presumption designed to punish them for recalcitrance. *See id.* at 679; Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC), slip op. at 15 (E.D.N.Y. Nov. 20, 2017).

16. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) (basing this assertion on a review of the FSIA's text and structure to ascertain Congress's intent); *see also* Wye Oak Tech., Inc. v. Republic of Iraq, 24 F.4th 686, 690 (D.C. Cir. 2022) ("The FSIA exceptions are exhaustive; if none applies to the circumstances presented in a case, the foreign state has immunity and the court lacks subject-matter jurisdiction."); *cf.* Karen Halverson Cross, *The Extraterritorial Reach of Sovereign Debt Enforcement*, 12 BERKELEY BUS. L.J. 111, 114–15 (2015) ("The Supreme Court has interpreted the FSIA to be the exclusive basis for jurisdiction against a foreign state in U.S. court.").

17. 28 U.S.C. § 1603(a)–(b).

18. *Id.* § 1604.

engagement with what it terms "the doctrine of sovereign distinction"—the ways foreign sovereign and foreign private defendants are treated differently, or not, under US law.[19] This novel conceptual approach to civil procedure and transnational litigation offers a valuable perspective on the contours and impacts of US law. When considering the rules governing lawsuits against foreign parties, commentators have typically focused on particular rules or particular types of entities. They have asked, for example, whether a foreign State should receive constitutional protections,[20] how to serve process across national borders,[21] what a US court can order corporations with duties under foreign law to do,[22] and so on. These inquiries are valuable, but they neglect a bigger picture. By contrast, this Article tackles this bigger picture head-on, asking: How do the rules for sovereigns differ from the rules for private parties? And what does this have to do with "sovereignty"?[23]

In particular, this Article focuses on the domain of procedure, broadly understood.[24] By setting the conditions of participation in civil litigation in US courts, both statutory and judge-made doctrines dictate the shape of that litigation and thus demand sustained

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19. Foreign parties, including foreign sovereign parties, of course also interact with the US legal system as plaintiffs. For discussions of this phenomenon, see Zachary D. Clopton, *Diagonal Public Enforcement*, 70 STAN. L. REV. 1077 (2018); Diego A. Zambrano, *Foreign Dictators in U.S. Court*, 89 U. CHI. L. REV. 157 (2022).

20. *See, e.g.*, Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633 (2019); Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483 (1987).

21. *See, e.g.*, Eric Porterfield, *Too Much Process, Not Enough Service: International Service of Process Under the Hague Service Convention*, 86 TEMP. L. REV. 331 (2014).

22. *See, e.g.*, Geoffrey Sant, *Court-Ordered Law Breaking: U.S. Courts Increasingly Order the Violation of Foreign Law*, 81 BROOK. L. REV. 181 (2015).

23. The concept of sovereignty is intertwined with various related but distinct concepts—"nation," "State" and "statehood," and "self-determination" primary among them. To the greatest extent possible, this Article seeks to set aside these related concepts and focus on the concept of sovereignty alone.

24. I do not intend to make controversial claims about what should be understood as procedural here or to draw sharp distinctions with other domains. Rather, this Article includes under the procedural umbrella various topics that govern how lawsuits in US courts are conducted. Some included topics, such as personal jurisdiction and service of process, are indisputably procedural. Others, such as immunity and injunctions, are more capaciously procedural. *See, e.g.*, Carlos Manuel Vázquez, Altmann v. Austria *and the Retroactivity of the Foreign Sovereign Immunities Act*, 3 J. INT'L CRIM. JUST. 207, 211–12 (2005) (describing the Supreme Court's finding in Republic of Austria v. Altmann, 541 U.S. 677 (2004), that foreign sovereign immunity under the Foreign Sovereign Immunities Act of 1976 "defied categorization" as either purely substantive or purely procedural); Caprice L. Roberts, *Remedies, Equity &* Erie, 52 AKRON L. REV. 493, 494 (2019) (describing remedies, the field in which injunctions fall, as lying "at the intersection of procedure and substance"). All can be usefully considered together for the way they set the "rules of the game," so to speak.

investigation. Here, I undertake that investigation through the concept of "procedural sovereign distinction," the first component of which must be foreign sovereign immunity.

US law has long provided some form of immunity to foreign sovereign defendants in recognition of what is understood as making these defendants unique—their sovereignty.[25] As Chief Justice Marshall remarked in the foundational US foreign sovereign immunity case, sovereignty ostensibly entails "perfect equality and absolute independence."[26] Allowing lawsuits in US courts to proceed unrestricted against foreign sovereigns—constructed in such terms—would be an affront to these sovereigns' power and dignity.[27] Providing foreign sovereigns immunity from suit, except where Congress has expressly indicated otherwise,[28] is grounded in what US law deems to be the nature of sovereignty.

The reason for and method of differentiating between foreign sovereign and foreign private defendants are thus closely linked in immunity. Setting a default rule of immunity from suit for foreign sovereigns alone fits and is justified by the principle of foreign State sovereignty, as Marshall articulated it, that underlies the US legal system. Put otherwise, this dimension of the current doctrine of procedural sovereign distinction *is justified by* the articulated reason for distinguishing between these types of defendants.

Yet US procedural law continues to distinguish between foreign sovereign and foreign private defendants past the point of immunity. In cases where immunity does not apply,[29] foreign sovereign and foreign private defendants are not simply treated alike. Rather, doctrines of civil procedure treat these defendants alike in some respects, but differently in others, and this discrepancy creates a puzzle for sovereign distinction. What does *sovereignty* have to do with treating foreign defendants alike in *forum non conveniens*[30] but

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25. For a discussion of the shifting approaches to foreign sovereign immunity in US law, *see infra* Part II.A.

26. Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812).

27. *Id.* at 144 (asserting that interference with sovereign property, such as military vessels, could not take place "without affecting [the foreign sovereign's] power and his dignity").

28. *See id.* at 146.

29. *See* Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic, 877 F.2d 574, 576 n.2 (7th Cir. 1989) ("[S]overeign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits.") (citing Compania Mexicana de Aviacion, S.A. v. U.S. Dist. Ct., 859 F.2d 1354, 1358 (9th Cir. 1988)).

30. *See* Aenergy, S.A. v. Republic of Angola, 31 F.4th 119, 135 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 576 (2023) (holding that the FSIA does not prohibit application of a standard *forum non conveniens* doctrine).

differently in personal jurisdiction,[31] alike in preclusion[32] but differently in service of process,[33] alike in injunctive relief[34] but differently in money damages?[35]

This Article argues that procedural sovereign distinction has, in at least some respects, lost track of sovereignty. By considering the distinction made between foreign sovereign and foreign private defendants, this Article isolates what work, precisely, sovereignty is or is not doing.[36] While the immunity distinction is justified by US law's articulated concept for foreign State sovereignty, distinctions made in other procedural domains are often disconnected from and bear no relation to this concept—the reason for distinguishing between foreign defendants in the first place.

The mismatch is particularly stark in the three illustrative domains that this Article considers—personal jurisdiction, service of process, and injunctive relief. In personal jurisdiction, foreign sovereigns receive fewer procedural protections than foreign private defendants. In service of process, while plaintiffs may effectuate service of process on a foreign corporation by serving its domestic subsidiary, the parallel is not true for serving foreign sovereigns. Plaintiffs are not permitted to serve foreign sovereign defendants via their embassies in the United States, notwithstanding that embassies—even more so than subsidiaries—exist to facilitate communication. Yet while foreign sovereign and foreign private defendants are treated differently in these respects, the same general standards apply to them with respect to the coercive tool of injunctive relief.

None of these dimensions of procedural sovereign distinction—whether treating foreign defendants differently or alike—are grounded in or justified by the reason US law distinguishes between these defendants, as this Article will show. In personal jurisdiction and service of process, where these defendants are treated differently, there are good arguments for treating them alike. And in injunctive relief, where these defendants are treated alike, there are good

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31. *See infra* Part III.A.

32. *See, e.g.*, NML Cap., Ltd. v. Banco Central de la Republica Arg., 652 F.3d 172, 184–86 (2d Cir. 2011) (discussing claim and issue preclusion against a foreign sovereign defendant as a matter of federal common law).

33. *See infra* Part III.B

34. *See infra* Part III.C.

35. Most notably, the FSIA bars punitive damages in any cases against foreign States per se that proceed under the § 1605 (non-terrorism) exceptions. *See* 28 U.S.C. § 1606; *see also* Opati v. Republic of Sudan, 140 S. Ct. 1601, 1605 (2020) (explaining that the FSIA generally bars punitive damages against sovereign defendants).

36. For this reason, this Article does not include a number of other types of parties with some connection to sovereignty, including domestic sovereigns and foreign State officials.

arguments for treating them differently. Procedural sovereign distinction thus suffers from a justificatory shortfall.

This Article proceeds as follows: Part II describes foreign sovereign immunity in US law. Tracing this doctrine from the Early Republic through the twentieth century, it lays out the basic tenets of foreign sovereign immunity and its purpose in treating sovereign defendants differently than their private counterparts. In Part III, the Article turns to other dimensions of procedural sovereign distinction, laying out the rules that apply to foreign sovereigns and foreign private parties in personal jurisdiction, service of process, and injunctive relief. While these three domains and immunity are by no means all of procedural sovereign distinction, together they offer a window into the issues in this area. Part IV then outlines the conceptual mismatch between the reason for distinguishing between foreign sovereign and foreign private defendants and US law's current doctrine of procedural sovereign distinction. Finally, Part V considers how relevant actors might respond to the recognition of this mismatch between justification and implementation. Resolving this mismatch would be challenging, since it would require action from both the Supreme Court and Congress, and it may not be desirable in every case. Nonetheless, it is worth pursuing.

Ultimately, this Article makes two broad proposals. First, it urges readers to see US law's current doctrine of procedural sovereign distinction for what it is—a doctrine worth considering in its entirety, with a mixed relationship to the justification for distinguishing between sovereign and private defendants. Second, and more ambitiously, it invites readers to consider what US law might gain from bringing procedural sovereign distinction into alignment with the justification for the distinction, grounded in what is understood in US law as the nature of foreign State sovereignty.

The *Funk* case illustrates the difficulty and hazards of differentiating between foreign sovereign and foreign private defendants. After a decade of litigation and many unanswered discovery orders regarding the defendants' sovereignty,[37] the plaintiffs are no closer to redress for their injuries. If making this distinction can offer enterprising parties another tool to drag out litigation and forestall justice, as it arguably has in this case, then there should be good reason for making it. There should be something in sovereignty worth protecting, and that unique something should guide the treatment of defendants deemed to have it.

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37. *See* discussion *supra* note 15.

II. IMMUNITY AS PROCEDURAL SOVEREIGN DISTINCTION

That sovereigns are entitled to immunity from lawsuits in other States' courts is a longstanding principle of both US and international law.[38] This Part traces the strong connection drawn between a particular understanding of sovereignty and this entitlement from the Early American Republic to present day, demonstrating how, even as the contours of immunity have shifted, its relationship to sovereignty remains.

The traditional rule of immunity for foreign sovereigns was absolute: Unless the foreign sovereign consented, a lawsuit against them could not proceed.[39] Chief Justice Marshall's 1812 opinion for the Supreme Court in *The Schooner Exchange v. McFaddon*, resolving the question of whether a friendly foreign sovereign's armed ship within US territory could be subjected to suit in US courts,[40] exemplifies this rule.[41] While noting that the United States, in its own sovereign

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38. *See, e.g.*, Nat'l City Bank of N.Y. v. Republic of China, 348 U.S. 356, 358 (1955) ("The freedom of a foreign sovereign from being haled into court as a defendant has impressive title-deeds."). Although this Article is concerned with foreign sovereign immunity in particular, the principle of sovereign immunity applies to other sorts of sovereigns as well. Most notably, the states within the United States and federally recognized Indian tribes are also presumptively entitled to immunity from suits brought by any person in both federal courts and their own state courts. For US states' immunity, see U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."); Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455, 2461–62 (2022) ("Basic tenets of sovereign immunity teach that courts may not ordinarily hear a suit brought by any person against a nonconsenting State."); Alden v. Maine, 527 U.S. 706, 713 (1999) (finding that US states are entitled to sovereign immunity within their own courts by virtue of the nature of their sovereignty). For tribal immunity, see Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014) (describing tribal immunity as "the baseline position"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.").

39. *See Sovereign Immunity—Waiver and Execution: Arguments from Continental Jurisprudence*, 74 YALE L.J. 887, 887 (1965) ("Sovereign immunity in its absolute form entitles a foreign state to immunity from jurisdiction and execution in all disputes before domestic courts.").

40. *See* Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 147 (1812) (finding that the foreign sovereign's armed ship could not be subject to US jurisdiction).

41. Indeed, *Schooner Exchange* continues to be cited as the foundational US case in foreign sovereign immunity. *See, e.g.*, Opati v. Republic of Sudan, 140 S. Ct. 1601, 1605 (2020) (describing *Schooner* as "[t]he starting point for nearly any dispute touching on foreign sovereign immunity"); Republic of Austria v. Altmann, 541 U.S. 677, 689 (2004) ("Chief Justice Marshall's opinion in *Schooner Exchange v. McFaddon* is generally viewed as the source of our foreign sovereign immunity jurisprudence."); Damrosch, *supra* note 20, at 521 (describing *Schooner* as "a landmark opinion that served for a century and a half as the source for the rule of immunity of foreign states from the

capacity, could exercise jurisdiction over foreign sovereigns and their property,[42] Marshall found foreign sovereigns were presumptively entitled to immunity from all lawsuits in US courts.[43]

As this Part will explore, over the course of the centuries following *Schooner Exchange*, the notion that sovereignty required at least a presumptive entitlement to immunity was consistently reinscribed in both domestic and international law. In the nineteenth and early twentieth centuries, US courts frequently reiterated Marshall's reasoning as well as his holding.[44] And, even as the United States and many others shifted from a regime of absolute immunity to one of restrictive immunity, foreign sovereigns generally were not to be haled into domestic courts for their so-called "sovereign or public acts."[45]

Crucially, the justification for this general entitlement to immunity is found in what Marshall described as the nature of sovereignty itself. As Ingrid Brunk recently put it, "[n]o entity is less like a 'citizen'" than a foreign State.[46] Nor is this merely a matter of political theory. From the Early American Republic to the enactment of the FSIA, an understanding of foreign States' sovereignty as entailing equality and independence, which in turn requires immunity

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jurisdiction of United States courts"); Daniel T. Murphy, *The American Doctrine of Sovereign Immunity: An Historical Analysis*, 13 VILL. L. REV. 583, 583 (1968) (noting that *Schooner Exchange* was still, in 1968, "repeatedly referred to in judicial opinions . . . as a present underpinning for the concept of sovereign immunity, even though the political and social circumstances of today differ considerably from those existing in 1812").

42. *Schooner Exch.,* 11 U.S. at 146 ("Without doubt, the sovereign of the place is capable of destroying this implication [of sovereign immunity]. . . . But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.").

43. *See id.* at 145–46.

44. *See infra* Part II.A.2.

45. *See* 26 Dep't State Bull. 986 (June 23, 1952) [hereinafter Tate Letter] (announcing the US shift to the "restrictive theory" of foreign sovereign immunity); *see also, e.g.*, 28 U.S.C. § 1605(a)(2) (distinguishing foreign states' "commercial acts," for which immunity can be withheld, from their sovereign acts, which remain entitled to immunity); Jurisdictional Immunities of the State (Germany v. Greece), Judgment, 2012 I.C.J. Rep. 99, ¶ 61 (Feb. 3) ("States are generally entitled to immunity in respect of *acta jure imperii*.").

46. Wuerth, *supra* note 20, at 686–87; *see also* Damrosch, *supra* note 20, at 487 (characterizing foreign States as "permanent outsiders"). It is worth noting that Brunk made this comment in quite a different context—discussing the history of constitutional due process provisions being afforded to foreign sovereigns. Wuerth, *supra* note 20, at 686. The artful turn of phrase is also useful for thinking about foreign sovereign immunity as well, however.

in other States' domestic courts, has consistently undergirded US law.[47]

A. *Foreign Sovereigns' Entitlement to Immunity*

1. General Principles

When Chief Justice Marshall wrote in *Schooner Exchange*, the Court was faced with what he saw as a case of first impression. Unable to turn to directly relevant precedent in US law, Marshall relied on what he described as "general principles, and on a train of reasoning, founded on cases in some degree analogous to this."[48] Marshall found such analogous cases in the immunity of heads of state and ambassadors, as well as instances of one sovereign allowing another's troops to pass through its territory.[49] Yet he also turned to the nature of sovereignty itself, addressing the question both directly and as an indirect element of these analogous cases.[50]

Marshall identified sovereigns as inherently equal and independent entities, each exercising authority over its own territory.[51] He referred to the "perfect equality and absolute independence of sovereigns,"[52] including in "possessing equal rights and equal independence,"[53] and he argued sovereignty confers to sovereigns

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47. *See* Damrosch, *supra* note 20, at 521 (commenting on the enduring legacy of Marshall's *Schooner Exchange* decision in "shap[ing] the Supreme Court's approach to various problems of domestic law").

48. *Schooner Exch.*, 11 U.S. at 136.

49. *See id.* at 137–41.

50. Attorney General William Pinkney, arguing the case on behalf of the United States, described foreign sovereign immunity as derived "from the nature of sovereignty, and from the universal practice of nations." *Id.* at 134; *see also Sovereign Immunity—Waiver and Execution*, *supra* note 39, at 888 ("Historically, the immunity of the foreign state was derived from both the immunity of its ambassadors and from the state's sovereign nature.").

51. The hypocrisy of Marshall's view of sovereignty here considering his later opinions regarding the sovereignty possessed by Indian tribes should not pass unnoticed. While Marshall described foreign sovereigns—in particular, the United States' ally of France in the *Schooner Exchange* case—as inherently equal to and independent from the United States, he would soon afterward lay the essential legal groundwork for subordinating the sovereignty of indigenous peoples to the United States government. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (recognizing the Cherokee nation as a distinct community such that Georgia state law had no effect on Cherokee territory, but asserting US federal authority over the tribe); *see also* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1818–23 (2019) (describing infamous "Marshall trilogy" of cases—*Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*—in which Marshall positioned Indian tribes as "domestic dependent nations").

