A SHIFTING EQUILIBRIUM: PERSONAL JURISDICTION, TRANSNATIONAL LITIGATION, AND THE PROBLEM OF NONPARTIES

by
Cassandra Burke Robertson[*] *and Charles W. "Rocky" Rhodes*[**]

Should a foreign bank that maintains a permanent branch office in New York be subject to personal jurisdiction to enforce an asset-freeze order lodged against its customers' accounts for counterfeiting merchandise trademarked by New York corporations? Before the Supreme Court decided Daimler AG v. Bauman*, the answer would have been an easy yes—because the bank's in-state activity was continuous, systematic, and substantial, the bank would have been subject to general jurisdiction. Now that general jurisdiction is limited to the entity's home forum, however, the answer is less clear.*

This unresolved issue is critical in resolving two pending high profile trademark-infringement cases, where Gucci America and Tiffany & Co. have requested a federal court in New York to order three Chinese banks—all with New York branch offices—to enforce an asset-freeze order against bank customers who allegedly sold products infringing on the plaintiffs' trademarks. And such issues regarding the courts' jurisdictional authority will continue to arise in subsequent cases and contexts, a potentially ominous development for international commerce, which depends on effective court access to enforce judicial remedies.

In this Article, which builds on our previous work, we explore the effects of the Supreme Court's most recent jurisdictional decisions in Daimler *and* Walden v. Fiore. *We predict that jurisdictional doctrine will shift toward a new equilibrium that broadens the standards for specific jurisdiction and some types of consent-based jurisdiction in response to the narrowing of general jurisdiction. We offer a framework by which courts can exercise jurisdiction over nonparties in transnational cases consistently with constitutional requirements of due process.*

Our proposal returns to the Supreme Court's International Shoe *standard, which incorporated an entity's "continuous and systematic" contacts into the specific jurisdiction analysis. We argue that the type of*

[*] Professor of Law and Laura B. Chisolm Distinguished Research Scholar, Case Western Reserve University.

[**] Vinson & Elkins LLP Research Professor and Professor of Law, South Texas College of Law. The authors would like to thank Bill Dodge for his comments on an earlier draft, John Parry for organizing this symposium, all the other symposium participants for their valuable insights on jurisdictional doctrine, and Nicholas Lauren for his effort and patience in editing our Article.

continuous and systematic contacts present when multinational corporations maintain a local office are strong enough to warrant relaxing the connectedness requirement for specific jurisdiction. If the nature of the entity's in-forum activities are related to the sovereign regulatory interests in the case—if, for example, an entity provides in-forum banking services, and the court is seeking the entity's assistance in enforcing an asset freeze—then the forum connectedness standard should be met. Likewise, when an entity intentionally obtains benefits from registering to do business within the state (such as the ability to conduct intrastate business and the right to sue within the forum as a plaintiff), the state may in exchange obtain the entity's consent to jurisdiction for those cases impacting the state's sovereign regulatory and protective interests.

Finally, although we support a somewhat broader constitutional jurisdiction standard that balances state regulatory, individual, and business interests, we also advocate in favor of a strong comity analysis that incorporates foreign sovereign interests and ensures that courts' exercise of adjudicative power is bounded by the forum's legislative jurisdiction. We argue that this comity analysis should be separate from personal jurisdiction, both to ensure that it receives courts' undivided attention and to leave room for the other branches of government to participate in developing a coherent doctrine of court access in cases affecting foreign interests.