52. *Schooner Exch.*, 11 U.S. at 137.

53. *Id.* at 136.

"absolute and complete jurisdiction within their respective territories."[54] One sovereign could only be understood to enter another's territory on the basis of express or implied license that they would be immune from that jurisdiction's courts—in other words, "only under an express license, or in the confidence that the *immunities belonging to his independent sovereign station*, though not expressly stipulated, are reserved by implication, and will be extended to him."[55]

To be sure, possessing absolute and complete jurisdiction in its territory, one sovereign could revoke another's immunity.[56] But Marshall asserted revoking immunity would impinge on the power and the dignity of the foreign sovereign,[57] and it would be a "breach of faith" if done without warning.[58] As such, only a clear statement of intent could suffice to revoke sovereign immunity.[59] By contrast, Marshall argued, "[w]hen *private* individuals of one nation spread themselves through another," it would be both inconvenient and dangerous to exempt them from jurisdiction in the State they had entered, and it would not impact their own State's sovereignty to subject them to that jurisdiction.[60] With sovereignty understood in these terms, immunity was both essential to recognizing the sovereignty of the United States' co-sovereigns and critical to the operation of the United States' own sovereignty in exercising restraint.

Thus, the purpose for distinguishing between foreign sovereign and foreign private defendants in *Schooner Exchange* lay in ensuring the protection of foreign States' sovereignty, as characterized by Marshall.[61] In that case, the distinction turned on whether a ship was

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54. *Id.*

55. *Id.* at 137 (emphasis added).

56. *Id.* at 146 ("Without doubt, the sovereign of the place is capable of destroying this implication [of foreign sovereign immunity].").

57. *Id.* at 144 (asserting that interference with sovereign property, such as military vessels, could not take place "without affecting [the foreign sovereign's] power and his dignity").

58. *Id.* at 146 ("[U]ntil such [jurisdictional] power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise."); *see also* The Santissima Trinidad, & the St. An De, 20 U.S. 283, 315 (1822) (characterizing *Schooner Exchange* as "preserving the national faith").

59. *Schooner Exch.*, 11 U.S. at 146.

60. *Id.* at 144 (emphasis added).

61. *See id.* at 125–28. Analogous reasoning grounds the sovereign immunity to which the states of the United States are entitled. As the Supreme Court described in *Alden v. Maine*, "[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today (either literally by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments." 527 U.S. 706, 713 (1999); *see also* PennEast

properly considered a sovereign's property or, rather, private property.[62] Marshall apparently disposed of this question with ease, dedicating only a pair of lines in the opinion to it,[63] but he acknowledged its consequences: A case against a privately operated ship could have proceeded, while this case against a foreign sovereign's military vessel could not.[64] Sovereignty thus distinguished two types of defendants from one another—sovereign and private—and it dictated that the former, but not the latter, should be entitled to immunity.

2. Turning to Precedent and International Law

After *Schooner Exchange*, US courts no longer needed to resort to general principles and began referring to precedent. Between 1812 and the FSIA's passage in 1976, courts could turn to Marshall's decision and the line of cases it inspired without necessarily rehashing the principles of sovereignty on which it depended.[65] Only four years after *Schooner Exchange*, Justice Johnson described another maritime case as largely indistinguishable from *Schooner Exchange* and echoed

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Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2258 (2021); Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1483, 1493 (2019); N. Ins. Co. of N.Y. v. Chatham Cty., 547 U.S. 189, 193 (2006) (all reaffirming this association of US states' sovereign immunity with the nature of sovereignty). It also appears in altered form in the entitlement of federally recognized Indian tribes to immunity. Since the 1830s, the Supreme Court has held that tribes are "distinct, independent political communities, retaining their original natural rights." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). In the twentieth century, the Supreme Court has relied on this reasoning to affirm that tribes "have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55, 58 (1978).

62. *See, e.g.*, *Schooner Exch.*, 11 U.S. at 118–19, 135 (presenting arguments on both sides of this question).

63. *See id.* at 146 ("In the present state of the evidence and proceedings, the Exchange must be considered as a vessel, which was the property of the Libellants, whose claim is repelled by the fact, that she is now a national armed vessel, commissioned by, and in the service of the emperor of France. The evidence of this fact is not controverted."); *see also id.* at 144 (noting a public armed ship is "in all respects different" from a foreign private individual or their property).

64. *Id.* at 145–46 (concluding, as a matter of the principles of public law, that military vessels "are to be considered as exempted by the consent of that power from his jurisdiction").

65. Decisions in the related act of state doctrine also cite *Schooner Exchange* for the underlying principles of sovereignty that it expounds. *See, e.g.*, First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972) (noting both the act of state doctrine and foreign sovereign immunity are grounded in "the notion of comity between independent sovereigns"). The canonical statement of the act of state doctrine is found in the Court's 1897 *Underhill v. Hernandez* opinion: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." 168 U.S. 250, 252 (1897).

Marshall's language in warning that sustaining a claim against a French privateer "would have detracted from the dignity and equality of sovereign states."[66] Similarly, the Court extensively referred to *Schooner Exchange* over a century later in its 1926 *Berizzi Brothers Co. v. The Pesaro* decision, including quoting Marshall's assertion that sovereign immunity derives from "the absolute independence" and equality of sovereigns.[67] Even after the United States abandoned absolute sovereign immunity in 1952, the Court continued to rely on Marshall's 1812 decision to locate the grounds of sovereign immunity in sovereignty.[68] Thus, by returning to *Schooner Exchange* as the canonical statement of foreign sovereign immunity doctrine, the Supreme Court continually reinscribed that foreign sovereigns were distinguished from foreign private parties in the way Marshall described and that the nature of sovereignty—understood as entailing equality and independence—created an entitlement to immunity.

By the time of the FSIA's passage in 1976, it was clear that foreign sovereign immunity was a rule not only of US law but also of international law. The House Judiciary Committee, recommending the bill, opened their discussion by asserting: "Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state."[69] As such, the Committee described the FSIA as codifying the view of sovereign immunity "presently recognized in international law."[70] It was hardly alone in reaching this conclusion. Reviewing the question of sovereign immunity in a 1980 report, the United Nations International Law Commission (ILC) found the rule had been formulated in the early nineteenth century—including, notably, in *Schooner Exchange*[71]—and later "adopted as a general rule of customary international law solidly rooted in the current practice of States."[72] The ILC suggested, moreover, that sovereign immunity derived from the nature of sovereignty and was grounded in the

66. *See* L'Invincible, 14 U.S. (1 Wheat.) 238, 252, 256 (1816).

67. *See* Berizzi Bros. v. The Pesaro, 271 U.S. 562, 575 (1926).

68. *See, e.g.*, Nat'l City Bank of N.Y. v. Republic of China, 348 U.S. 356, 362 (1955) (relying on *Schooner Exchange* to assert foreign sovereign immunity derives *inter alia* from "respect for the 'power and dignity' of the foreign sovereign").

69. H.R. REP. NO. 94-1487, at 8 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.

70. *Id.* (describing the FSIA's first purpose thus).

71. The report quotes four paragraphs from Marshall's opinion in *Schooner Exchange*, describing it as a "classic statement of the rule of State Immunity." *See* Int'l Law Comm'n, Rep. on the Work of Its Thirty-Second Session, U.N. Doc. A/35/10, at 145 (1980).

72. *Id.* at 147.

principles of sovereign equality and independence.[73] And the International Court of Justice more recently confirmed this view in its only decision on State immunity to date, noting that sovereign immunity "derives from the principle of sovereign equality of States" and "occupies an important place in international law."[74] An understanding of sovereignty as entailing equality and independence thus grounds sovereigns' entitlement to immunity under international law as well.[75]

B. *The Current US Law of Foreign Sovereign Immunity*

Today, the immunity to which foreign sovereigns are entitled in US courts is governed by the FSIA, which largely codified the "restrictive theory" of immunity.[76] The US State Department first adopted this theory to allow US citizens conducting business with foreign sovereigns to bring lawsuits regarding those relationships in the United States. Under absolute immunity, US citizens could sue private counterparties in US courts, provided jurisdictional and other procedural requirements were met. But the same recourse was not available against sovereign counterparties. In response, State Department Acting Legal Advisor Jack Tate announced a shift in policy in 1952: Foreign sovereigns would still be immune with respect to their "sovereign or public acts (*jure imperii*) . . . , but not with respect to private acts (*jure gestionis*)."[77] What has come to be known as the "Tate

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73. *See id.* at 156 (describing the notion that "State immunity is derived from sovereignty" as the "most convincing argument[] in support of the principle of State Immunity").

74. Jurisdictional Immunities of the State (Germany v. Greece), Judgment, 2012 I.C.J. Rep. 99, ¶ 57 (Feb. 3).

75. Of course, to say that sovereigns are *de jure* equal and independent under international law is to say nothing of their *de facto* equality and independence. It has long been acknowledged that the *de jure* and *de facto* standards diverge. *See, e.g.*, Ann Van Wynen Thomas & A.J. Thomas, Jr., *Equality of States in International Law—Fact or Fiction?*, 37 VA. L. REV. 791, 794–95 (1951) ("[S]trict equality of states has never been in conformity with the existing facts of the international system."); Martti Koskenniemi & Ville Kari, *Sovereign Equality*, *in* THE UN FRIENDLY RELATIONS DECLARATION AT 50 166, 168 (Jorge E. Viñuales ed., 2020) (asserting that "[t]he inequality of sovereign nations is so ingrained in the fabric of the international system" that their chapter about it in an edited volume could "hardly hope to properly unpack the reasons and stakes behind it"); Melissa Stewart, *Cascading Consequences of Sinking States*, 59 STAN. J. INT'L L. 131, 154 (2023) ("Sovereign equality does not mean factual equality . . . .").

76. *See* Verlinden v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983) ("[T]he Act codifies . . . the restrictive theory of foreign sovereign immunity under which immunity is confined to suits involving the foreign sovereign's public acts.").

77. Tate Letter, *supra* note 45, at 984; *see also* William W. Bishop, Jr., *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93, 93 (1952) (describing this as a "new United States position"). *But see* John M. Niehuss, Comment,

Letter" thus embraced the "restrictive theory," whereby sovereigns' immunity was restricted to their sovereign acts.[78] Yet challenges with this approach quickly appeared—namely, relying on foreign sovereign defendants to ask the executive branch to weigh in on most cases to determine whether immunity applied to the facts at hand, resulting in an avalanche of work for the State Department and inconsistent applications of immunity across cases.[79]

The shift from absolute to restrictive immunity might be read as abandoning Marshall's theory of sovereignty demanding immunity, but it accomplishes the opposite. The restrictive theory only further emphasizes sovereignty's centrality to sovereign immunity. As one anonymous commenter remarked in 1965, "Restrictive immunity postulates that the fundamental relationship of states is . . . one of mutual respect for sovereignty."[80] By disentangling purportedly sovereign activity from purportedly non-sovereign activity and reiterating the entitlement to immunity for the former only, the restrictive theory emphasized the connection between sovereignty and immunity. If the absolute immunity regime of the 1812 *Schooner Exchange* tied the right to immunity to its articulation of the nature of sovereignty, the mid-twentieth century's restrictive theory regime reinforced the knot.[81]

When Congress passed the FSIA in 1976, this Act affirmed the restrictive theory, provided the first statutory basis for foreign sovereign immunity in US law, and reassigned responsibility for

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International Law—Sovereign Immunity—The First Decade of the Tate Letter Policy, 60 MICH. L. REV. 1142, 1142 n.2 (1962) (noting that Secretary of State Lansing had previously made a similar pronouncement in 1918 but it was rejected by the Supreme Court); Berizzi Bros. v. Steamship Pesaro, 271 U.S. 562, 574–75 (1926) (holding that the *Schooner Exchange* rule of immunity for foreign ships extended not only to military vessels but also to ships "in the carriage of merchandise for hire").

78. *See Verlinden*, 461 U.S. at 487 ("[I]n the so-called Tate Letter, the State Department announced its adoption of the 'restrictive' theory of foreign sovereign immunity. Under this theory, immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts.").

79. *See id.* at 487–88 (noting the executive was primarily responsible for determining immunity but, when the foreign sovereign didn't request executive inputs, courts were sometimes tasked with the determination, resulting in governing standards that "were neither clear nor uniformly applied"); Samantar v. Yousuf, 560 U.S. 305, 311–13 (2010) (describing the "inconsistent application of sovereign immunity" that resulted from the process of diplomatic representatives requesting "suggestion[s] of immunity" from the State Department).

80. *Sovereign Immunity—Waiver and Execution*, *supra* note 39, at 891.

81. H.R. REP. NO. 94-1487, at 8 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 (summarizing the impact of the Tate Letter on sovereign immunity determinations).

immunity determinations to the judiciary.[82] For covered entities,[83] the FSIA now occupies the field of foreign sovereign immunity in civil cases.[84] As the Supreme Court explained in 1989, the FSIA is the "sole basis for obtaining jurisdiction over a foreign state in [US] courts."[85]

So what does it mean to be a "foreign state"? Although the FSIA uses this singular term throughout, the statute applies to two categories of foreign sovereign defendants: foreign States themselves and their "agencies and instrumentalities." For the FSIA, "foreign state" generally refers to both.[86] In turn, the statute defines "[a]n 'agency or instrumentality of a foreign state'" as any entity that meets three criteria: (1) a separate legal entity; (2) an organ or political subdivision of a foreign State, or majority owned by a foreign State or political subdivision thereof; and (3) neither a citizen of a US state nor established under a third country's laws.[87] Accordingly, the FSIA's provisions apply equally in almost all circumstances[88] to foreign

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82. *See* Opati v. Republic of Sudan, 140 S. Ct. 1601, 1605 (2020) (describing the earlier process of deferring to executive branch determinations in cases of foreign sovereign immunity, its breakdown, and the introduction of the FSIA to remedy the situation); *see also Samantar*, 560 U.S. at 311–13 (referring to the FSIA's primary purposes as being "(1) to endorse and codify the restrictive theory of sovereign immunity, and (2) to transfer primary responsibility for deciding 'claims of foreign states to immunity' from the State Department to the courts"); Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004) (making the same point); *Verlinden*, 461 U.S. 480, 488 (1983) ("Congress passed the [FSIA] in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'" (quoting H.R. REP. NO. 94-1487, at 7 (1976)). For a discussion of the experiment in institutional competency that this shift from executive to judicial determinations entailed, see generally Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. PENN. L. REV. 411 (2015).

83. Notably, the FSIA does not address the matter of foreign officials' immunity. *See Samantar*, 560 U.S. at 308; *see also* Chimène Keitner, *Prosecuting Foreign States*, 61 VA. J. INT'L L. 221, 239 (2021) (noting that "foreign head of state immunity and foreign official immunity . . . have not yet been codified"). Foreign officials' immunity is governed by a related but distinct set of rules and considerations. *See* Yousuf v. Samantar, 699 F.3d 763, 768–78 (4th Cir. 2012); *see also* William S. Dodge, *A Primer on Foreign Official Immunity*, TRANSNAT'L LITIG. BLOG (May 23, 2022), https://tlblog.org/a-primer-on-foreign-official-immunity [https://perma.cc/8BHW-L9LC] (archived Dec. 26, 2023).

84. As of April 2023, the Supreme Court confirmed that the FSIA is confined to civil cases; it does not apply in criminal cases. Turkiye Halk Bankasi A.S. v. United States, 598 U.S. 264, 272–73 (2023).

85. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).

86. 28 U.S.C. § 1603(a); *see also Samantar*, 560 U.S. at 314 ("The term 'foreign state' on its face indicates a body politic that governs a particular territory. . . . In § 1603(a), however, the Act establishes that 'foreign state' has a broader meaning . . . .").

87. 28 U.S.C. § 1603(b)(1)–(3).

88. As will be discussed in greater detail below, the FSIA includes one exception to agencies and instrumentalities' inclusion in the term "foreign state"—with respect to methods of service of process. *See infra* notes 170–172 and accompanying text.

States, their organs and subdivisions, and state-owned enterprises[89]—a category that this Article collectively refers to as "sovereign defendants."

Finally, turning to the question of immunity, the FSIA begins with a presumption that defendants defined as sovereign are entitled to immunity.[90] The statute then outlines various exceptions to this immunity, which provide the basis for US courts to exercise jurisdiction over certain civil cases against sovereign defendants.[91] At the time of enactment, the FSIA contained six exceptions, listed in sections 1605(a)–(b). The most prominent of these are if the sovereign defendant waives immunity,[92] if the case relates to a sovereign defendant's commercial activity with a nexus to the United States,[93] and if the case concerns takings in violation of international law.[94] Then, in 1988, Congress amended the statute to add an exception for actions seeking to enforce arbitral agreements and arbitration awards.[95] Finally, Congress amended the FSIA between 1996 and 2016 to add two further exceptions in response to various acts of terrorism.[96]

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89. For an entity to be considered a state-owned enterprise, the Supreme Court has indicated that the State's ownership stake must be direct. Dole Food Co. v. Patrickson, 538 U.S. 468, 474 (2003). This "open[s] subsidiaries to litigation" and marks a distinction from other areas of US law, like economic sanctions, where ownership interests are traced as far as they can go. *See* Paula Kates, *Immunity of State-Owned Enterprises: Striking a New Balance*, 51 N.Y.U. J. INT'L L. & POL. 1223, 1226 (2019); DEP'T OF TREASURY, REVISED GUIDANCE ON ENTITIES OWNED BY PERSONS WHOSE PROPERTY AND INTERESTS IN PROPERTY ARE BLOCKED (Aug. 13, 2014), https://home.treasury.gov/system/files/126/licensing_guidance.pdf [https://perma.cc/DHR9-8FTZ] (archived Dec. 27, 2023) ("[A]ny entity owned in the aggregate, directly or indirectly, 50 percent or more by one or more blocked persons is itself considered a blocked person.").