I. INTRODUCTION

An iconic Gucci handbag, "with interlocking G's, made of Gucci's signature fabric," purportedly available for half its normal price.[1] A classic Tiffany & Co. silver heart pendant, normally sold for $345, now advertised for a mere $24.[2] It sounds too good to be true, and it is—these items are counterfeit luxury goods being passed off as authentic, manufactured abroad and marketed to U.S. residents over the internet through sites such as Tiffanystores.org and Myluxurybags.com.[3]

Tiffany & Co. and Gucci America appeared to have a strong claim for trademark infringement—they were easily able to obtain a prelimi-

[1] Megan C. Chang & Terry E. Chang, *Brand Name Replicas and Bank Secrecy: Exploring Attitudes and Anxieties Towards Chinese Banks in the* Tiffany *and* Gucci *Cases*, 7 Brook. J. Corp. Fin. & Com. L. 425, 427 (2013).

[2] *Id.* at 426.

[3] *Id.* at 426–27.

nary injunction ordering that the sales be ceased and freezing the accounts related to the online sales.[4] Obtaining an effective remedy, however, presented a more difficult challenge. Going after the sellers would not be easy; finding them would require crossing national boundaries as well as uncovering layers of technological curtains that shielded the true locations and identities of many of the perpetrators.[5]

It is no wonder, then, that the corporate plaintiffs adopted a strategy of going after the financial assets, rather than all the individuals behind the scheme—although the individuals were distant and, often, unknown, the cash that they earned from sales in the United States could be tracked into the perpetrators' bank accounts.[6] Both Tiffany & Co. and Gucci were able to identify the accounts associated with the allegedly infringing activity and obtain an injunction freezing those accounts.[7] Ensuring compliance with the asset-freeze order would prove to be more difficult, however; individuals who resided outside the country and could not be located would have little incentive to comply with the court's order. In fact, Gucci argued that at least two of the named defendants previously "had default judgments and permanent injunctions entered against them" by other brand owners, but that "[u]ndeterred, Defendants continued selling counterfeit[] products."[8] It appeared that the assets were much easier to reach than the defendants themselves. In both cases, there was evidence that money in the relevant accounts had been originally deposited in the United States, and then subsequently transferred outside the United States, into branches of three different Chinese banks. As a result, the plaintiffs sought to obtain the assistance of the banks where the defendants' accounts were held. The plaintiffs served the asset-freeze injunction against the relevant banks (Bank of China, China Merchants Bank, and the Industrial and Commercial Bank of Chi-

[4] Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 126 (2d Cir. 2014); Tiffany & Co. v. China Merchs. Bank, 589 F. App'x 550, 551 (2d Cir. 2014). The sale of counterfeit goods has been a significant problem for well-known luxury brands. *See* Irina D. Manta, *Hedonic Trademarks*, 74 OHIO ST. L.J. 241, 269 (2013) (examining the psychology behind consumers' appreciation of trademarks, especially with regard to luxury goods).

[5] *See* Andrew F. Popper, *In Personam and Beyond the Grasp: In Search of Jurisdiction and Accountability for Foreign Defendants*, 63 CATH. U. L. REV. 155, 157–59 (2013) (explaining the costs of intellectual property infringement, the difficulty that plaintiffs face in holding foreign defendants accountable for violations, and the problems with current personal jurisdiction doctrine that inhibit an effective legal remedy).

[6] The complaint named several defendants who resided in the United States, and additionally named several individuals whose names were known, but "whose address is presently unknown to Plaintiffs," as well as "John Does" whose identities were not known to the plaintiffs, but who allegedly participated in the counterfeiting activity. Second Amended Complaint at 5–10, Gucci Am., Inc. v. Weixing Li, No. 10 Civ. 4974(RJS) (S.D.N.Y. Aug. 23, 2011), 2011 WL 2975971.

[7] *Gucci*, 768 F.3d at 126.