90. 28 U.S.C. § 1604 ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.").

91. 28 U.S.C. § 1330(a). This resolves the issue of subject matter jurisdiction, but personal jurisdiction does not require much more. For further discussion of the FSIA's personal jurisdiction requirements, see infra notes 131–134 and accompanying text.

92. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, 2893 (codified as 28 U.S.C. § 1605(a)(1)).

93. *See id.* § 1605(a)(2). Under this exception, a sovereign defendant is not entitled to immunity in a case based on commercial activity that takes place in the United States, an action taking place in the United States in support of commercial activity elsewhere, or a direct effect in the United States from commercial activity elsewhere. *Id.*

94. *See id.* § 1605(a)(3).

95. *See* Monroe Leigh, *1996 Amendments to the Foreign Sovereign Immunities Act with Respect to Terrorist Activities*, 91 AM. J. INT'L L. 187, 187 (1997) (describing the 1988 amendment as a backdrop to the 1997 amendment).

96. *See* H.R. REP. NO. 105-48, at 2 (1997); *see also* H.R. REP. NO. 104-383, at 37 (1995) (describing the bombing of Pan Am 103 and "the kidnapping and murder of Marine Colonel William Higgins by members of the Hizballah" as among AEDPA's precipitating events).

These terrorism exceptions are now found in sections 1605A[97] and 1605B. While section 1605B creates a relatively straightforward exception to immunity in cases concerning acts of terrorism within the United States,[98] section 1605A is more complex. On one hand, section 1605A is far more limited in that it relates only to particular types of acts[99] committed against particular victims[100] by particular foreign sovereigns.[101] But, on the other, it is also far more expansive because it requires no nexus with US territory. The terrorism exceptions have been immensely controversial—among other things, President Obama vetoed the Justice Against Sponsors of Terrorism Act, which created section 1605B,[102] and serious questions remain about their compatibility with international law[103]—but they are now part of US foreign sovereign immunity law.

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97. This section has been referred to as "section 1605 big A" to distinguish it from the original exceptions in § 1605(a). *See, e.g.*, Transcript of Oral Argument at 46, Opati v. Republic of Sudan, 140 S. Ct. 1601 (2020) (No. 17-1268).

98. 28 U.S.C. § 1605B(b). Congress introduced § 1605B as part of the 2016 Justice Against Sponsors of Terrorism Act (JASTA). "While JASTA was written in general terms, it was drafted specifically to allow families of the victims of the 9/11 attacks to sue Saudi Arabia for its suspected role in those attacks." Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 111 AM. J. INT'L L. 155, 156 (2017) (citing Steve Vladeck, *The 9/11 Civil Litigation and the Justice Against Sponsors of Terrorist Act (JATSA)*, JUST SEC. (Apr. 18, 2016), https://www.justsecurity.org/30633/911-civil-litigation-justice-sponsors-terrorism-act-jasta/ [https://perma.cc/8VG5-UMBE] (archived Dec. 27, 2023)).

99. The covered acts are torture, extrajudicial killing, aircraft sabotage, hostage taking, and the provision of material support for any of these. 28 U.S.C. § 1605A(a)(1).

100. The covered victims are US nationals, members of the US armed forces, and US government employees and contractors acting within the scope of their employment. *Id.* § 1605A(a)(2)(A)(ii).

101. Section 1605A only applies to foreign sovereigns that have been designated as state sponsors of terrorism by the US Secretary of State. *Id.* § 1605A(a)(2)(A)(i)(I); *see also* Leigh, *supra* note 95, at 187 (highlighting § 1605A's limitations).

102. Press Release, White House Office of the Press Secretary, Veto Message from the President – S.2040 (Sept. 23, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040 [https://perma.cc/VX9J-JL23] (archived Dec. 27, 2023).

103. *See, e.g.*, Letter from European Union Delegation to the United States, U.S. Dep't of State (Sept. 19, 2016), https://www.washingtonpost.com/news/powerpost/wp-content/uploads/sites/47/2016/09/EU-on-JASTA.pdf [https://perma.cc/R8PF-U326] (archived Dec. 27, 2023) (asserting that, after Congress passed JASTA and before President Obama vetoed it, "the adoption and implementation of JASTA would be in conflict with fundamental principles of international law and in particular the principle of State sovereign immunity"); *cf.* Maryam Jamshidi, *Iran's ICJ Case against Canada Tests the Terrorism Exception to Sovereign Immunity*, JUST SEC. (July 24, 2023), https://www.justsecurity.org/87357/irans-icj-case-against-canada-tests-the-terrorism-exception-to-sovereign-immunity/ [https://perma.cc/RPE2-LGFB] (archived Dec. 27, 2023) (describing Iran's case against an analogous provision in Canadian law, asserting terrorism exceptions violate international law's principle of sovereign immunity). *But*

C. *Protecting Sovereignty Through Immunity*

The primary reason for distinguishing between foreign sovereign and foreign private defendants in US courts is thus clear. US law distinguishes between them to ensure that sovereigns receive the immunity to which they are entitled by virtue of their sovereignty and that the United States receives the same treatment abroad.[104] Immunity itself arises from the nature of sovereignty as conceived in US law, and it largely continues to protect sovereigns for their acts as such.

In many respects, US foreign sovereign immunity doctrine aligns the reason for treating certain defendants differently with the ways they are treated differently. They are treated differently because of their unique characteristics: While foreign sovereigns are at least formal co-equals of the United States entitled to independence, foreign private parties are not. And the difference in the way they are treated is grounded in this reasoning: By virtue of their co-equal and independent status, foreign sovereigns are entitled to immunity at least under certain circumstances, while foreign private parties are not.

Of course, the connection between the reason for and the method of differentiating is complicated by some of the FSIA's exceptions to immunity. Whereas the justificatory relationship between the nature of sovereignty and the rule of sovereign immunity was clear in the era of absolute immunity, it became more complex as exceptions to immunity were carved out. The restrictive theory further emphasizes the centrality of sovereignty to sovereign immunity by preserving immunity in circumstances where sovereigns are acting as such. The FSIA's commercial activity exception thus reflects a close relationship between sovereignty and the entitlement to immunity. Many other exceptions challenge this relationship, however, as they deprive defendants of immunity even when they are sovereign and acting in their sovereign capacity. For example, a sovereign taking property in violation of international law is at least plausibly still acting as a sovereign,[105] yet it would be denied immunity under the FSIA. Here

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see, e.g., William S. Dodge, *Does JASTA Violate International Law?*, JUST SEC. (Sept. 30, 2016), https://www.justsecurity.org/33325/jasta-violate-international-law-2/ [https://perma.cc/8NJL-FVAH] (archived Dec. 27, 2023).

104. *See* Nat'l City Bank v. Republic of China, 348 U.S. 356, 362 (1955) (listing "public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign" as the foundations of US foreign sovereign immunity law).

105. *See, e.g.*, de Csepel v. Republic of Hungary, 714 F.3d 591, 600 (D.C. Cir. 2013) ("To be sure, expropriation 'constitute[s] a quintessentially sovereign act' . . . ." (quoting Rong v. Liaoning Province Gov't, 452 F.3d 883, 890 (D.C. Cir. 2006)).

we find some fraying in the underlying principle of sovereignty's justification of current US immunity doctrine.

But this is not the end of the story, and the *reason* for distinguishing between sovereign and private defendants pulls further apart from the *ways* we distinguish between them when we consider other procedural rules that apply in civil cases against these defendants.

III. FURTHER DOMAINS OF PROCEDURAL SOVEREIGN DISTINCTION

Procedural sovereign distinction is a broad and complex domain, encompassing all procedural rules that apply in cases against foreign sovereign and foreign private defendants and the relations between such rules. As Part II discussed, the distinction between these types of defendants relates directly to the presumptive entitlement of foreign sovereigns, but not foreign private parties, to immunity. In many other procedural domains, however, the connection between the reason for treating these defendants differently and the ways they are actually treated is not so clear.

To demonstrate the issues involved, this Part outlines procedural sovereign distinction in just three of many domains—personal jurisdiction, service of process, and injunctive relief. Of these, personal jurisdiction and service of process illustrate how foreign sovereigns are often treated differently than foreign private parties, even where there may be good arguments for treating them alike. Injunctive relief, on the other hand, offers an example of US law treating sovereign and private parties alike, even where there may be good arguments for treating them differently. Together, these domains reveal the messy way procedural sovereign distinction has developed, and they lay the groundwork for considering what US procedural sovereign distinction has to do with what has been described as the nature of sovereignty.

A. *Personal Jurisdiction*

Most readers will be familiar with the requirements for US courts to have personal jurisdiction over a foreign private defendant. In addition to traditional bases for jurisdiction such as consent, a district court may have either specific or general jurisdiction over a defendant.[106] For specific jurisdiction, applying to cases where the

106. The Supreme Court recently confirmed that consent—even implied consent—remains a valid basis for the exercise of personal jurisdiction. *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 138 (2023). Some had worried the Court might do away with *International Shoe* altogether or disrupt the distinction between specific and general

plaintiff's claim "'arise[s] out of or relate[s] to the defendant's contacts' with the forum,"[107] the defendant must meet the *International Shoe* standard. That is, the defendant must "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[108] While this standard applies to foreign defendants as much as out-of-state domestic defendants, the Supreme Court has indicated fairness may tip the scales against foreign private defendants being haled into US courts.[109] Even if the plaintiff's claim does not have the connection

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jurisdiction in its *Mallory* decision. *See, e.g.*, Maggie Gardner, *Their Beef is with* Burger King, TRANSNAT'L LITIG. BLOG (June 8, 2023), https://tlblog.org/their-beef-is-with-burger-king/ [https://perma.cc/J4SK-RANR] (archived Dec. 27, 2023). But the Court ultimately emphasized that consent sits alongside *International Shoe*, which opened up additional avenues for jurisdiction beyond traditional bases like consent. *See Mallory*, 600 U.S. at 139–40. In this sense, *International Shoe* has proved a more enduring alternative to *Pennoyer* than Geoffrey Hazard famously predicted in 1965. *See* Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 241–42 ("*Pennoyer*'s conceptual endurance is not easily explained . . . . But most important is the fact that the inertia of the *Pennoyer* system has never been challenged by the appearance of an acceptable alternative.").

107. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1025 (2021) (quoting Daimler AG v. Bauman, 571 U.S. 117, 127 (2014)) (reviewing past cases in which the Court has specified that the relationship may be one of arising out of *or* relating to).

108. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see also* Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts like a Private Party, Treat It like One*, 5 CHI. J. INT'L L. 675, 691 (2005) (commenting that private parties "routinely" face a "minimum contacts analysis"). This canonical rule from the Court's 1945 decision has been amended over the years but remains essentially intact. Thirteen years after deciding *International Shoe*, the Court clarified in *Hanson v. Denckla* that conduct satisfying the minimum contacts test must involve the defendant "purposefully avail[ing] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S. 235, 253 (1958). The Court later confirmed this approach in *Shaffer v. Heitner*. *See* 433 U.S. 186, 216 (1977); *see also* Wendy Collins Perdue, *The Story of* Shaffer*: Allocating Jurisdictional Authority Among the States*, *in* CIVIL PROCEDURE STORIES 135, 154 (Kevin M. Clermont ed., 2008) ("*Shaffer* . . . marked the Court's endorsement of *Hanson*'s emphasis for personal jurisdiction on purposeful availment by the defendant, rather than *McGee*'s focus on reasonableness that would include the interests of the plaintiff and the state in assuring a remedy."). And the Court has continued to develop and refine this standard, determining it cannot be satisfied by isolated occurrences or merely foreseeable circumstances, *see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295–96 (1980); by "random, fortuitous, or attenuated contacts," *see* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985); or even by relevant business operations in the forum when the plaintiff's claims did not relate to the forum, *see* Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773, 1775, 1779–84 (2017).

109. Notably, the Court's 1987 decision in *Asahi* raised concerns about the particular position foreign corporate defendants find themselves in. *See* Morrissey, *supra* note 108, at 698 ("In *Asahi*, the Supreme Court outlined a plethora of concerns that inform a specific jurisdiction minimum contacts analysis with respect to foreign private parties.").

required for specific jurisdiction, however, a defendant can be subject to general jurisdiction, which allows plaintiffs to bring "any and all claims" against a defendant.[110] For general jurisdiction, a defendant must be "essentially at home in the forum State."[111] As of the Supreme Court's 2014 decision in *Daimler AG v. Bauman*, finding where a corporation is essentially at home requires courts to review the corporation's worldwide conduct and determine where the epicenter of the corporation's activity is.[112] The result is stringent protection for foreign private entities, and especially foreign corporations, from having to defend lawsuits in US courts.[113] Indeed, as a group of civil procedure scholars has argued, this general jurisdiction standard may mean no US forum is available against foreign private defendants at all.[114]

At base, these protections stem from foreign private defendants' entitlement to constitutional due process in federal courts.[115] Although

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110. *Ford*, 141 S. Ct. at 1024 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)) (confirming this view of general jurisdiction).

111. *Daimler*, 571 U.S. at 122 (2014) (quoting *Goodyear*, 564 U.S. at 919).

112. *See id.* at 139 & n.20; *see also id.* at 143 (Sotomayor, J., concurring) ("The problem, the Court says, is not that Daimler's contacts with California are too few, but that its contacts with other forums are too many."); *Bristol-Myers Squibb*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting) (describing *Daimler* as "impos[ing] substantial curbs on the exercise of general jurisdiction").

113. Having some limits on the exercise of personal jurisdiction over defendants also seems to comport with international law. Of course international law does not strictly govern this area, but, as James Crawford put it, international law still has something to say about "[t]he exercise of ordinary civil jurisdiction over private persons and companies . . . , at least where some 'transnational' element is involved." James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT'L L. 820, 857 (1981). Specifically, "international law probably requires that a court not exercise jurisdiction over a case having no significant connection with the forum, without the defendant's consent." *Id.* This interestingly suggests international law—prototypically conceived of as governing relations between States—is likely satisfied with respect to the protections foreign private defendants receive in US courts.

114. *See* Maggie Gardner, Pamela K. Bookman, Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, *The False Promise of General Jurisdiction*, 73 ALA. L. REV. 455, 459 (2022) (noting that, even where a "home" for a foreign private party can be found in the United States, courts in that forum may nonetheless wish to dispose of cases on the basis of *forum non conveniens*).

115. The Due Process Clause as it appears in the Fifth Amendment, which relates to the federal government, is identical to the clause that exists in the Fourteenth Amendment, which relates to the states: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amends. V & XIV, § 1. As Chimène Keitner has outlined, however, few courts have considered what exactly the Fifth Amendment's Due Process Clause would require with respect to foreign defendants. *See* Chimène I. Keitner, *Personal Jurisdiction and Fifth Amendment Due Process Revisited*, *in* THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW 231, 233 & n.9, 237–42 (Paul B. Stephen & Sarah A. Cleveland eds., 2020). Whether foreign defendants should be granted due process

we may take it for granted today, it was not inevitable that foreign entities would be so entitled. Chimène Keitner, for example, has collected a series of arguments that "posit[] that nonresident aliens do *not* have constitutional due process rights, including in the personal jurisdiction context."[116] Even assuming they have some constitutional rights,[117] however, does not resolve whether foreign entities are properly considered "persons" within the meaning of the Due Process Clause. Not long before the FSIA's passage, US states were still passing legislation permitting their courts to assume personal jurisdiction over foreign corporations as persons.[118] And, as Aaron Simowitz has noted, although the Supreme Court has often assumed that foreign private parties are entitled to due process protections, the Court has never so held.[119] Thus, foreign private defendants' entitlement to the protections of the jurisdictional standards above is a matter of some historical contingency.

Foreign States, on the other hand, generally are not considered "persons" in the meaning of the Due Process Clause and receive none of the related constitutional protections available to foreign private defendants.[120] In this sense, foreign States do not receive the high level

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protections at all also remains a matter of scholarly controversy. *See, e.g.*, Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by* Goodyear Dunlop Tires v. Brown *and* J. McIntyre Machinery v. Nicastro, 63 S.C. L. REV. 617, 633 (2012) (noting that granting foreign private defendants constitutional due process protections is "both highly controversial and contrary to other Supreme Court precedent" in the areas of the so-called wars on drugs and terror); Austen Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006) (arguing that foreign private defendants should not be granted due process protections in personal jurisdiction).

116. Keitner, *supra* note 115, at 238 & n.28 (emphasis added); *see also, e.g.*, GERARD CARL HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 4 (1918) (describing the "restrictive theory" of foreign corporate personhood, which held that corporations could only be understood as legal entities in the State in which they were incorporating, meaning that US courts should treat foreign corporations as simply "human beings going about their various businesses, assuming individual rights and liabilities, and bound together for purposes of mutual advantage by merely personal ties").

117. *See* Keitner, *supra* note 115, at 238 (noting that courts' prevailing approach rejects the notion that nonresident aliens have no constitutional rights, particularly in the personal jurisdiction context).

118. *See* William Harvey Reeves, *The Foreign Sovereign Before United States Courts*, 38 FORDHAM L. REV. 455, 482 (1970) ("Some half-dozen states . . . have permitted their courts, under certain circumstances, to assume personal jurisdiction over foreign corporations.").

119. *See* Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325, 351 (2018).