[8] Brief for Appellee at 7, *Gucci*, 768 F.3d 122 (No. 11-3934-cv), 2013 WL 3282650.

na), and the federal district court ordered the banks to comply with the asset-freeze injunction.[9]

In the district court proceedings, the banks did not raise a personal jurisdiction objection. Second Circuit precedent appeared clear: the multinational banks each did continuous and systematic business within the State of New York, and all had branches located there. Instead, the banks raised objections centered on issues of international comity, arguing that Chinese bank-secrecy law prohibited them from complying with the district court's order.[10] The district court ruled against the banks and ordered them to comply with the asset-freeze injunction, and the banks filed appeals to the Second Circuit.[11]

While the appeals were pending, the Supreme Court decided *Daimler AG v. Bauman* and *Walden v. Fiore*.[12] These cases, as we have explained elsewhere, substantially shifted the equilibrium for personal jurisdiction.[13] *Daimler* significantly narrowed the application of general (dispute-blind) jurisdiction, holding that a party's "systematic and continuous" contacts alone are not enough to support jurisdiction unrelated to the forum.[14] *Walden* limited the scope of "effects-based" jurisdiction, holding that a defendant's mere knowledge that a plaintiff will suffer negative effects in a given forum is likewise insufficient to support jurisdiction.[15]

The Second Circuit asked the parties to address what effect these cases might have on the proceedings in *Gucci* and *Tiffany*. The banks responded to this request by arguing that, under *Daimler*, the district court could not exercise jurisdiction over them; there was no general jurisdiction, they argued, because the banks were neither incorporated nor had their principal place of business in New York, and they were therefore not "at home" in that state.[16] They further argued that specific jurisdiction would not apply, as *Walden* had "ma[de] clear . . . that specific jurisdiction must be based on contacts between the person over whom jurisdiction is sought to be exercised," and "the Banks' provision of banking services to the defendants in China" therefore could not count as a relevant contact to support jurisdiction.[17]

---

[9] Chang & Chang, *supra* note 1, at 426–27.

[10] Brief for Appellant at 31, 34–40, *Gucci*, 768 F.3d 122 (No. 11-3934-cv), 2013 WL 1790984 (arguing that "[t]he district court also erred by failing to address at all [Bank of China's] argument that the Asset Freeze should be modified because it violates principles of comity").

[11] *Gucci*, 768 F.3d at 125.

[12] Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Walden v. Fiore, 134 S. Ct. 1115 (2014).

[13] Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 263–64 (2014).

[14] *Daimler AG*, 134 S. Ct. at 761.

[15] *Walden*, 134 S. Ct. at 1124–25.

[16] Letter Brief at 1–2, *Gucci*, 768 F.3d 122 (No. 11-3934-cv), 2014 WL 1873367.

[17] *Id.* at 3.

The circuit court largely agreed.[18] It held that the district court possessed the authority to freeze defendants' assets even without personal jurisdiction over the banks, as the asset freeze affected only the rights of the defendants, who were properly before the court as parties to the litigation.[19] However, to the extent that the district court sought to compel the banks to comply with the injunction and related discovery orders, the court held that personal jurisdiction over the banks was first necessary.[20] It issued an opinion holding that *Daimler* foreclosed the possibility of general jurisdiction over the banks. It remanded both *Gucci* and *Tiffany* to the district court for consideration of whether specific jurisdiction existed over the banks.[21] In addition, it observed that *Daimler*'s prohibition on general jurisdiction applies only when an entity "has not consented to suit in the forum."[22] The court noted that consent to jurisdiction was a possibility in the case, and it therefore stated that the district court "may also consider whether [Bank of China] has consented to personal jurisdiction in New York by applying for authorization to conduct business in New York and designating the New York Secretary of State as its agent for service of process."[23]

As of this writing, the district court has not yet ruled on the remanded cases. Regardless of how these two cases are ultimately resolved, the underlying issues will not disappear anytime soon; while these particular disputes were the first post-*Daimler* cases to raise questions of personal jurisdiction over foreign banks, they almost certainly will not be the last. International commerce depends on multinational financial institutions. Likewise, effective remedies in transnational litigation require that prevailing parties have the ability to enforce the resulting judgment.[24] A

---

[18] *Gucci*, 768 F.3d at 145; *Tiffany & Co.*, 589 F. App'x at 553 ("[T]he district court had no reason to consider, or to develop the record as to, whether it could properly assert specific jurisdiction over the Banks, or whether the Banks consented to jurisdiction by applying for authorization to conduct business in New York and designating the New York Secretary of State as their agent for service of process.").