120. The Ninth Circuit is now an outlier in this respect, as that court recently confirmed in a denial to rehear a case against an entity owned by the Indian government, which a three-judge panel had dismissed for lack of personal jurisdiction, en banc. *See*

of constitutional scrutiny associated with *in personam* jurisdiction.[121] As Ingrid Brunk has illustrated, this too was not always the case. Through and after the FSIA's enactment, courts regularly held that foreign States and their agencies and instrumentalities were entitled to due process protections.[122] When the FSIA was introduced, courts applied an *International Shoe* analysis to determine whether they had personal jurisdiction over foreign sovereigns sued under the Tate Letter framework.[123] And some have argued that the FSIA saw foreign States as "persons" entitled to due process. Lori Damrosch, for example, catalogues legislative history and court decisions as evidence that "[t]he prevailing assumption behind the [FSIA] . . . is that due process constraints do and should apply."[124] George Foster goes a step further and suggests the FSIA drafters may have *relied* on the assumption that foreign sovereigns would be entitled to due process.[125] Then, for the first sixteen years of the Act's existence, the FSIA's personal jurisdiction requirements were supplemented with due process protections.[126] Indeed, Mary Kay Kane wrote in her 1982

Devas Multimedia Private Ltd. v. Antrix Corp., No. 20-36024, No. 22-35085, No. 22-35103, 2024 WL 441110, at *2 (Bumatay, J., dissenting from denial of rehearing) ("This case presents a straightforward question. Despite the FSIA's text, does the Act require plaintiffs to *also* prove 'minimum contacts' to assert personal jurisdiction over a foreign state? Unlike every other federal court, the Ninth Circuit answers 'yes.'"); *see also* Ingrid Brunk, *Ninth Circuit Gets Tangled Up in Minimum Contacts and Due Process*, TRANSNAT'L LITIG. BLOG (Feb. 13, 2024), https://tlblog.org/ninth-circuit-gets-tangled-up-in-minimum-contacts-and-due-process/.

121. *See* Aaron D. Simowitz, *Jurisdiction as Dialogue*, 52 N.Y.U. J. INT'L L. & POL. 485, 487 (2020) (contrasting assertions of *in personam* jurisdiction, which "receive[] the full scrutiny of the Fifth or Fourteenth Amendment to the Constitution," with assertions of consent or *in rem* jurisdiction) [hereinafter Simowitz, *Jurisdiction as Dialogue*].

122. Wuerth, *supra* note 20, at 646; *see also* Damrosch, *supra* note 20, at 499 (observing, in 1987, that "judicial application of constitutional norms [had become] commonplace" in lawsuits against foreign sovereign defendants).

123. *See* Melanie Howell, *Foreign Sovereign Immunities Act—Immunity Exception Provisions of § 1330(a)*—Harris Corp. v. National Iranian Radio & Television, 14 GA. J. INT'L & COMPAR. L. 397 (1984) (noting that courts continued this practice from before the FSIA was passed in the years after its passage).

124. Damrosch, *supra* note 20, at 493, 500; *see also, e.g.*, S. Jason Baletsa, Comment, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1275 (2000) ("By requiring minimum contacts with the forum state, the drafters of the FSIA clearly contemplated that foreign states were entitled to due process protection.").

125. George K. Foster, *Collecting from Sovereigns*, 25 ARIZ. J. INT'L & COMPAR. L. 665, 694 (2008).

126. *See* Wuerth, *supra* note 20, at 644 ("Before the Supreme Court's dicta in *Republic of Argentina v. Weltover, Inc.*, courts, litigants, Congress, scholars, and the U.S. government all reasoned or assumed that the Due Process Clauses (and thus the minimum contacts analysis) applied to foreign states."); Karen Halverson, *Is a Foreign State a 'Person'? Does it Matter?: Personal Jurisdiction, Due Process, and the Foreign*

compendium on suing foreign sovereigns that "both [the FSIA's] legislative history and the uniform holding of the decisions thus far prevent" the conclusion that compliance with the statute alone "could suffice to establish personal jurisdiction."[127] "All of this changed,"[128] Brunk explains, after the Supreme Court's comment in *Republic of Argentina v. Weltover* (1992): "Assuming, without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause, we find that Argentina possessed 'minimum contacts' that would satisfy the constitutional test."[129] A massive shift followed from this circuitous suggestion that foreign sovereigns might not, in fact, be "persons."

The Court provided no reasoning for this passing statement, even with constitutional rights hanging in the balance, yet it has come to stand in all circuits, except the Ninth, for the proposition that foreign States are not entitled to due process. In the decades since *Weltover*, lower courts, relying on this dicta, have largely deemed constitutional tests unnecessary for finding personal jurisdiction over a foreign sovereign defendant.[130] They have not done so because of compelling reasoning in *Weltover*, since none exists on this point, but rather simply because the Supreme Court was understood to have suggested that foreign sovereigns aren't persons.

Sovereign Immunities Act, 34 N.Y.U. J. INT'L L. & POL. 115, 128 (2001) ("In the United States, federal circuit and district courts until recently have held that a foreign state is entitled to due process."); Baletsa, *supra* note 124, at 1273 ("From a historical perspective, American jurisprudence has always assumed that foreign states possess due process rights.").

127. Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 396–97 (1982).

128. Wuerth, *supra* note 20, at 646–47.

129. Republic of Argentina v. Weltover, 504 U.S. 607, 619 (1992).

130. Wuerth, *supra* note 20, at 647. *But see also id.* at 635 (commenting that "modern case law from the lower courts *generally* excludes foreign states . . . from constitutional protections" (emphasis added) but arguing "current doctrine is haphazard and unclear"); Devas Multimedia Private Ltd. v. Antrix Corp., No. 20-36024, No. 22-35085, No. 22-35103, 2023 WL 4884882, at *2 (Aug. 1, 2023) (distinguishing *Weltover*). The Supreme Court still has not definitively ruled on this question. *Cf. id.* ("*Weltover* left open the question of whether foreign states are persons—and thus entitled to a minimum contacts analysis under the Due Process Clause—and only suggested how the Supreme Court might rule on the issue."); Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96 (D.C. Cir. 2002) (noting that the Supreme Court "expressly indicated that the constitutional issue remains an open one" even while deciding that foreign States were not "persons" in the relevant sense). The Court had another opportunity to decide whether foreign States are "persons" in its 2020 *Opati* decision, but they declined to comment. *See* Haley S. Anderson, *The Significance of the Supreme Court's* Opati *Decision for States and Companies Sued for Terrorism in U.S. Courts*, JUST SEC. (May 19, 2020), https://www.justsecurity.org/70260/the-significance-of-the-supreme-courts-opati-decision-for-states-and-companies-sued-for-terrorism-in-u-s-courts/ [https://perma.cc/CZL4-UG3Z] (archived Dec. 28, 2023). As I outlined, the Justices in fact expressed some skepticism during oral argument about the notion of foreign sovereigns receiving constitutional due process protections. *Id.*

Instead of being concerned with due process, personal jurisdiction over foreign States is governed exclusively by the FSIA.[131] Under section 1330(b), personal jurisdiction exists where (1) the court has subject matter jurisdiction—requiring only that an exception to immunity applies—and (2) service of process is proper.[132] With this relatively simplistic formulation, the FSIA is susceptible to criticism that it "muddles the traditional ways one thinks about" jurisdiction and immunity, as Linda Silberman and Aaron Simowitz argue,[133] or that it makes personal jurisdiction "automatic," as George Foster asserts.[134]

Without constitutional protections, foreign States' primary protection against being haled before US courts is thus found in the FSIA's provision of and exceptions to immunity. In its original form, the FSIA's exceptions involved such close connections with the United States that various scholars remarked the statute either incorporated or imitated the requirements of *International Shoe* and its progeny.[135] This was perhaps particularly the case with respect to the central commercial activities exception,[136] according to which an exception to immunity applies where there is a sufficient nexus between a foreign sovereign's commercial activity and the United States.[137] However,

131. *See* Waldman v. Palestine Liberation Org., 835 F.3d 317, 329 (2d Cir. 2016) ("Foreign sovereign states do not have due process rights but receive the protection of the Foreign Sovereign Immunities Act.").

132. *See* 28 U.S.C. § 1330(b); *see also* Morrissey, *supra* note 108, at 677–78 (describing this close relationship between subject matter jurisdiction, personal jurisdiction, and service of process in the FSIA); Kane, *supra* note 127, at 386 (noting that, under the FSIA, "[p]ersonal jurisdiction exists whenever there is subject matter jurisdiction and proper service is made").

133. Linda Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath* Daimler *Wrought?*, 91 N.Y.U. L. REV. 344, 369 (2016); *see also* Halverson, *supra* note 126, at 120–21 (raising the same general concern while using the milder language of "intertwin[ing]" jurisdiction with immunity).

134. Foster, *supra* note 125, at 693.

135. *See, e.g.*, Simowitz, *Jurisdiction as Dialogue*, *supra* note 121, at 499 ("The FSIA's authorizations of jurisdiction were designed to ape the then prevailing standard for personal jurisdiction."); Damrosch, *supra* note 20, at 500 (characterizing Congress as "[c]learly" intending to incorporate constitutional norms into the FSIA); Crawford, *supra* note 113, at 857–58 ("The Foreign Sovereign Immunities Act . . . embodies the 'minimum contacts' requirement of due process . . . .").

136. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3662.3 (4th ed. 2022) (describing the commercial activities exception as "[p]robably the most significant exception to a foreign state's jurisdictional immunity"); Morrissey, *supra* note 108, at 676 (referring to the commercial activities exception as "[t]he most important of the exceptions to sovereign immunity"); Maryam Jamshidi, *The Political Economy of Foreign Sovereign Immunity*, 73 HASTINGS L.J. 585, 589 (2022) (characterizing the commercial activity exception as "central" in limiting immunity).

137. *See* Wye Oak Tech., Inc. v. Republic of Iraq, 24 F.4th 686, 691 (D.C. Cir. 2022) (describing the exception's nexus requirements as "designed to ensure that there is a

even the commercial activities exception does not provide the same protection as constitutional due process. The commercial activity exception can apply, for example, where a foreign State's commercial activity merely "causes a direct effect in the United States"[138] that is neither substantial nor foreseeable.[139] Such unforeseeable and insubstantial effects would be an insufficient basis for specific jurisdiction over a foreign private defendant, yet it is enough to bring a foreign sovereign into US court.

Moreover, the FSIA's amendments after 1976 do away with any pretense of "minimum contacts" for foreign State defendants—any sense in which foreign State and foreign private defendants might be treated alike. In particular, responding to political pressure after various tragedies claimed US lives,[140] Congress amended the FSIA in 1996 to add the first so-called "terrorism exception."[141] Now US victims of torture, extra-judicial killing, aircraft sabotage, or hostage taking could bring related suits against foreign States,[142] provided that two conditions apply. First, the act, or material support for it, must be undertaken by an official, employee, or agent of the foreign State in the course of their office, employment, or agency. Second, the State must be designated as a "state sponsor of terrorism" by the Secretary of State.[143] Commentators swiftly noted not only the potential advantages of these amendments in pursuing human rights

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sufficient connection . . . to warrant the exercise of jurisdiction"); Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT'L L. 369, 372 (2001) (arguing that a defendant who met the criteria for the commercial activities exception would also meet the *International Shoe* standard); Halverson, *supra* note 126, at 122 (referring to a "close correlation between the jurisdictional nexus requirement" in the commercial activity exception "and the 'minimum contacts' requirement of *International Shoe*").

138. 28 U.S.C. § 1605(a)(2).

139. *See* Guirlando v. T.C. Ziraat Bankasi A.S., 602 F.3d 69, 74 (2d Cir. 2010); ("To be a 'direct' effect within the meaning of the third clause of the commercial activity exception, the impact need not be either substantial or foreseeable . . . ."); *see also* Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC, 813 F.3d 98, 108–09 (2d Cir. 2016) ("[A] breach of contractual duty causes direct effect in the United States sufficient to confer FSIA jurisdiction so long as the United States is the place of performance for the breached duty."); Daou v. BLC Bank, 42 F.4th 120, 136 (2d Cir. 2022) (noting a jurisdiction-conferring direct effect also occurs "where a contractual provision allows the foreign sovereign's creditor to choose the place of payment" and the creditor chooses a place in the United States).

140. *See supra* note 96.

141. 28 U.S.C. § 1605A ("Terrorism exception to the jurisdictional immunity of a foreign state").

142. Specifically, this exception provides that the claimant or victim must be a US national, a member of the US armed forces, or an employee or contractor of the US government. 28 U.S.C. § 1605A(a)(2)(A)(ii).

143. The provision initially appeared at 28 U.S.C. § 1605(a)(7) but now appears, in slightly revised form, at 28 U.S.C. § 1605A.

violations—albeit limited by categories of conduct and victims to which the exception applies and the designation process on which it relies[144]—but also the dramatically weakened territorial nexus to the United States they embodied.[145]

Meanwhile, foreign States' agencies and instrumentalities occupy a murky middle ground. Following *Weltover*, courts of appeal have come to rely on another Supreme Court decision—*First National City Bank v. Banco Para el Comercio Exterior de Cuba* ("*Bancec*")—to determine whether an entity should be treated like a private defendant or like a State. In *Bancec*, the Supreme Court considered whether a foreign State's instrumentality could effectively be held liable for the foreign State's debt.[146] The Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such"[147] but that equitable principles may require deviation from this norm.[148] Despite this holding's narrow tailoring to the context of piercing the corporate veil in ascribing liability, lower courts have come to apply *Bancec* and a subsequently formulated five-factor test to the question of whether foreign States' agencies and instrumentalities are "persons" within the meaning of the Due Process Clause.[149] Effectively, if a foreign State exercises sufficient control over an entity, the agency or instrumentality is treated like a State, meaning its sole protections from the exercise of personal jurisdiction are found in the FSIA. Otherwise, the agency or instrumentality is treated like a private party, meaning the more typical personal jurisdiction analysis applies.[150] As Brunk puts it, "[t]he *Bancec* test has swerved out of its

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144. *See, e.g.*, Deborah M. Mostaghel, *Wrong Place, Wrong Time, Unfair Treatment? Aid to Victims of Terrorist Attacks*, 40 BRANDEIS L.J. 83, 100–19 (2001) (praising the 1996 amendments to the FSIA for "penetrat[ing] the shield of sovereign immunity behind which government sponsors of terrorism could hide" and "enabl[ing] victims to bring private lawsuits" while arguing for expanding the exception to include a broader class of victims).

145. *See, e.g.*, Baletsa, *supra* note 124, at 1276 (noting that this exception "drastically undermines the due process concerns Congress specifically preserved in enacting the FSIA").

146. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 613 (1983); *see also id.* at 626 (commenting that "[l]imited *liability* is the rule, not the exception" for governmental corporations as much as private corporations (emphasis added)).

147. *Id.* at 626–27.

148. *Id.* at 630–32.

149. *See, e.g.*, Gater Assets Ltd. v. AO Moldovagaz, 2 F.4th 42, 50 (2d Cir. 2021); First Inv. Corp. v. Fujian Mawai Shipbuilding, Ltd., 703 F.3d 742, 752–53 (5th Cir. 2012); GSS Grp. Ltd. v. Nat'l Port Auth., 680 F.3d 805, 815–17 (D.C. Cir. 2012).

150. *See* Wuerth, *supra* note 20, at 640 n. 30.

lane" here.[151] Congress subsequently built this five-factor test into the FSIA with respect to exceptions to immunity from attachment or execution,[152] but Congress has not spoken about other applications of *Bancec*, such as in personal jurisdiction. Thus, in the post-*Weltover* world, foreign defendants treated as sovereign—States and some of their agencies and instrumentalities—have different, and weaker, protections from being haled into US courts than their private counterparts.

Accordingly, the personal jurisdiction standards that apply to foreign sovereign and foreign private defendants are different not only in their sources—statutory provisions for State defendants and constitutional protections interpreted through case law for private defendants, with agencies and instrumentalities sometimes falling into one category and sometimes the other—but also in terms of the strength of the connection to the US forum they require.

B. *Service of Process*

When suing a foreign State, one reasonably might first think of serving process on the foreign State's embassy in Washington, DC. After all, as first-year law students often learn in their civil procedure classes, service on foreign corporations can be effected by serving the corporation's wholly owned and controlled subsidiary in the United States.[153] And what is an embassy if not, effectively, a wholly owned and controlled subsidiary of its sending State, created with the express purpose of facilitating communication between the sending and receiving States?

The FSIA does not mention embassies in its provision on service of process, however.[154] Rather, section 1608 enumerates other options for service of process, which, along with the presence of an exception to immunity, confer personal jurisdiction over a foreign sovereign defendant.[155] For foreign State defendants, as opposed to their

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151. Ingrid Brunk, *Throwback Thursday: Forty Years of the* Bancec *Test*, TRANSNAT'L LITIG. BLOG (Feb. 16, 2023), https://tlblog.org/throwback-thursday-forty-years-of-the-bancec-test/ [https://perma.cc/DSB8-EXSS] (archived Jan. 3, 2024).

152. *See* Rubin v. Islamic Republic of Iran, 583 U.S. 202, 210–11 (2018) (reasoning that Congress's 2008 amendment of the FSIA to add § 1610(g) "incorporate[s] almost verbatim the five *Bancec* factors").

153. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 707 (1988).

154. Federal Rule of Civil Procedure 4(j)(1) provides that service of process on a foreign State must be made in accordance with the FSIA, and section 1608 in particular. FED. R. CIV. P. 4(j)(1).

155. For service of process under § 1608, the FSIA disambiguates foreign States from their agencies and instrumentalities. *See* 28 U.S.C. § 1603(a) (specifying that agencies and instrumentalities are not included in the meaning of "foreign state" in §

agencies or instrumentalities, these options are (1) according to special arrangement; (2) according to an international service convention; (3) by mail to the foreign State's head of the ministry of foreign affairs; or (4) by mail to the US Secretary of State, who will then transmit the papers through diplomatic channels.[156]

Moreover, the Supreme Court recently confirmed that plaintiffs may not serve foreign States by mailing service to their embassies. The question before the Court in *Republic of Sudan v. Harrison*, a case proceeding on the basis of the FSIA's state sponsor of terrorism exception to immunity, was whether plaintiffs' service of process addressed to Sudan's Minister of Foreign Affairs and mailed to Sudan's embassy in Washington, DC, was sufficient.[157] When the *Harrison* plaintiffs filed suit in this case in 2010, neither of the first two options for service of process under section 1608(a) were available, so they correctly turned to the third. Specifically, "[a]t respondents' request, the clerk of the court sent the service packet, return receipt requested, to: 'Republic of Sudan, Deng Alor Koul, Minister of Foreign Affairs, Embassy of the Republic of Sudan, 2210 Massachusetts Avenue NW, Washington, DC 20008."[158] A few days later, a signed receipt was returned.[159] However, Sudan did not appear in the litigation and the plaintiffs received a $314 million default judgment in DC.[160] When the plaintiffs sought to enforce this judgment in New York, Sudan challenged registration and enforcement.[161]

Although the *Harrison* plaintiffs had addressed the service to the State's head of the ministry of foreign affairs, the signed receipt was returned, there was "no evidence in the record showing that Sudan's foreign minister could not be reached through the embassy,"[162] and Sudan apparently had actual notice of the suit,[163] the Supreme Court found the plaintiffs' service wanting. Specifically, service did not

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1608); *id.* § 1608(a)–(b) (providing separate methods of service for foreign States and their agencies and instrumentalities).