[19] *Gucci*, 768 F.3d at 145.

[20] *Id.* at 134 ("[A] district court need not preliminarily establish personal jurisdiction over a nonparty bank to restrain a defendant's assets. However, a district court can enforce an injunction against a nonparty such as [Bank of China] only if it has personal jurisdiction over that nonparty.").

[21] *Id.*

[22] *Id.* at 136 n.15 (quoting *Daimler AG*, 134 S. Ct. at 755–56).

[23] *Id.*

[24] Grupo Mexicano de Desarrollo, S.A., v. Alliance Bond Fund, Inc. 527 U.S. 308, 333 (1999) (holding that the district court lacked authority to issue an asset-freezing order in a claim for monetary damages); *Id.* at 338–39 (Ginsburg, J., concurring and dissenting) ("[I]ncreasingly sophisticated foreign-haven judgment proofing strategies, coupled with technology that permits the nearly instantaneous transfer of assets abroad, suggests that defendants may succeed in avoiding meritorious claims in ways unimaginable before the merger of law and equity."); Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 WASH. L. REV. 257, 266, 347–48 (1992) (noting that "a plaintiff who proceeds to trial and prevails may obtain a judgment in her favor but may not be able to collect on that

plaintiff who cannot reach the defendant's assets is unlikely to be made whole, even after winning on the merits;[25] transnational judgment enforcement is difficult at best, regardless of whether that plaintiff seeks to enforce a foreign judgment in the United States or a U.S. court's judgment abroad.[26] As a result, multinational financial institutions are often drawn into transnational lawsuits, frequently as the target of nonparty discovery requests.[27] The *Gucci* and *Tiffany* cases followed this pattern; in addition to the asset-freeze order, there were also discovery orders that created additional disputes in both the district court and the circuit court of appeals, though the circuit court ultimately delayed their resolution to

---

judgment for some time, if ever," and arguing in favor of expanding courts' authority to issue preliminary injunctions based on the so-called *Mareva* injunctions common in England).

[25] Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1464 (2011) ("[I]n order to obtain an effective remedy, a plaintiff must rely on enforcement by a court that does have jurisdiction over assets of the defendant.").

[26] S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 85 (2014) ("[T]he law regarding enforcement and recognition of judgments in the United States is extremely convoluted. As a result, it is nearly impossible for litigants to anticipate either the procedural or substantive principles that will govern in any particular case."); John F. Coyle, *Rethinking Judgments Reciprocity*, 92 N.C. L. REV. 1109, 1154–55 (2014) (noting that "[t]here has long been a perception that judgments rendered by U.S. courts fare quite poorly when one seeks to enforce them abroad," and explaining that there are different reasons for this difficulty: some nations refuse to enforce any foreign judgments, others refuse to enforce U.S. judgments in the absence of a formal treaty, and still others may allow for recognition "as a formal legal matter, but it may be difficult (if not impossible) to achieve this end in practice").

[27] Linda J. Silberman, Goodyear *and* Nicastro*: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 614 (2012) (noting that judgment recognition issues are reduced in cases where "courts have required garnishees, including foreign banks subject to jurisdiction in the United States, to turn over assets of the judgment debtor that they hold outside of the forum state, thereby providing an enforcement mechanism even when the foreign debtor and the assets are outside the state"); *see, e.g.*, Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 527 (S.D.N.Y. 1987) ("[I]t has been suggested that the factor which distinguished the early Second Circuit cases adopting a restrictive approach to ordering discovery in the face of foreign nondisclosure laws was the fact that they all involved a nonparty witness."); *see also* M & C Corp. v. Erwin Behr GmbH & Co., 508 F. App'x 498, 500–02 (6th Cir. 2012) (holding that nonparty Deutsch Bank waived a personal jurisdiction defense after the plaintiff sought to hold it in contempt for "violat[ing] the injunction through the sale of [defendant's] assets"); Reebok Int'l Ltd. v. McLaughlin, 49 F.3d 1387, 1395 (9th Cir. 1995) (holding that the district court lacked personal jurisdiction over Banque Internationale a Luxembourg S.A., and therefore could not hold it in contempt for releasing funds in contravention of an asset-freeze order to which it was not a party); United States v. First Nat'l Bank of Chi., 699 F.2d 341, 346 (7th Cir. 1983); Laker Airways Ltd. v. Pan Am. World Airways, 607 F. Supp. 324, 326 (S.D.N.Y. 1985) ("The non-party witnesses Midland and Montagu are not sued in the District of Columbia at this time. Implicit, however, is the suggestion that they are among the 'lenders' believed by plaintiff to have colluded with Laker's competitors to deny financing to Laker.").

await the district court's ruling on personal jurisdiction after remand.[28] Thus, even before *Daimler* was decided, courts grappled with issues of comity and extraterritorial reach over third parties in transnational cases.[29]

Now, however, the Supreme Court's rulings on personal jurisdiction create a larger dilemma in transnational cases. If there is no personal jurisdiction over the multinational financial institutions, parties will have difficulty ascertaining who benefited monetarily from the allegedly illegal conduct, and by how much. This difficulty creates an unexpected challenge for plaintiffs in transnational cases (and, perhaps, an unexpected windfall for defendants in these cases). Because the courts had been applying the "continuous and systematic" standard for general jurisdiction, few multinational entities even sought to challenge the existence of personal jurisdiction prior to *Daimler*;[30] indeed, the defendants raised no such defense in either *Tiffany* or *Gucci* until the court of appeals asked them to brief the issue after *Daimler*.[31] Scholars also assumed that banks

---

[28] *Gucci*, 768 F.3d at 141("[S]pecific personal jurisdiction may permit the district court to order the Bank to comply with particular discovery demands, a question we leave to the district court to address on remand."); Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976 (NRB), 2012 WL 1918866, at *10–11 (S.D.N.Y. May 23, 2012) (ordering Tiffany & Co to use the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters to seek information from Industrial and Commercial Bank of China and China Merchants Bank, "[g]iven the Chinese government's stated intention to cooperate with such a request, as well as the near certainty that this issue will continue to arise in future litigation," but upholding a federal-rules-based discovery order against the Bank of China, because that bank had been "the acquiring bank for an infringing website," and therefore "may very well possess information that will enable Tiffany to discover defendants' identities or even recover a portion of defendants' illicit profits").

[29] "Courts have shown reluctance to exercise the full range of [their] subpoena powers over foreign nonparty witnesses found within their territorial jurisdiction." Robert C. O'Brien, *Compelling the Production of Evidence by Nonparties in England Under the Hague Convention*, 24 SYRACUSE J. INT'L L. & COM. 77, 89 n.68 (1997) (quoting GARY B. BORN WITH DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS 359–60 (2d ed. 1992)).

[30] In upholding a challenge to personal jurisdiction brought by a nonparty financial institution, at least one court took pains to specify that "this is not a case concerning the failure of a foreign bank with United States branches to comply with a federal district court's orders," and to distinguish the case from others where personal jurisdiction had been found. *Reebok Int'l Ltd.*, 49 F.3d at 1391 n.3 (citing United States v. Bank of N.S. (In re Grand Jury Proceedings), 740 F.2d 817 (11th Cir. 1984) and United States v. Bank of N. S. (In re Grand Jury Proceedings) 691 F.2d 1384 (11th Cir. 1982), both of which had upheld contempt orders against nonparty banks with domestic branches).