156. *Id.* § 1608(a). This subsection also provides a hierarchy among the methods. Delivery in accordance with a special arrangement is preferred to delivery in accordance with an international convention, and so on. *See* H.R. REP. NO. 94-1487, at 24 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6623; Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1054 (2019) (referring to the methods as being set out "in hierarchical order").

157. *Harrison*, 139 S. Ct. at 1054.

158. *Id.*

159. *Id.* at 1054–55.

160. *Id.* at 1055.

161. *Id.*

162. *Id.* at 1064 (Thomas, J., dissenting).

163. Beyond the embassy returning a signed receipt, the attorney representing Sudan also acknowledged at oral argument that Sudan had actual notice of the suit at least "after the motion for default judgment but before the default judgment itself." Transcript of Oral Argument at 68, *Harrison*, 139 S. Ct. 1048 (2019) (No. 16-1094).

satisfy the method provided in section 1608(a)(3).[164] Justice Alito's opinion for the Court reasoned primarily that "[t]he most natural reading of [section 1608(a)(3)'s] language is that service must be mailed directly to the foreign minister's office *in the foreign state*."[165] This apparent hair-splitting prompted William Eskridge and Victoria Nourse to describe the case as an example of "line drawing that purports to be neutral but risks partisanship,"[166] and its impact was quickly felt in litigation against foreign States.[167]

The *Harrison* decision also demonstrated how service of process on foreign sovereigns is entangled with both jurisdiction and immunity. Not only did the finding of improper service mean the requirements of section 1608 were not satisfied but—because of the FSIA's intertwined rules on immunity, jurisdiction, and service—the default judgment was also invalid for lack of personal jurisdiction.[168] And Justice Alito's majority opinion betrayed a concern about making it too easy to serve foreign sovereigns because, after all, "the foreign state's immunity from suit is at stake."[169] Never mind that service of process is entirely separate from the determination of whether an exception to immunity applies.

By contrast, the rules for serving foreign agencies and instrumentalities align with the rules for foreign private defendants. Service of process is distinctive within the FSIA for its differentiation between the types of sovereign defendants,[170] and section 1608(b)(2) authorizes service on agencies and instrumentalities of foreign States by delivery to "an office, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States."[171] As such, the procedural sovereign distinction here is really between sovereign States *themselves* and other

164. *Harrison*, 139 S. Ct. at 1056.

165. *Id.* (emphasis added). Justice Thomas disputed this point, instead arguing the FSIA's text and the VCDR support service to a sovereign defendant's embassy in the United States. *Id.* at 1064–65 (Thomas, J., dissenting).

166. William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1722, 1822 (2021).

167. *See, e.g.*, Adetoro v. King Abdullah Acad., No. 1:19-cv-01918 (TNM), 2019 WL 3457989, at *3 (D.D.C. July 30, 2019) (finding the plaintiffs, rather than the clerk of the court, mailing service of process to the head of the foreign ministry of the defendant State was insufficient, although substantially compliant with § 1608(a)).

168. Indeed, Sudan raised this issue on appeal. *See Harrison*, 139 S. Ct. at 1055 (describing Sudan's appeal to the Second Circuit, contending "that the default judgment was invalid for lack of personal jurisdiction").

169. *Id.* at 1060.

170. As the statute's definitions indicate, § 1608 is the sole section of the FSIA where agencies and instrumentalities are not included within the meaning of "foreign state." 28 U.S.C. § 1603(a).

171. *Id.* § 1608(b)(2).

entities.[172] But this leaves open the puzzle of what the varying rules on sovereigns and private defendants have to do with the nature of sovereignty that the distinction is meant to protect.

Just as for private defendants, the purpose of service of process on a sovereign State is notice. For private defendants, service of process's notice-giving function is intended, at least in part, to satisfy due process. As the Supreme Court found in *Mullane v. Central Hannover Bank & Trust Co.* in 1950,

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.[173]

The value of notice in service of process is not limited to protecting constitutional due process rights, however, and it also applies to non-"persons." The Supreme Court confirmed as much in its 1996 *Henderson v. United States* decision, where an injured seaman sought to sue the United States, and the Court noted that "the core function of service is to supply notice of the pendency of a legal action . . . ."[174] And Congress certainly considered the matter of notice in relation to the FSIA's drafting. The House Judiciary Committee, for example, noted that, for plaintiffs serving process through diplomatic channels, the FSIA "only requires that [process] be transmitted in such a way that the foreign state has actual notice of the suit."[175] Thus the purpose is the same between sovereign and private defendants, but the permitted methods for achieving this purpose differ.

C. *Injunctive Relief*

Having considered two procedural areas where foreign sovereign and foreign private parties are treated differently, we turn now to an area where they are largely treated alike. In fact, these parties are

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172. Justice Alito emphasized this point in *Harrison*, referring to this provision in § 1608(b)(2) to argue service on foreign States via their embassies in the United States is not permitted under the FSIA. *See* 139 S. Ct. at 1058–59.

173. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); *see also* Philip Craig Storti, *Substituted Service of Process on Individuals*, 21 HASTINGS L.J. 1257, 1258 (1970) ("In service of process questions, courts have traditionally measured due process by [this] well-settled rule.").

174. Henderson v. United States, 517 U.S. 654, 672 (1996).

175. H.R. REP. NO. 94-1487, at 24 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6623.

treated alike in various domains—choice of law,[176] *forum non conveniens*,[177] and so on. From among these domains, this Article focuses on injunctive relief because of the particular dynamics that arise between coercion and sovereignty, ultimately demonstrating that even where no distinction is made between foreign sovereign and foreign private parties, procedural sovereign distinction can still suffer from conceptual difficulties.

Injunctions are also unique among the topics discussed here because they are not requirements for a lawsuit to proceed but rather a tool available to courts. Specifically, an injunction is "a court order that directs a party to perform or refrain from performing a particular action" and thus "an exceptionally potent and far-reaching remedy, the grant or denial of which often leads to a cascade of serious consequences."[178] These orders are a form of discretionary, equitable remedy and, like other forms of equity in US law, they find their origin in the English Court of Chancery.[179] However, since the merger of law and equity in the United States, and in particular since the 1938 adoption of the Federal Rules of Civil Procedure, injunctions have been available in US courts of law under Rule 65.[180]

There are three basic types of injunctions: temporary restraining orders (TROs), which are issued before a hearing and typically last no more than twenty-eight days in the federal system;[181] preliminary injunctions, which are used largely to preserve the *status quo ante* while a case is litigated[182] and can accordingly last far longer than

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176. *See* Cassirer v. Thyssen-Bornemisza Collection Found., 142 S. Ct. 1502, 1510 (2022).

177. *See* Aenergy, S.A. v. Republic of Angola, 31 F.4th 119, 135 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 576 (2023).

178. KIRSTIN STOLL-DEBELL, NANCY L. DEMPSEY & BRADFORD E. DEMPSEY, INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS 2 (2009).

179. *See generally* David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539 (1985) (describing "[t]he rules of injunctions" as "a product of the institution of the Court of Chancery" and tracing those rules' evolution).

180. *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 999 (2015); WRIGHT & MILLER, *supra* note 136, § 2941 ("Prior to 1938 actions seeking legal relief had to be brought separately from those requesting equitable relief . . . .").

181. *See* FED. R. CIV. P. 65(b)(2).

182. *See* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 534 (1978) (characterizing "preserving the status quo" as a "main goal of preliminary relief" since the late nineteenth century); *see also* Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 110 (2001) (noting that, before *Winter*, some circuits so prioritized the status quo that they disfavored "preliminary orders that [were] mandatory in form or that otherwise upset the status quo").

TROs;[183] and permanent injunctions, which operate as the name advertises. Because of their comparatively limited impact, this Article sets TROs to one side, focusing on the more formidable preliminary and permanent injunctions.

The basic rules governing whether a court should grant injunctive relief may appear relatively straightforward. In recent decades, the Supreme Court has provided revised standards for both preliminary and permanent injunctions. First, in its 2006 *eBay v. MercExchange* decision, the Supreme Court articulated a standard for permanent injunctions:

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[184]

In the Court's telling, this test was "historically employed by courts of equity," and the issue at stake in *eBay* was simply whether to extend the test to disputes arising under the Patent Act, which the Court did.[185] *eBay*'s formulation quickly became "*the* test for whether a permanent injunction should issue" regardless of disputes' subject matter.[186] Then, in *Winter v. Natural Resources Defense Council* (2008), the Supreme Court outlined a very similar standard for preliminary injunctions,[187] which it described as "an extraordinary remedy never awarded as of right."[188] The irreparable harm, balance of equities, and public interest factors are part of the tests for both permanent and preliminary injunctions, while parties seeking preliminary injunctions must demonstrate a likelihood of success on

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183. Indeed, courts may treat longer-duration TROs as preliminary injunctions, particularly for purposes of appeal. *See, e.g.*, Sampson v. Murray, 415 U.S. 61, 86 (1974) (agreeing that "a temporary restraining order continued beyond the time permissible under Rule 65 must be treated as a preliminary injunction").

184. eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006) (citing Weinberger v. Romero—Barcelo, 456 U.S. 305, 311–13 (1982)); Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987)).

185. *See eBay*, 547 U.S. at 390.

186. *See* Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 205 (2012).

187. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

188. *Id.* at 24.

the merits, and those seeking permanent injunctions must demonstrate the inadequacy of legal remedies.[189]

Simple as these formulations may appear in theory, they are less straightforward to assess in practice. First, these standards only clearly apply to claims arising under federal law. In various other cases—"including diversity cases, supplemental jurisdiction cases, and those in which a state-law claim raises a 'disputed and substantial' federal issue"[190]—matters become more complex with the legacy of *Erie Railroad Co. v. Tompkins*.[191] As the Supreme Court recently found in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, state choice-of-law rules apply to cases against foreign sovereign defendants just as they apply to cases against foreign private defendants[192]—another domain of procedural sovereign distinction where the two categories are treated alike.[193] Accordingly, the standards of injunctive relief for

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189. Scholars have questioned whether these formulations are actually rooted in traditional equitable principles, as the Court claims. *Compare* Bray, *supra* note 180, at 1001 (noting scholars' criticism of the Supreme Court's decisions in *eBay* and *Winter* for "overclaiming about the historical pedigree" of those tests); Gergen, Golden & Smith, *supra* note 186, at 205 (citing remedies scholars as having been "unfamiliar with any traditional four-factor test for permanent injunctions" before *eBay*); *with* Bray, *supra* note 180, at 1048 (arguing the *eBay* test largely replicated existing federal and state tests for permanent injunctions); Lee, *supra* note 182, at 111–14 (noting what would become the *Winter* standards for preliminary injunctions had long been used by circuit courts and the Supreme Court); Leubsdorf, *supra* note 182, at 537 (arguing the preliminary injunction standard that applied in 1978, remarkably similar to *Winter*'s standard, had not markedly changed since the late nineteenth century).

190. Michael T. Morley, *Beyond the Elements:* Erie *and the Standards for Preliminary and Permanent Injunctions*, 52 AKRON L. REV. 457, 457–58 (2018).

191. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Under the *Erie* framework, federal courts adjudicating claims arising under state law must apply federal procedural law and state substantive law. *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("[B]oth the Enabling Act and the Erie rule say, roughly, that federal courts are to apply state 'substantive' and federal 'procedural' law . . . ."); *see also* Suzanna Sherry, *Normalizing* Erie, 69 VAND. L. REV. 1161, 1163 (2016) (describing the *Erie* doctrine as "declaring that state law trumps [un-codified] federal interests"). The question, accordingly, is whether standards for injunctive relief are procedural or substantive. Either way, FRCP 65 continues to apply to claims arising under state law, but this rule does not actually provide standards for preliminary or permanent injunctions. *See* FED. R. CIV. P. 65.

192. Cassirer v. Thyssen-Bornemisza Collection Found., 142 S. Ct. 1502, 1510 (2022). This is a very recent development, however. Prior to the 2022 *Cassirer* decision, federal courts applied a variety of choice-of-law rules in cases against foreign sovereign defendants, including a federal choice-of-law rule that was unavailable to foreign private defendants. *See* Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 169 U. PENN. L. REV. 2193, 2207–08 (2021).

193. Indeed, in *Cassirer*, the Court reached this conclusion on the basis of the same FSIA section that ostensibly justifies issuing injunctions against foreign sovereigns in the same manner as against foreign private parties. *See* 142 S. Ct. at 1508–09 (characterizing § 1606 as "clear" and arguing that it "requires the use of California's choice-of-law rule—because that is the rule a court would use in comparable private litigation").

all defendants depend on state choice-of-law rules, opening the door to confusion. Regarding preliminary injunctions, David Shipley has identified that "[s]ome courts have said that federal law governs the standards for issuing a preliminary injunction in diversity actions, while others have applied state law governing preliminary relief."[194] In fact, courts may avoid the issue by declaring state and federal standards are the same, as Michael Morley has discussed.[195] Yet distinctions persist and can be impactful.[196] And even where it is clear what standard applies, courts must assess what each factor actually requires—what "likelihood of success" or "the public interest" mean, for example[197]—and how the factors relate to one another.

Notably absent from the general criteria for injunctions is any consideration of parties' sovereign status. Although the FSIA's legislative history suggests the drafters intended to limit the issuance of injunctions to circumstances in which injunctive relief would be "clearly appropriate,"[198] without any indication regarding the standard by which such appropriateness should be measured, the statute does not explicitly address the issue of injunctions at all.[199] Rather, it simply indicates in section 1606 that foreign sovereigns are subject to liability "in the same manner and to the same extent as a private individual under like circumstances."[200] Once a court has jurisdiction over a foreign sovereign party, they are to be treated like private parties insofar as they can be ordered to undertake or refrain from various actions. The concept of sovereignty itself accordingly makes no difference in the standards for ordering injunctive relief.

One Third Circuit decision, issued over a decade before *eBay* and *Winter*, stands out as an exception, and it is worth pausing over its

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194. David E. Shipley, *The Preliminary Injunction Standard in Diversity: A Typical Unguided* Erie *Choice*, 50 GA. L. REV. 1169, 1172–73 (2016).

195. *See* Morley, *supra* note 190, at 480 (commenting also that "[s]uch courts typically go on to apply federal standards and caselaw").

196. *See, e.g.*, *id.* at 481–90 (describing differences between the federal and state standards for issuing injunctions, as well as differences in relevant case law); Shipley, *supra* note 194, at 1182–99 (outlining conflicting standards for preliminary injunctions between the Eleventh Circuit and Georgia state law).

197. *See, e.g.*, M. Devon Moore, *The Preliminary Injunction Standard: Understanding the Public Interest Factor*, 117 MICH. L. REV. 939, 944–52 (2019) (describing circuits' competing approaches to the preliminary injunction criteria after *Winter* and the role of the public interest factor); Bethany M. Bates, *Reconciliation After* Winter*: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1537–48 (2011) (describing circuits' competing approaches after *Winter* to assessing the movant's likelihood of success on the merits).

198. H.R. REP. NO. 94-1487, at 21 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6621.

199. *See* Halverson Cross, *supra* note 16, at 115 (referring to the FSIA's "gap" regarding discovery and injunction orders, especially those with extraterritorial effects).

200. 28 U.S.C. § 1606.

extraordinary circumstances and language. *Republic of the Philippines v. Westinghouse Electric Corporation* concerns a dispute between the Philippines and its National Power Corporation on one side and American corporations contracted to construct a nuclear power plant a few hours outside of Manila on the other.[201] The sovereign parties sued the corporations in US district court and the case went to trial in New Jersey.[202] In the Third Circuit's telling, members of the government of the Philippines engaged in a campaign to harass, threaten, and discredit witnesses who testified on behalf of the corporations.[203] The district court issued an injunction against this behavior and "directed the Republic to renounce and abandon its retaliatory actions, and to advise [former targets] officially of its actions and intended actions."[204]

On appeal, the Third Circuit engaged in a striking and unusual discussion of the Philippines' sovereignty and the appropriateness of a US district court issuing such an order against a foreign sovereign. The appellate court pointed to Marshall's decision in *Schooner Exchange*, among other texts, to argue that sovereignty entails equality and independence.[205] As such, the Third Circuit's decision asserted, "a district court's power to sanction or exercise other forms of judicial control over a foreign sovereign is not coterminous with its power to regulate or punish other litigants."[206] Finding the district court's injunction unduly interfered with a sovereign nation's domestic activities,[207] the Third Circuit struck down the injunction and advised the district court to consider other, less intrusive sanctions.[208]

It is rare to see such analysis from a court considering injunctive relief issued against a foreign sovereign party, and the *Westinghouse* case was remarkable in many respects—the dispute's stakes, the retaliation against witnesses, the scope of the district court's injunction, and of course the Third Circuit's response. More commonly, courts do not engage in anything like this discussion of sovereignty and its relationship to the coercive power of injunctions. One might expect the issue of sovereignty to arise under the consideration of the public interest, but even this is often not the case. District courts'

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201. Republic of the Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 67–68 (3d Cir. 1994).

202. *Id.* at 68.

203. *See id.* at 71.

204. *Id.* at 70–71.

205. *Id.* at 79 ("[I]t is . . . widely accepted that each sovereign nation has the sole jurisdiction to prescribe and administer its own laws, in its own country, pertaining to its own citizens, in its own discretion.").