[31] Although defendants normally will be held to waive personal jurisdiction objections by failing to timely raise them in the district court, the court held that the issue was not waived in this case because controlling circuit authority would have foreclosed such an argument prior to *Daimler*. "Under prior controlling precedent of this Circuit, the Bank was subject to general jurisdiction because through the activity of its New York branch, it engaged in a 'continuous and systematic course of doing

with branches in New York were therefore "plainly subject to the court's personal jurisdiction"—a conclusion that can no longer be assumed, but is now very much in question.[32] *Daimler* therefore creates significant uncertainty in transnational cases.

In this Article, we examine how *Daimler v. Bauman*, and, to a lesser extent, *Walden v. Fiore*, are likely to shape transnational litigation in the United States. In Part II, we analyze the post-*Daimler* doctrinal landscape, examining how courts are likely to analyze jurisdiction over nonparties, especially nonparty financial institutions, in transnational cases. In Part III, we recommend a balanced approach to personal jurisdiction that considers the scope and nature of the entity's forum contacts, recognizing that the "continuous and systematic" nature of those contacts is still highly relevant to the jurisdictional analysis. Although *Daimler* held that continuous and systematic contacts alone cannot give rise to dispute-blind general jurisdiction, it left the earlier *International Shoe* framework in place—meaning that the depth and nature of those contacts are still important to the specific jurisdiction analysis, as long as the dispute is sufficiently connected to the forum. We conclude that the doctrine of specific jurisdiction, standing alone or perhaps combined with principles of jurisdictional consent, can normally give rise to jurisdiction over nonparty financial institutions conducting business in the forum through branch locations. Finally, Part IV expands the analysis to account for political realities. It examines the policy choices inherent in transnational jurisdictional disputes, and it applies a comparative institutional choice framework to recommend that the political branches take an active role in negotiating jurisdictional agreements that protect both domestic and foreign regulatory interests.

II. PERSONAL JURISDICTION OVER NONPARTIES

As the previous Part set out, transnational litigation in U.S. courts relies significantly on the ability to exercise jurisdiction over nonparty multinational financial institutions.[33] In the past, there was rarely a significant question about personal jurisdiction; because multinational institutions generally have U.S. branches, it was assumed that the courts could exercise general jurisdiction over them.[34] Now that *Daimler* has foreclosed such an assumption, courts will have to determine the scope of jurisdiction over these entities in transnational cases.

This jurisdictional challenge is made even more difficult by a lack of clarity regarding personal jurisdiction over nonparties, whether domestic

---

business in New York.'" *Gucci*, 768 F.3d at 136 (quoting Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 58 (2nd Cir. 1985)).

[32] O'Brien, *supra* note 29, at 89 n.68 (quoting BORN & WESTIN, *supra* note 29, at 360) (discussing *Laker Airways*, 607 F. Supp. 324).

[33] *See supra* note 24.

[34] *See supra* notes 30–32 and accompanying text.

or foreign.[35] As the circuit court pointed out in *Gucci*, the Supreme Court has never addressed the scope of specific jurisdiction over nonparties.[36] As a result, most courts considering the issue have adopted a variation on the *International Shoe* test, "first assess[ing] the connection between the nonparty's contacts with the forum and the order at issue, and then decid[ing] whether exercising jurisdiction for the purposes of the order would comport with fair play and substantial justice."[37]

Some courts have expressed a willingness to exert personal jurisdiction over a domestic nonparty who has aided a party's violation of a court order.[38] Even when the nonparty entity has no other connection to the forum, its violation of the order has been termed a "super contact" that is itself a sufficient purposeful contact with the forum to meet the "minimum contacts" prong of the specific jurisdiction analysis.[39]

The leading case to apply this analysis is the Fifth Circuit's decision in *Waffenschmidt v MacKay*.[40] In *Waffenschmidt*, the defendant in a securities litigation suit had disposed of assets in violation of the court's injunction by "transferr[ing] them in the form of United States Treasury Notes