206. *Id.* at 72–73.

207. *Id.* at 75 ("[T]he district court had the power to sanction the Republic for its wrongdoing, but it should not have entered the injunctive provisions at issue here.").

208. *See id.* at 80.

consideration of the standards for injunctive relief against foreign sovereign parties is typically limited to the *eBay* or *Winter* criteria outlined above.[209]

This is not to say the matter of sovereignty has no bearing on the issuance of injunctive relief. Courts still must have jurisdiction to issue injunctions,[210] and injunctions against foreign sovereign parties must not violate the FSIA's general prohibition on prejudgment attachment of such parties' assets.[211] Parties' sovereign status is also directly incorporated into the criteria for injunctive relief in the specialized area of orders enjoining foreign judicial proceedings, where courts consider international comity.[212] Circuits have various approaches to the comity criterion for such anti-suit injunctions,[213] but all consider comity to some extent without it ever being dispositive.[214] In this

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209. *See* NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 263 (2d Cir. 2012) ("[T]he FSIA imposes no limits on the equitable powers of a district court that has obtained jurisdiction over a foreign sovereign . . . ."). For further examples of courts considering injunctions against foreign sovereigns without incorporating sovereignty into their consideration, see Bell Helicopter Textron Inc. v. Islamic Republic of Iran, 764 F. Supp. 2d 122, 129 (D.D.C. 2011), *rev'd on other grounds*, 892 F. Supp. 2d 219 (D.C. Cir. 2012) (noting simply that, "[p]ursuant to the FSIA, a foreign state is liable in the same manner and to the same extent as a private individual under like circumstances," and applying a standard injunctive relief analysis); Brenntag Int'l Chems., Inc. v. Norddeutsche Landesbank GZ, 9 F. Supp. 2d 331, 341–48 (S.D.N.Y. 1998), *aff'd*, 175 F.3d 245 (2d Cir. 1999) (considering foreign state party's sovereignty only to confirm that the issuance of an injunction would not violate the FSIA's bar on prejudgment attachment).

210. *See* Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 470 (5th Cir. 1985) (recalling that courts must have subject matter and personal jurisdiction over enjoined parties); *see also, e.g.*, *In re* Estate of Ferdinand Marcos Hum. Rts. Litig., 94 F.3d 539, 548 (9th Cir. 1996) (vacating an injunction against a foreign sovereign party after finding the party was entitled to immunity).

211. 28 U.S.C. §§ 1609–11 (providing that foreign sovereigns' property is generally immune from attachment and execution while outlining exceptions); *see also, e.g.*, Brenntag Int'l Chems., Inc. v. Bank of India, 175 F.3d 245, 252–54 (2d Cir. 1999) (analyzing and ultimately rejecting foreign sovereign party's assertion that injunction at issue constituted prohibited pre-judgment attachment of assets).

212. *See* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 937–45 (D.C. Cir. 1984) (discussing the role of international comity in injunctions against foreign proceedings).

213. Some circuits adopt a "permissive approach" toward anti-suit injunctions, which "accord[s] less weight to considerations of international comity," while others adopt a "restrictive approach," which "accord[s] more weight" to comity. Martin F. Gusy & Matthew J. Weldon, *Anti-Suit Injunctions and Anti-Arbitration Injunctions in the US Enjoining Foreign (Non-US) Proceedings*, WESTLAW PRAC. L. (2014), https://www.westlaw.com/3-5602848?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 [https://perma.cc/NDC8-9AHQ] (archived Jan. 4, 2024); *see generally* Samantha Koeninger & Richard Bales, *When a U.S. Domestic Court Can Enjoin a Foreign Court Proceeding*, 22 CARDOZO J. INT'L & COMPAR. L. 473 (2014).

214. *Cf.* Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 432 (7th Cir. 1993) ("Just as we don't think the 'lax' cases would refuse to consider tangible evidence of a threat to comity, so we don't think the 'strict' cases would refuse to weigh against such a threat [to] substantial U.S. interests.").

context, some courts have suggested that an anti-suit injunction issued against a foreign sovereign party would raise particular comity concerns. The Ninth Circuit remarked in a dispute involving Microsoft and Motorola, for example, that "comity is less likely to be threatened in the context of a private contractual dispute than in a dispute implicating . . . government litigants."[215] And, drawing on this language to issue an injunction against South Korea, a district court in Maryland suggested a framework for comity's relationship with foreign parties' sovereign status:

> Comity concerns, which are least when the party to be enjoined is a private individual, slightly greater when the party is a private company unrelated to a foreign government, and greater when the party is a company wholly or partly owned by a foreign sovereign, are greatest when a foreign sovereign is to be enjoined.[216]

Not all courts consider sovereigns' status as part of the comity analysis for anti-suit injunctions, however. Just last year, a DC district court issued an anti-suit injunction against Spain, enjoining it from pursuing parallel proceedings in the Netherlands regarding a dispute pending before the district court.[217] While weighing comity, the court considered only the impact an injunction would have on the Dutch courts, not the impact it would have on Spain as a foreign sovereign party being enjoined.[218]

Thus, in this domain of broad judicial discretion, foreign sovereign and foreign private parties may sometimes be treated differently. But this differential treatment is typically confined to requests for the specialized form of anti-suit injunctions, and, even here, there is no guarantee courts will take sovereign status into account. In most cases, sovereignty makes no unique difference to injunctive relief,[219] and foreign sovereign parties are treated like foreign private parties for the purposes of injunctive relief.

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215. Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 887 (9th Cir. 2012).

216. BAE Sys. Tech. Sol. & Servs., Inc. v. Korea's Def. Acquisition Program Admin., 195 F. Supp. 3d 776, 797 (D. Md. 2016) (citing *Microsoft*, 696 F.3d at 887).

217. Nextera Energy Glob. Holdings B.V. v. Kingdom of Spain, 656 F. Supp. 3d 201, 215–16 (D.D.C. 2023) (relying on *Laker*, 731 F.2d).

218. *See Nextera*, 656 F. Supp. 3d at 216 (acknowledging that comity dictates that, "when possible, the *decision of foreign tribunals* should be given effect in domestic courts . . ." (emphasis added) (quoting *Laker*, 731 F.2d at 937) (internal quotation marks omitted)).

219. That is, no difference beyond its impact on jurisdiction and the form that injunctions can take. *See supra* notes 210–211.

IV. THE MISMATCH

Different procedural rules thus apply to foreign sovereign and foreign private defendants in some areas, but not others. Following the logic of foreign sovereign immunity first laid out in the Early Republic with Marshall's decision in *Schooner Exchange* and still followed today, we would expect this collection of divergences and convergences to track what fundamentally differentiates the two groups—sovereignty.[220] Yet across personal jurisdiction, service of process, and injunctive relief, procedural sovereign distinction falls short. The ways that sovereigns and private parties are or are not treated differently have lost sight of why US law differentiates between these types of foreign defendants in the first place. Beginning with foreign States themselves and then turning to their agencies and instrumentalities, this Part maps the mismatch in US law between the conceptual justification for differentiation and the current doctrine of sovereign distinction.

A. *Foreign States Per Se*

1. Personal Jurisdiction

Taking the three procedural domains in the same order as in Part III, we begin with personal jurisdiction. Following the Supreme Court's dicta in *Weltover*, foreign States generally have less access to personal jurisdiction protections in US courts than foreign private defendants.[221] Foreign private defendants, not possessing sovereignty, are not entitled to such heightened protection, yet in practice, they receive the greater level of protection. In addition, due process limitations on personal jurisdiction restrict courts' reach beyond their territorially bounded authority; a foreign private defendant must be essentially "at home" in the forum[222] or have sufficient contacts with it[223] for a lawsuit against them to proceed. Where due process limitations do not apply, no meaningful connection to US territory is required for a court to exercise personal jurisdiction. Most US courts thus can adjudicate cases against foreign States that would not survive a motion to dismiss for lack of jurisdiction if it were against a private

220. *See supra* Part III.A.
221. *See supra* notes 128–130 and accompanying text.
222. *See supra* notes 111–114 and accompanying text.
223. *See supra* notes 107–110 and accompanying text.

entity.[224] If sovereigns are characterized by independence from one another, it is hard to imagine why US courts should have such expansive reach to grasp foreign States when they lack such power over foreign private entities.

One might object that, if foreign States were entitled to due process protections in personal jurisdiction, lawsuits against foreign States would be dead on arrival. Indeed, a foreign State definitionally could never be understood as "at home" in the United States, so general jurisdiction would be out of the question, leaving only specific jurisdiction. But this objection both misses the point of this Article and is probably misplaced. It misses the point because this Article concerns the different procedural rules applicable to foreign sovereign and foreign private defendants, not how likely success might be against either type of defendant. The latter question is enormously important, but it is orthogonal to the issue of sovereign distinction. Moreover, the objection is probably misplaced because before *Weltover*, when courts were applying a "minimum contacts" analysis to foreign sovereign defendants, lawsuits against foreign States were nevertheless able to clear this hurdle.[225]

2. Service of Process

The disjuncture between current procedural sovereign distinction and the justifications, based on sovereignty, for distinguishing between these types of defendants becomes even sharper when considering the rules regarding service of process on subsidiary entities. On one hand, the result in *Harrison* is unsurprising in light of the long history of prohibiting service of process on ambassadors and problematizing

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224. Considerations other than whether the court has personal jurisdiction over the defendant may mean a court nonetheless declines to hear a case. *See, e.g.*, Aenergy, S.A. v. Republic of Angola, 31 F.4th 119, 135 (2d Cir. 2022) (affirming dismissal of an FSIA case on *forum non conveniens* grounds); Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57, 59–60 (2d Cir. 2005) (dismissing an FSIA case for nonjusticiability under the political question doctrine).

225. *See, e.g.*, Meadows v. Dominican Republic, 817 F.2d 517, 523 (9th Cir. 1987) ("The record shows that the Dominican Republic has sufficient contacts in the United States to give the district court personal jurisdiction."); Tex. Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 315 (2d Cir. 1981) (applying a "minimum contacts" analysis to Nigeria, as well as the Central Bank of Nigeria, and finding that "defendants' relation to the forum here satisfies the 'minimum contacts' requirement"); *see also, e.g.*, Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic, 877 F.2d 574, 576 (7th Cir. 1989) (upholding a district court's determination that an exception to Greece's sovereign immunity applied and noting that the district court "held that the transaction bore a sufficient connection to the United States to support . . . personal jurisdiction"); Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 428 (2d Cir. 1987) (finding that "the constitutional requirements for personal jurisdiction" over Argentina were satisfied), *rev'd on other grounds*, 488 U.S. 428 (1989).

service of process on embassies, and it may be correct as a matter of international law. As William Henry Reeves noted in 1970, service on ambassadors is "contrary to the general immunity which ambassadors have enjoyed since before the days of the Roman Empire."[226] If we seek to differentiate service of process mailed to embassies from service of process on ambassadors, as Andreas Lowenfeld did in his 1969 sovereign immunities statute proposal,[227] we may violate the Vienna Convention on Diplomatic Relations (VCDR). In an amicus brief in *Harrison*, a group of law professors described the problem as follows:

> [S]ervice of process on a foreign embassy runs afoul of article 22(1) of the VCDR, which provides that: "[t]he premises of [a diplomatic] mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of mission."[228]

Indeed, Mary Kay Kane has argued that the option of mailing service of process to an embassy may not have been included in the FSIA for this very reason,[229] and the Court found these arguments persuasive in *Harrison*.[230]

On the other hand, *Harrison*'s result is potentially jarring if we consider analogous rules for foreign corporate defendants. For this group of defendants, plaintiffs can serve a corporation's wholly owned and controlled subsidiary in the United States, as the Supreme Court found in its 1988 *Volkswagenwerk Aktiengesellschaft v. Schlunk*

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226. Reeves, *supra* note 118, at 482; *see also* Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 908 (1969) (citing 22 U.S.C. §§ 252–53 (1964)) (explaining that service of process on ambassadors "has been void and, indeed, subject to criminal penalty since 1790").

227. Lowenfeld, *supra* note 226, at 925–26, 937.

228. Brief for International Law Professors as Amici Curiae Supporting Petitioner at 3, Republic of Sudan v. Harrison, 139 S. Ct. 1048 (2019) (No. 16-1094). The United States made the same point in its own amicus brief. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 20, 25–26, *Harrison*, 139 S. Ct. 1048. The United States also offered a further international law–based reason for prohibiting service of process on embassies: "the concept of reciprocity governs much of international law," and the United States did not want to be subjected to service of process at its embassies abroad. *Id.* at 25–26 (quoting Boos v. Barry, 485 U.S. 312, 323 (1988)).

229. Kane, *supra* note 127, at 402 n.93 ("Congress wanted to preclude service on an embassy by mail in order to avoid problems that might arise concerning possible violations of the Vienna Convention on Diplomatic Relations.").

230. *See Harrison*, 139 S. Ct. at 1060 (describing the Court's holding as having the "virtue" of "avoiding potential tension with the Federal Rules of Civil Procedure and the Vienna Convention on Diplomatic Relations").

decision.[231] There, the Court deemed service of process on a German corporation sufficient when delivered to its American subsidiary, allowing plaintiffs to avoid international law rules on serving process abroad.[232] Nor is this a relic of a bygone era; relatively recent circuit court opinions have confirmed that *Schlunk* is alive and well.[233]

The oddity of the distinction represented by the Court's decisions in *Harrison* and *Schlunk* is highlighted when considering the purposes of embassies and subsidiaries. While a subsidiary should be communicating with its parent company, communication between the State in which the subsidiary is operating and the parent company need not be the purpose of even a wholly owned subsidiary. Rather, the subsidiary may have its own business to conduct, as did the subsidiary in *Schlunk*. Whereas the German parent company allegedly designed and assembled the car at issue, the subsidiary was allegedly responsible only for selling the car.[234] By contrast, one of the primary functions—arguably *the* primary function—of embassies is to facilitate communication between States. The VCDR itself makes this clear in Article 3, where it enumerates embassy functions, including "[r]epresenting the sending State in the receiving State," "[n]egotiating with the Government of the receiving State," reporting to the sending State's government on "conditions and developments in the receiving State," and "[p]romoting friendly relations between the sending State and the receiving State."[235] If service of process aims at notice, then surely these differences should be relevant. Yet the FSIA and its strict

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231. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 697, 708 (1988) (explaining the circuit court's finding regarding the relationship between the subsidiary and parent companies and affirming the circuit court's opinion).

232. *Id.* at 706–07 (finding that the Hague Service Convention did not apply).

233. In the thirty-six years since it was decided, *Schlunk* has been cited in only five Supreme Court opinions, including three majority opinions, one concurrence, and one dissent. None of these opinions have altered or narrowed its core holdings. *See* Water Splash, Inc. v. Menon, 518 U.S. 217 (2017); Sanchez-Llamas v. Oregon, 548 U.S. 331, 391 (2006) (Breyer, J., dissenting); Breard v. Greene, 523 U.S. 371, 375 (1998); E. Airlines, Inc. v. Floyd, 499 U.S. 530, 534–35, 543 (1991); Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 136 (1989) (Brennan, J., concurring). Some circuits have added color onto the proposition that foreign corporations can be served via their domestic subsidiary. The Fifth Circuit, for example, specifies that a foreign parent corporation only "receives proper service through its domestic subsidiary where the evidence shows that one is the agent or alter ego of the other." UNM Rainforest Innovations v. D-Link Corp., No. 6-20-CV-143-ADA, 2020 WL 3965015, at *4 (D. Tex. July 13, 2020) (citing Affinity Labs of Tex. v. Nissan N. Am., No. WA:13-CV-369, 2014 WL 11342502, at *4 (D. Tex. July 2, 2014); Lisson v. ING Groep N.V., 262 Fed. App'x. 567, 570 (5th Cir. 2007)). Even under such circumstances, service of process is authorized on a separate legal entity from the foreign defendant, and the primary function of the US subsidiary is not facilitating communication between the United States and the foreign corporation.

234. *See Schlunk*, 486 U.S. at 696.

235. Vienna Convention on Diplomatic Relations art. 3, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

interpretation under *Harrison* ignore the particular role of embassies in facilitating communication and the goal of service of process as communicating information.

It might be tempting to turn to registration to explain the divergence in rules for service on subsidiaries and embassies, but this is insufficent. Certainly "[e]ach of the fifty states has a registration statute that requires a *corporation* doing business in the state to register with the state and appoint an agent for service of process."[236] Embassies, on the other hand, do not register in the same way as agents for their sending States. While this may be a distinction between foreign private entities and foreign States, it is at best a formalistic distinction. Moreover, explicit registration is not always necessary for the designation of an agent for service of process.[237] If implied consent to an agent for service is sufficient for private defendants, then it might also seem sufficient for State defendants.[238] Similarly, some courts allow for service of process on foreign parent companies via US subsidiaries even where the subsidiary is not wholly owned or controlled and the foreign parent has not designated an agent for the purposes of service of process.[239] Accordingly, registration alone seems inadequate to account for the differing rules that apply to foreign private and foreign State defendants, and the distinction based on sovereign status seems to be doing some work.

Most importantly, this distinction between foreign State and foreign private defendants is not required by the concept of sovereignty, as expounded by Chief Justice Marshall and regularly

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236. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1345 (2015) (emphasis added).

237. Consider the 1927 case of *Hess v. Pawloski*, in which the Supreme Court upheld a Massachusetts law declaring the use of state highways by a non-resident to be equivalent to appointing the Massachusetts registrar as the driver's agent for purposes of service of process. 274 U.S. 352, 357 (1927) ("The difference between the formal and implied appointment is not substantial, so far as concerns the application of the due process clause of the Fourteenth Amendment.").

238. This is particularly so because, as discussed in Part III.A, foreign States are not entitled to due process protections under the US Constitution. *See supra* notes 128–130 and accompanying text.

239. California's Code of Civil Procedure, for example, allows service of process on a "general manager" of a corporation, CAL. CIV. PROC. CODE § 416.10, and its Corporations Code specifies service of process for a foreign corporation may be made on "its general manager in the state," CAL. CORP. CODE § 2110. California courts and the Ninth Circuit have interpreted the "general manager" category to include subsidiaries under certain circumstances. *See* United States *ex rel.* Miller v. Pub. Warehousing Co. KSC, 636 F. App'x 947, 949 (9th Cir. 2016) (specifying the subsidiary need not be wholly owned by the parent corporation, but there must be a "sufficiently close connection with the parent" in terms of "the frequency and quality of contact between the parent and the subsidiary, the benefits in California that the parent derives from the subsidiary, and the overall likelihood that service upon the subsidiary will provide actual notice to the parent.").

reinscribed in US and international law, although this concept is ostensibly the basis on which we distinguish between these types of defendants. If prohibiting service of process on embassies is a rule of international law under the VCDR, then it might be understood as an expression of States' power to make rules for themselves through treaties. But nothing in the essential qualities of sovereign equality and independence require that service of process on a foreign State cannot be made on that State's embassy. Indeed, mailing service into the territory of a foreign State is arguably a greater threat to States' territorial authority.

3. Injunctive Relief

Finally, despite the different treatment of foreign State and foreign private defendants in personal jurisdiction and service of process, these defendants are all equally susceptible to courts issuing injunctions against them.[240] Indeed, this may be what Congress intended by including section 1606 in the FSIA, providing that foreign sovereign defendants are "liable in the same manner and to the same extent as a private individual under like circumstances."[241] Although straightforward on its face, this approach explicitly ignores what makes sovereign and private defendants different in the eyes of US and international law, and it has led to some controversial results.

Take the 2012 injunctions in *NML Capital v. Argentina*.[242] In this dispute over sovereign debt obligations, a Southern District of New York (S.D.N.Y.) judge ordered that if Argentina made payments to one set of bondholders, it must also make proportional payments to another set—namely, the plaintiffs.[243] And to determine whether issuing

240. The limited exceptions, of course, are in the case of anti-suit injunctions, where courts sometimes incorporate foreign sovereign parties' sovereignty into their consideration of international comity, and the remarkable *Westinghouse* decision. *See supra* notes 201–218 and accompanying text.

241. 28 U.S.C. § 1606.

242. *See* NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 254 (2d Cir. 2012). Commentators gave this case the moniker, "trial of the century." *Pari Passu Saga*, Fin. Times: FT Alphaville, https://web.archive.org/web/20160925052815/http://ftalphaville.ft.com/tag/pari-passu-saga/ [https://perma.cc/8ZRY-NWK5] (archived Feb. 26, 2024).

243. *See NML*, 699 F.3d at 254. One might expect such injunctions to fall afoul of the act of state doctrine, which, according to a recent Supreme Court decision, "prevents United States courts from determining the validity of the public acts of a foreign sovereign." Federal Republic of Germany v. Philippines, 141 S. Ct. 703, 711 (2021). Indeed, the very same judge who issued the *NML* injunctions had, three decades prior, suggested the act of state doctrine precluded judicial examination of another State's restrictions on paying its sovereign debt. *See* Allied Bank Int'l v. Banco Credito de Cartago, 566 F. Supp. 1440, 1444 (S.D.N.Y. 1983) (discussing Costa Rican decrees

injunctions would be appropriate, the S.D.N.Y. applied the same set of criteria that a court would apply to any private defendant.[244] Commentators objected for several reasons,[245] but the loudest cries among them expressed disbelief, and even outrage, that a foreign sovereign was being treated like a private defendant. Mark Weidemaier and Anna Gelpern, for example, described the *NML* hearings as "a never-ending drama about the existential predicament of judging a sovereign."[246] And, for its part, Argentina insisted that enforcing the injunction would be "tantamount to a violation of public international law" because it intruded on Argentina's right to oversee its economic system.[247] In effect, the injunctions paid no heed to Argentina's status as a co-equal and independent sovereign.

If US courts are to hear lawsuits against foreign sovereign defendants at all, they must have some power to issue orders affecting those defendants. Courts must be able to issue orders about the conduct of litigation—regarding whether a case may proceed, how discovery should be conducted, and so on—and they also must be able to issue awards. Without such powers, we could not properly say that lawsuits against foreign sovereigns are possible within the US court system.

Not all orders are equally coercive, however. None of the sorts of orders listed in the previous paragraph are quite so fundamentally coercive as injunctions. In the words of Andrew Hessick and Michael Morley, "Injunctions are one of the most powerful remedies in the law."[248] By directing a foreign sovereign to undertake or refrain from particular action, injunctions directly threaten the equality and independence of that sovereign, departing substantially from the

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regarding repayment of its sovereign debt); *see also* Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 520 (2d Cir. 1985) ("[I]f, as Judge Griesa held, the act of state doctrine applies, it precludes judicial examination of the Costa Rican decrees."). However, the act of state doctrine is inapposite to injunctive relief. Injunctions do not purport to determine the validity of any act, let alone a sovereign act, but rather purport to make a defendant act or refrain from acting in a particular way.

244. NML Capital, Ltd. v. Republic of Arg., No. 08 Civ. 6978 (TPG), at *2–3 (S.D.N.Y. Feb. 23, 2012).

245. *See, e.g.*, Juan J. Cruces & Tim R. Samples, *Settling Sovereign Debt's "Trial of the Century,"* 31 EMORY INT'L L. REV. 5, 44 (2016) (objecting that imposing an injunction may discourage settlement); W. Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation*, 31 YALE J. REG. 189, 191, 196 (2014) (objecting the injunction was formulated in an unusual and convoluted way); Halverson Cross, *supra* note 16, at 115 (objecting the gap in the FSIA regarding injunctive relief "should have been construed against enforcement").

246. Weidemaier & Gelpern, *supra* note 245, at 218.

247. Kristina Daugirdas & Julian David Mortenson eds., *Contemporary Practice of the United States Relating to International Law*, 108 AM. J. INT'L L. 540, 543 (2014).

248. F. Andrew Hessick & Michael T. Morley, *Interpreting Injunctions*, 107 VA. L. REV. 1059, 1060 (2021).

purpose for which the US legal system ostensibly distinguishes between foreign sovereign and foreign private defendants.

B. *Agencies and Instrumentalities*

In some respects, the rules of procedural sovereign distinction in personal jurisdiction, service of process, and injunctive relief that apply to foreign States' agencies and instrumentalities seem to pose less concern of mismatch, or even avoid this concern altogether. As noted above, the service of process rules for foreign sovereigns' agencies and instrumentalities look very much like those for foreign private defendants. Nor does this likeness seem to threaten agencies or instrumentalities' sovereignty; creating an avenue to serve process on an office or agent of an entity that has separate legal personhood from the State to which it in some sense belongs does not undermine that State's status as a co-equal and independent sovereign.[249] Similarly, injunctions directed to foreign States' agencies or instrumentalities may not raise the same level of concern as US courts issuing injunctions against foreign States themselves. If the only link to the foreign State is that the State owns a hair over fifty percent of the defendant company's stock, then an injunction ordering that company to take or refrain from some action might not implicate the foreign State's sovereignty at all. However, if the agency or instrumentality is more closely linked to the State—such as an organ that was created for a national purpose and is actively supervised by the State[250]—the same concerns that arise with foreign State defendants may arise here too.

With respect to personal jurisdiction, matters are murkier again because of the uncertainty regarding which rules apply. Whether agencies and instrumentalities are subject to a traditional personal jurisdiction analysis turns on a set of equitable principles that can be applied inconsistently and were never intended for constitutional questions in the first place.[251] Indeed, the very same entity can be

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249. Recall that, to be considered an agency or instrumentality of a foreign State for the purposes of the FSIA, an entity must be a separate legal person established under the laws of that State. *See* 28 U.S.C. § 1603(b).

250. These factors—whether the foreign State created the entity for a national purpose and whether the foreign State actively supervises the entity—are two of the factors in the Second Circuit and Fifth Circuit's test for determining "organs" within the meaning of the FSIA. *See* Filler v. Hanvit Bank, 378 F.3d 213, 217 (2d Cir. 2004); Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 846–47 (5th Cir. 2000). The other criteria are whether the foreign State requires the hiring of public employees and pays their salaries, whether the entity holds some exclusive rights in the foreign State, and how the entity is treated under the foreign State's law. *Id.*

251. *See supra* notes 146–152 and accompanying text.

treated differently under *Bancec* by two courts and be granted due process protections in one jurisdiction while denied such protections in another.[252] Moreover, this operation of the *Bancec* distinction between various entities highlights the sharp distinction that currently exists along sovereignty lines between those who are afforded constitutional protections and those who are not.

Otherwise, these entities closely resemble private parties that would be entitled to due process. They are manufacturers and exporters,[253] banks and financial firms,[254] airlines and railways,[255] energy companies,[256] and so on—all of which otherwise would be

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252. *Compare* Amaplat Mauritius Ltd. v. Zimbabwe Mining Dev. Corp., No. 22-cv-58(CRC), 2023 WL 2603746, at *9 (D.D.C. Mar. 22, 2023) (finding Zimbabwe Mining Development Co. (ZMDC) was not closely tied to the State of Zimbabwe under *Bancec*, and dismissing case with respect to ZMDC for lack of personal jurisdiction); *with* Funnekotter v. Agric. Dev. Bank of Zimbabwe, No. 13 Civ.1917(CM), 2015 WL 3526661, at *6 (S.D.N.Y. June 3, 2015) (finding ZMDC had failed to produce evidence rebutting its status as an alter ego of Zimbabwe, meaning it would not be entitled to due process).

253. *See, e.g.*, First Inv. Corp. of the Marshall Islands v. Fujian Mawai Shipbuilding, Ltd., 703 F.3d 742, 752–55 (5th Cir. 2012) (finding shipbuilding companies owned by China did not meet the *Bancec* test and were accordingly entitled to due process protections from the exercise of personal jurisdiction); *see also* Packsys, S.A. de C.V. v. Exportadora de Sal, S.A. de C.V., 899 F.3d 1081 (9th Cir. 2018) (action against salt-production company majority owned by Mexican government); Virginia. v. Bulgartabac Holding Grp., 360 F. Supp. 2d 791 (E.D. Va. 2005) (action against tobacco manufacturer and exporter majority owned by Bulgarian government).

254. *See, e.g.*, Janvey v. Libyan Inv. Auth., 840 F.3d 248 (5th Cir. 2016) (action against, in part, an investment firm wholly owned by Libya); Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012) (action against, in part, bank owned by Hungarian government); Aurum Asset Managers, LLC v. Bradesco Companhia de Seguros, 441 F. App'x 822 (3d Cir. 2011), *aff'g* No. 0-102, 2010 WL 4027382 (E.D. Pa. Oct. 13, 2010) (action against bank owned by political subdivision of Brazil); Hanil Bank v. Perseroan Terbatas Bank Negara Indon., 148 F.3d 127 (2d Cir. 1998), *aff'g* 1997 WL 411465 (S.D.N.Y. 1997) (action against bank owned by Indonesian government).

255. *See, e.g.*, Uab Skyroad Leasing v. OJSC Tajik Air, No. 20-cv-00763 (APM), 2021 WL 254106, at *5 (D.D.C. Jan. 26, 2021) (finding that a foreign State's airline was not closely connected enough to the foreign State under *Bancec* and finding that the airline lacked minimum contacts with the United States); *see generally* Baylay v. Etihad Airways P.J.S.C., 881 F.3d 1032 (7th Cir. 2018) (action against airline owned by United Arab Emirates); *Abelesz*, 692 F.3d (action against, in part, railway owned by Hungarian government); Auster v. Ghana Airways Ltd., 514 F.3d 44 (D.C. Cir. 2008) (action against, in part, airline owned by Ghana and commercial arm of Ghana Air Force); *In re* Tamimi, 176 F.3d 274 (4th Cir. 1999) (action against airline owned by Saudi Arabia); Scalin v. Société Nationale des Chemins de Fer Français, No. 15-cv-03362, 2018 WL 1469015 (N.D. Ill. Mar. 26, 2018) (action against railway owned by French government).

256. *See, e.g.*, Crystallex Int'l Corp. v. Bolivarian Republic of Venezulea, 932 F.3d 126, 132–33 (3d Cir. 2019) (allowing, under *Bancec*, attachment of a state oil company's shares in satisfaction of a judgment against a foreign State); Gater Assets Ltd. v. AO Moldovagaz, 2 F.4th 42, 50 (2d Cir. 2021) (finding district court lacked personal jurisdiction over state natural gas distributor because, although company was foreign State's agency or instrumentality, it was not sufficiently connected to the foreign State

subject to a traditional personal jurisdiction analysis. The notions of sovereign equality and independence themselves provide no justification for distinguishing among agencies and instrumentalities in this way, nor can they justify depriving entities with some relationship to foreign States of the due process rights foreign private entities receive.

And differentiating between types of foreign defendants—particularly between types of foreign entities—has costs. Six years into the *Funk v. Belneftekhim* litigation, for example, the district court finally ruled that the defendants were not entitled to sovereign immunity. The United States District Court for the Eastern District of New York made this determination, however, on the grounds that the defendants had failed to demonstrate their sovereignty, not that they conclusively were not sovereign.[257] In those years, the defendants had obstructed all attempts to undertake meaningful discovery on the sovereignty question.[258] They had stalled the case by appealing a series of orders from the district court, demanding time and resources from the Second Circuit as well.[259] After so many failed discovery orders, the district court ultimately sanctioned the defendants by instituting a presumption against their entitlement to immunity.[260] In the meantime, it was impossible for the district court to determine whether it even had jurisdiction to hear the case because it was impossible to tell whether the defendants were sovereign or private. If the distinction between foreign sovereign and foreign private defendants is worth so

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under *Bancec* and lacked minimum contacts with the forum); *see generally* Skanga Energy & Marine Ltd. v. Petroleos de Venezuela S.A., 522 F. App'x 88 (2d Cir. 2013), *aff'g* 875 F. Supp. 2d 264 (S.D.N.Y. 2012) (action against petroleum products seller owned by Venezuelan government); Terenkian v. Republic of Iraq, 694 F.3d 1122 (9th Cir. 2012) (action against, in part, oil company owned by Iraq); Kensington Int'l Ltd. v. Itoua, 505 F.3d 147 (2d Cir. 2007) (action against, in part, oil company owned by Republic of the Congo).

257. Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC), slip op. at 13 (E.D.N.Y. Nov. 20, 2017) (instituting evidentiary presumption against defendant as form of sanction for nonresponsiveness to discovery orders that aimed to establish whether defendants were sovereign).

258. *See id.* at 12 ("Here, the paucity of materials available to the Court to decide the immunity question is the result of defendants' obstruction. . . . [D]efendants' failure to comply with discovery orders was and continues to be 'willful.'" (quoting Funk v. Belneftekhim, 861 F.3d 354, at 368 (2d Cir. 2017)).

259. *See* Notice of Appeal, Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC) (E.D.N.Y. July 30, 2015) (appealing discovery order of July 9, 2015); Notice of Appeal, Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC) (E.D.N.Y. Aug. 14, 2015) (appealing sanctions order of August 13, 2015); Notice of Appeal, Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC) (E.D.N.Y. Oct. 21, 2015) (appealing sanctions order of October 20, 2015); *see also* Funk v. Belneftekhim, No. 14 Civ. 0376 (BMC), slip op. at 13 (E.D.N.Y. Nov. 20, 2017) (describing the first two of these appeals as "frivolous").

260. Funk v. Belneftekhim, No. 14-cv-0376 (BMC), 2017 WL 5592676, at *7–9 (E.D.N.Y. Nov. 20, 2017); *see also supra* note 15.

much trouble, one might hope it would inform everything that flows from it—not only an immunity determination but also what rules are appropriate in cases where foreign sovereigns are haled into US courts.

V. A GROUNDED THEORY OF PROCEDURAL SOVEREIGN DISTINCTION

As this Article has demonstrated, US law distinguishes between foreign sovereign and foreign private defendants, and it does so in ways that are not always justified by the underlying rationale for the distinction. This Part seeks to answer the logical next question: What should be done about it? If the US legal system generally were to acknowledge and accept the mismatch, or if Congress specifically were to be the source of any remaining mismatch, then we would at least avoid the dangers of unreflective acceptance of the status quo. Yet there is some value to coherence in law—to legal rules fitting and being justified by principles underlying the legal system. Accordingly, this Article next considers how the current doctrine of procedural sovereign distinction might be altered to encourage fit with and justification by the nature of sovereignty as defined in US law.

A. *Making a Choice*

We have a choice to make. As always, one option is to accept the status quo. If this Article has persuaded you that it is worth considering how foreign sovereign and foreign private defendants are treated across various procedural domains, and that this procedural sovereign distinction sometimes lacks justification in what makes sovereign defendants different from other defendants, then this Article's primary proposal will have been a success.

If we are going to accept the status quo, however, then we should accept it with open eyes. Doing so would require being aware of the conceptual mismatch described above and acknowledging that it exists. This approach has been adopted before, including in relation to some of the very entities with which this Article is concerned. As Henderson argued over a century ago, for example, US law opted to treat foreign corporations as cognizable legal entities, rather than collections of individuals whose legal charter applied only in the State that granted it, in order to adapt to changing economic conditions but at the cost of "logical completeness."[261] And indeed, it would seem that Congress, in its various amendments of the FSIA, has opted to adapt to changing circumstances without regard for how this may open a gulf between the treatment of foreign sovereign and foreign private defendants.

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261. HENDERSON, *supra* note 116, at 7.

Another option is to conclude that Congress should review instances of judge-made sovereign distinctions to ensure that whatever distinctions are made are the intentional result of the law-making process, and not merely the result of sometimes haphazard case law development. This would involve, for example, Congress considering and possibly passing legislation regarding the entitlement of foreign sovereign defendants to due process protections. And the advantage of this approach would be that whatever incoherence remains in the system would be associated with political will. Again, we would be choosing incoherence, rather than unknowingly stumbling into it.

Our final option, however, is to bring procedural sovereign distinction into coherence with the justification for distinguishing between sovereign and private defendants. Doing so could promote the value of justification and coherence in law, and this Article argues US legal actors should at least consider amending existing law to these ends. It is to this more ambitious proposal that we now turn.