---

[35] Of course, this difficulty is compounded by uncertainty in the personal jurisdiction realm more broadly; although scholars have attempted to set out overarching theories of jurisdiction that could bring some order to the jurisdictional doctrine, no one theory has yet swayed the courts. *See, e.g.*, Stanley E. Cox, *The Missing 'Why' of General Jurisdiction*, 76 U. PITT. L. REV. (forthcoming 2015) ("[G]eneral jurisdiction cases have lurched along on the basis of unchallenged assumptions and judicially felt inclinations rather than been guided by any meaningful analysis."); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 7 (2010) ("The constitutional law of personal jurisdiction is muddled in part because it is not moored to a coherent purpose and thus drifts on shifting intellectual currents."); Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245 (2014) (noting the "disarray" of current doctrine, and recommending pragmatic changes to the doctrine that account for economic and political realities); Tanya J. Monestier, *Where Is Home Depot "At Home"?:* Daimler v. Bauman *and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 292 (2014). As a result, we continue to have a confused and conflicting jurisprudence among the lower courts.

[36] *Gucci*, 768 F.3d at 136.

[37] *Id.* at 137.

[38] *Id.* (citing Waffenschmidt v. MacKay, 763 F.2d 711, 718–19 (5th Cir. 1985); ClearOne Commc'ns, Inc., v. Bowers, 651 F.3d 1200, 1215–16 (10th Cir. 2011); SEC v. Homa, 514 F.3d 661, 673–75 (7th Cir. 2008).

[39] Julia K. Schwartz, Comment, *"Super Contacts": Invoking Aiding-and-Abetting Jurisdiction to Hold Foreign Nonparties in Contempt of Court*, 80 U. CHI. L. REV. 1961, 1961 (2013) ("Many circuits have held that a district court can hold a nonparty in contempt for knowingly aiding and abetting the violation of an injunction or restraining order, even when the court could not otherwise establish personal jurisdiction over that individual. In these cases, knowingly assisting the violation of an injunction establishes sufficient minimum contacts with the forum to establish personal jurisdiction. This principle has been referred to as a 'super contact.'"); *see also Waffenschmidt*, 763 F.2d at 721 ("Haling a person into court only upon finding that the nonparty has aided in knowingly violating an injunction fulfills traditional notions of fair play and substantial justice because it is foreseeable that the person would be required to respond in that forum.").

[40] *Waffenschmidt*, 763 F.2d 711.

with attached interest coupons" to several individuals.[41] The court held the transferees in contempt and ordered them to restore the funds in addition to attorney's fees.[42] Although the nonparty individuals contested personal jurisdiction, the court upheld the district court's decision.[43]

In addition to the court's inherent powers (which the court suggested could have sufficed alone), the Fifth Circuit concluded that an *International Shoe* minimum-contacts analysis would also support the exercise of personal jurisdiction in the case.[44] The court essentially applied an effects-test rationale to uphold jurisdiction, concluding that because the nonparties had "purposefully engaged in activity outside Mississippi that would have the foreseeable and intended result of dissipating assets subject to marshalling in that forum," they had sufficient forum contacts for jurisdiction.[45] Furthermore, the court found that jurisdiction over a "nonparty [who] has aided in knowingly violating an injunction" also "fulfills traditional notions of fair play and substantial justice" because the nonparty could reasonably foresee being "required to respond" in the forum.[46]

Other courts have followed the *Waffenschmidt* analysis to exercise personal jurisdiction over domestic nonparties.[47] It remains to be seen, however, whether these cases will survive the Supreme Court's other major personal jurisdiction case of 2014—*Walden v. Fiore*.[48] In *Walden*, the Court held that it would be improper for a Nevada court to exercise jurisdiction over a police officer in Georgia who had allegedly drafted an untruthful affidavit in support of an asset-forfeiture case.[49] Although the plaintiffs had alleged that the officer's untrue statements had effects in Nevada, where they lived and where they suffered the deprivation of funds, the Court disagreed.[50] It held that the plaintiffs "lacked access to their funds in Nevada not because anything independently occurred there, but because Nevada is where respondents chose to be at a time when they desired to use the funds seized by petitioner."[51] The Court concluded that

---

[41] *Id.* at 714.