B. *The Value of Coherence and Justification*

This Article proposes that the current doctrine of procedural sovereign distinction suffers from a lack of conceptual coherence, and that coherence is a value worth pursuing in law. As Ida Mae de Waal has observed, "Coherence is described as 'an ideal feature of law,' as a 'fundamental, albeit not absolute, value in every legal system,' and as 'a specific good, the value of which is undeniable.'"[262] Yet what philosophers, lawyers, and others mean by "coherence" remains a point of contention.[263] We must begin, then, with at least a provisional answer to the question of what coherence is.

For the purposes of this Article, coherence refers to the extent to which a legal rule fits and is justified by the principles underlying the legal system. This language of fit and justification is borrowed from Ronald Dworkin's theory of "law as integrity," elaborated throughout his works but most notably in his 1986 *Law's Empire*.[264] In *Law's*

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262. Ida Mae de Waal, *Coherence in Law*, 28 MAASTRICHT J. EUR. & COMPAR. L. 741, 765 (2021) (first quoting Stefano Bertea, *The Arguments from Coherence*, 25 OXFORD J. LEGAL STUD. 369, 369 (2005); then quoting Stefano Bertea, *Looking for Coherence Within the European Community*, 11 EUR. L. J. 154, 170 (2005); and then quoting JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 280 (1995)).

263. *See generally* AMALIA AMAYA, THE TAPESTRY OF REASON: AN INQUIRY INTO THE NATURE OF COHERENCE AND ITS ROLE IN LEGAL ARGUMENT (2015) (cataloguing and critiquing accounts of coherence).

264. Although this Article follows Dworkin in arguing that coherence, or integrity, is a worthwhile value, it does not follow him in arguing that it offers "the best constructive interpretation of our distinct legal practices and particularly of the way our

Empire, Dworkin argues that both legislators and judges ought to "try to make the total set of laws morally coherent,"[265] which judges in particular can do by treating the law "as expressing and respecting a coherent set of principles."[266] Other thinkers also broadly adopt this understanding of coherence. Neal MacCormick, for example, similarly argues that "the multitudinous rules of a developed legal system should 'make sense' when taken together."[267] This is not to say every legal doctrine must cohere with every other; Barbara Baum Levenbook correctly notes that branches of law may have internal logics, with principles that "bear little resemblance to, and are incoherent with, principles in other branches of law."[268] But where there is divergence, this too should fit and be justified by the legal system's underlying principles.

Coherence in the sense of fit with and justification by underlying principles is not the only value in legal systems, and arguably it should not override more important values such as fairness and justice if they come into conflict, but it is nonetheless valuable. One way coherence in law might be valuable is intrinsically—in other words, it might be nonderivatively worthy. Jonathan Crowe describes Dworkin's own view of integrity, or coherence, in this way, at least within legal systems that have adopted integrity as a value.[269] Alternatively, coherence might be valuable instrumentally, as a means of promoting other values. Crowe suggests, for example, that coherence is better understood as valuable for the way it advances "[t]he basic values shared by members of a community," ensuring that legal interpretation accords with these basic values.[270] Along similar lines, Lon Fuller argues a legal system ought to strive, among other things, to avoid contradiction.[271] For Fuller, failure in this respect would be "an affront

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judges decide hard cases at law." RONALD DWORKIN, LAW'S EMPIRE 216 (1986). This Article accordingly presents coherence as a worthy aspiration, rather than a descriptive account, of law.

265. *Id.* at 176.

266. *Id.* at 217.

267. NEAL MACCORMICK, LEGAL RULES AND LEGAL REASONING 152 (1984).

268. Barbara Baum Levenbook, *The Role of Coherence in Legal Reasoning*, 3 L. & PHIL. 355, 367 (1984).

269. *See* Jonathan Crowe, *Integrity and Truth in* Law's Empire, *in* DIGNITY IN THE LEGAL AND POLITICAL PHILOSOPHY OF RONALD DWORKIN 31, 33–34 (Salman Khurshid, Lokendra Malik & Veronica Rodriguez-Blanco eds., 2018).

270. *Id.* at 38–39.

271. *See* LON L. FULLER, THE MORALITY OF LAW 65–70 (1969). Coherence cannot be understood as merely non-contradiction, which may also be described as "bare consistency." *See* Aldo Schiavello, *On "Coherence" and "Law": An Analysis of Different Models*, 14 RATIO JURIS 143, 236 (2001). However, Fuller's concept of non-contradiction is at least compatible with the account of coherence here and it offers a useful illustration of instrumental value.

to man's dignity as a responsible agent."[272] Thus, coherence may be understood as a worthwhile end in itself or as a means to pursuing other values. Coherence probably operates in a mix of both ways. However conceived, we ought at least to consider adopting legal rules that fit and are justified by the principles underlying our legal system—including in the domain of procedural sovereign distinction.

C. *Grounded Rules for Procedural Sovereign Distinction*

What, then, would a grounded theory of procedural sovereign distinction look like?[273] In other words, what would be required for the procedural rules governing lawsuits against foreign sovereigns and foreign private parties to cohere with—to be justified by—the reason that US law treats sovereign defendants differently? This Article concludes by offering possible adjustments to the rules in personal jurisdiction, service of process, and injunctive relief, as well as general considerations relating to other domains of procedural sovereign distinction.

1. Personal Jurisdiction

If grounded rules for procedural sovereign distinction are desirable, courts should return to the practice of requiring that the constitutional standard for personal jurisdiction, embodied in *International Shoe* and its progeny, be met in lawsuits against all foreign sovereigns. The Supreme Court's obtuse dicta in *Weltover* is not only shaky ground on which to deny some due process protections but also has nothing to do with sovereignty. If anything, concerns for "fair play and substantial justice" should be particularly salient when the defendant is a co-equal and independent sovereign.

The upside of the *Weltover* dicta's impact is that the Supreme Court could resolve the mismatch in personal jurisdiction relatively easily. No Supreme Court ruling has held that foreign sovereigns are not persons within the meaning of the Due Process Clause, and even the *Weltover* dicta does not straightforwardly point to this conclusion. If, in an appropriate case, the Court were to find that foreign sovereigns are persons, one dimension of the mismatch would evaporate.

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272. FULLER, *supra* note 271, at 162.

273. "Grounded" in this sense refers to the quality of a doctrine that has achieved coherence between its rules and underlying principles. A grounded theory is one in which its rules obtain *in virtue of* its underlying principles. Thus, "grounding" as I use it here, drawing on a vein of literature in metaphysics, is "a non-causal relationship of determination." Paul Audi, *A clarification and defense of the notion of grounding*, *in* METAPHYSICAL GROUNDING: UNDERSTANDING THE STRUCTURE OF REALITY 101, 101 (Fabrice Correia & Benjamin Schneider eds., 2012).

Adopting this proposal would resuscitate a regime often associated with the Second Circuit's 1981 decision in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*.[274] Under this regime, courts would engage in a personal jurisdiction analysis after finding that an exception to immunity applies, and courts would consider foreign sovereigns' contacts with the United States as a whole, rather than merely with the forum jurisdiction.[275] It would also mean that all foreign sovereign defendants would be entitled to the same personal jurisdiction analysis that those falling short of the *Bancec* test are currently entitled to.

One objection to this proposal might be that it would create a new mismatch where foreign sovereigns, who would be "persons" for the purposes of due process, are treated differently than domestic sovereigns, who are not.[276] However, the two types of sovereigns are meaningfully different. Whereas domestic sovereigns have been incorporated into the overall US project, foreign sovereigns are definitionally outside it. States of the union retained some rights and privileges when they joined together, but they gave up others. The same is true of native peoples whose sovereignty was forcibly subordinated to the US federal government and, to some extent, the

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274. Tex. Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981). The Second Circuit first found that foreign States are "persons" entitled to due process protection, then proceeded with a personal jurisdiction analysis that followed exactly the criteria that we would expect for a foreign private defendant in 1981. *Id.* at 313–15.

275. *See id.* at 314–15 (considering Nigeria's contacts with the United States generally); *see also* Harris Corp. v. Nat'l Iranian Radio & Television, 691 F.2d 1344, 1352–53 (11th Cir. 1982) (considering an Iranian instrumentality's contacts with the United States in a "minimum contacts" analysis); Kane, *supra* note 127, at 405 ("In suits against foreign governments, the relevant contacts are those with the United States, not just those with the forum state.").

In effect, this is nationwide personal jurisdiction, for which some scholars have advocated as a more general matter within the federal court system. *See generally* Jonathan Remy Nash, *National Personal Jurisdiction*, 68 EMORY L. J. 509 (2019); A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 DENV. U. L. REV. 325 (2010). *But see* Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1 (1984) (arguing the Fifth and Fourteenth Amendments require considering contacts at the forum level).

276. *See* South Carolina v. Katzenbach, 383 U.S. 301, 323–24 (1966) ("The word 'person' in the context of the Due Process Clause . . . cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."); *see also* N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458, 464 (8th Cir. 1993) (affirming a preliminary injunction against a tribe where Congress had waived the tribe's immunity, without conducting a personal jurisdiction analysis).

governments of the many states.[277] Foreign sovereigns have no such political history with the United States. As Damrosch put it, "The view that foreign states are outsiders to the constitutional compact is not just a metaphor or an abstraction but a functional reality."[278] Thus, paradoxical as it might initially sound, they are arguably entitled to greater constitutional protections than domestic sovereigns. Even if one were to accept this objection, it would only apply to foreign States themselves. A more moderate option would be to at least grant due process protections to all foreign States' agencies and instrumentalities. Either way, the current distinction between foreign sovereign and foreign private defendants in personal jurisdiction does not represent rules grounded in sovereign equality and independence.

2. Service of Process

Similarly, coherence would seem to demand that the rules for serving process on foreign States be brought into line with the rules for serving foreign private defendants. Doing so might mean amending the FSIA to allow for service of process on embassies, given the analogous position of embassies to subsidiaries and the purpose of embassies in facilitating communication between sending and receiving States. Assuming Justice Alito's decision in *Sudan v. Harrison* correctly found that the FSIA prohibits service of process on embassies,[279] it would be up to Congress to change this rule. Doing so might violate international law, however.[280] And doing so would violate the US government's express preference. As noted in a *Harrison* amicus brief, the US government does not want to receive process through mail or personal delivery to US embassies around the world, and allowing service on foreign embassies in the United States would invite similar treatment of US embassies abroad.[281] If we take these objections seriously, then

277. The US Supreme Court recently confirmed this arrangement with the federal government and extended the authority of the states of the union over federally recognized tribal land. *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022) (holding that the federal government and state governments "have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country"); *see also* Gregory Ablavsky & Elizabeth Hidalgo Reese, *The Supreme Court Strikes Again*, WASH. POST (July 1, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/2022/07/01/castro-huerta-oklahoma-supreme-court-tribal-sovereignty/ [https://perma.cc/KD4H-TJJS] (archived Dec. 29, 2023) (describing the *Castro-Huerta* decision as "an act of conquest").

278. Damrosch, *supra* note 20, at 522.

279. *See* Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1056 (2019).

280. *See supra* notes 227–230 and accompanying text.

281. Brief for the United States as Amicus Curiae Supporting Petitioner at 25–26, *Harrison*, 139 S. Ct. 1048.

this option for resolving the mismatch in service of process might not be desirable after all.

Alternatively, bringing the rules for sovereigns and private parties into alignment might mean rethinking the appropriateness of allowing service of process on foreign private entities' domestic subsidiaries. This latter option would not necessarily mean that foreign entities could no longer be served via subsidiaries that they have specifically designated for this purpose. But it would certainly call into question whether courts should allow service of process on foreign parent entities via US subsidiaries that are neither wholly owned nor controlled by the foreign parent and that the foreign parent has not designated as an agent for service of process.[282]

If neither of these options—either bringing service of process rules for foreign States into line with foreign private entities or the other way around—is ultimately attractive, then this might be an area where we opt to maintain the status quo, acknowledging that we do so at the cost of coherence and a justificatory relationship. As noted above, coherence is not a trump card, and it may be outweighed by other values when appropriate.

3. Injunctive Relief

Finally, a foreign sovereign defending a lawsuit in a US court under an exception to immunity is nonetheless still a sovereign. Taking seriously sovereign distinction and the nature of sovereignty, as expounded in US law and international law, would require extending consideration of this conceptual distinction to the realm of remedies and, particularly, injunctive relief. Nor is the current ad hoc approach sufficient.

A grounded doctrine of procedural sovereign distinction in injunctive relief would incorporate the matter of sovereignty directly into the criteria for injunctive relief when that relief would run against a foreign sovereign party. Given that the current criteria are judicially created, the Supreme Court could add a criterion to resolve the mismatch.[283] Such an additional criterion might look something like requiring the movant to demonstrate that the requested relief would be an appropriate measure given the nature of the opposing party. This

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282. *See supra* notes 237–239 and accompanying text.

283. If some of the *eBay* and *Winter* critics are to be believed, the Court has recently transformed the standards for both permanent and preliminary injunctions. *See, e.g.*, Gergen, Golden & Smith, *supra* note 186, at 205 (describing *eBay* as a "revolution"); Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1034 & n.36 (2011) (criticizing *Winter* as among the "progeny" of *eBay* through which the Supreme Court was "mov[ing] backwards"). This may suggest that the Court is open to further adjustments in this domain.

approach would both incorporate the reason for distinguishing between sovereign and private parties into the ways they are distinguished and flesh out the rather oblique note from the FSIA's drafters that injunctive relief should only be issued when "clearly appropriate."[284]

Moreover, depending on the type of sovereign party and the type of relief sought, various forms of injunctions might still be appropriate according to this test. An order for specific performance of a contract selling unique real property in the United States, issued against a state-owned enterprise, might not threaten the co-equal status and independence of the affiliated foreign State. By contrast, an order like the *NML v. Argentina* injunction, purporting to instruct a foreign State in disposing of its sovereign debt in the wake of a financial crisis,[285] might raise greater concerns.

4. General Considerations

These are, of course, only three areas of countless procedural domains that appear in cases against foreign sovereign defendants, just as they appear in cases against foreign private defendants. When examining rules governing *forum non conveniens*,[286] discovery,[287] money damages,[288] pre- and post-judgment attachment and execution,[289] and so on, the relevant considerations will always be the same: What makes a sovereign defendant different, and is the nature of sovereignty reflected in the ways that the rules applied to sovereigns do or do not depart from the rules applied to private parties? Attending to these questions will help ensure that US law's procedural sovereign

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284. H.R. REP. NO. 94-1487, at 21 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6621.

285. *See* NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 254 (2d Cir. 2012); *see also supra* notes 242–247 and accompanying text.

286. The Second Circuit recently suggested the "principles underlying the *forum non conveniens* doctrine" may apply "in some cases perhaps with greater weight" when the defendant is a foreign sovereign. Aenergy, S.A. v. Republic of Angola, 31 F.4th 119, 128 (2d Cir. 2022); *see also* William S. Dodge, *Second Circuit Holds that Forum Non Conveniens Applies Under the FSIA*, TRANSNAT'L LITIG. BLOG (Apr. 25, 2022), https://tlblog.org/second-circuit-holds-that-forum-non-conveniens-applies-under-the-fsia/ [https://perma.cc/YR5E-8U2Y] (archived Dec. 29, 2023).

287. *See, e.g.*, Aaron D. Simowitz, *Transnational Enforcement Discovery*, 83 FORDHAM L. REV. 3293 (2015) (discussing the challenges of discovery involving foreign parties).

288. *See, e.g.*, Kane, *supra* note 127, at 391 (1982) (noting that in the FSIA as passed, punitive damages were prohibited against foreign States). Notably, the § 1605A terrorism exception deviates from this rule by allowing punitive damages. *See* Opati v. Republic of Sudan, 140 S. Ct. 1601, 1605 (2020).

289. *See, e.g.*, Halverson Cross, *supra* note 16, at 123–26 (discussing foreign sovereigns' property's immunity from execution).

distinction doctrine is conceptually grounded in all areas, as it already largely is in immunity.

VI. CONCLUSION

US courts apply different sets of rules to civil suits against foreign sovereigns and foreign private parties, but not always in ways that are justified by the underlying rationale for distinguishing between these types of defendants. While foreign sovereigns' presumptive entitlement to immunity aligns differentiated treatment with the reason for differentiation, other domains of procedural sovereign distinction do not. As Chief Justice Marshall reasoned in *Schooner Exchange*, the nature of sovereignty itself is what makes sovereign defendants unique. Sovereignty in Marshall's telling entails equality with and independence from other sovereigns, and this understanding has been underscored and reinscribed through subsequent US court decisions, the FSIA's drafting, and international law.

Yet as the doctrines of personal jurisdiction, service of process, and injunctive relief demonstrate, current procedural sovereign distinction has often lost track of the concept of sovereignty—the reason for treating foreign sovereign and foreign private defendants differently. In personal jurisdiction, private parties receive greater protection than sovereigns by virtue of the former's status as "persons" for the purposes of due process. In service of process, foreign parent companies can be served via their US subsidiaries that, in some cases, are not even wholly owned or controlled by the parent and have not been designated as agents for the purposes of service. Meanwhile, foreign States cannot be served via their US embassies, despite the fact that facilitating communication is the primary function of embassies. Finally, regarding injunctive relief, no consistent notice is taken of defendants' status in determining whether it is appropriate to order a defendant to take or refrain from certain action. As this Article has argued, none of these—neither the divergent treatment in personal jurisdiction and service of process, nor the convergent treatment in injunctive relief—embodies the notions of sovereign equality and independence.

We may decide these inconsistencies are worth keeping because they serve other values the US legal system aims to promote. But if we value coherence and justification, and if we believe sovereignty, as described here, is a principle that ought to continue to structure our world, then we should at least consider amending our doctrine of procedural sovereign distinction to reflect what our laws say sovereignty means. The Supreme Court and Congress should each take steps toward this end. Otherwise, why should this concept act as a dividing line between litigants at all?