[42] *Id.* at 715–16.

[43] *Id.*

[44] *Id.* at 717.

[45] *Id.* at 723.

[46] *Id.* at 721.

[47] *See, e.g.*, ClearOne Commc'ns, Inc., v. Bowers, 651 F.3d 1200, 1216 (10th Cir. 2011) (requiring "active concert or participation with a party"); SEC v. Homa, 514 F.3d 661, 673–75 (7th Cir. 2008) (applying a similar analysis to American nonparties who resided outside the country); *see also* Eli Lilly & Co. v. Gottstein, 617 F.3d 186, 194 (2d Cir. 2010) (holding that a nonparty "submitted himself to the personal jurisdiction of the Eastern District of New York when he aided and abetted a violation of the court's order").

[48] Walden v. Fiore, 134 S. Ct. 1115 (2014).

[49] *Id.* at 1119.

[50] *Id.* at 1125.

[51] *Id.*

because the plaintiffs "would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had," the defendant could not be said to have targeted his conduct at Nevada.[52] Because the cases allowing personal jurisdiction based on aiding a party's injunction violation rests on a "targeting" theory (as the *Gucci* court stated, "these decisions rely on the theory that intentionally violating an asset-freeze injunction is conduct 'designed to have purpose and effect in the forum'"),[53] these decisions appear vulnerable to challenge after *Walden*. Simply because a party may suffer financial deprivation in a forum does not mean that the financial institution targeted that forum when it released assets. Thus, aiding-and-abetting or conspiracy jurisdiction over domestic nonparties appears questionable after *Walden*.

The argument against aiding-and-abetting jurisdiction is stronger when applied to foreign entities; after all, foreign entities may not have any duty to comply with a foreign court's order. Although some commentators have recommended allowing aiding-and-abetting jurisdiction over nonparties in transnational cases as well as domestic ones,[54] the *Gucci* court pointed out that most courts have not yet done so.[55] Indeed, some courts have refused to subject foreign entities to aiding-and-abetting jurisdiction even in circumstances that would give rise to jurisdiction over a domestic entity.

In the leading transnational case *Reebok International Ltd. v. McLaughlin*, plaintiff Reebok had sued the defendant for selling counterfeit athletic shoes.[56] It obtained a temporary restraining order freezing the defendant's assets.[57] After Banque Internationale a Luxembourg (BIL) allegedly released funds to the defendant, Reebok sought sanctions against the bank for aiding the defendant in violating the restraining order.[58] The court explicitly noted that there was no general jurisdiction because the bank did not have a U.S. branch.[59] Thus, the question was whether there was specific jurisdiction based on the bank's release of funds (outside the country) to a defendant subject to the court's asset-freeze order.[60]

---

[52] *Id.*

[53] Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 137 (2d Cir. 2014) (quoting SEC v. Homa, 514 F.3d 661, 675 (7th Cir. 2008)).

[54] *See* Schwartz, *supra* note 39, at 2004 (recommending that courts apply aiding-and-abetting jurisdiction over foreign nonparties in conjunction with an additional comity analysis).

[55] Gucci, 768 F.3d at 137 ("We have found no case, however, applying such an analysis in the context of a *foreign* nonparty with only limited contacts in the forum.").

[56] 49 F.3d 1387 (9th Cir. 1995).

[57] *Id.* at 1388–89.

[58] *Id.* at 1389.

[59] *Id.* at 1391.

[60] *Id.*

The bank asserted that the court lacked personal jurisdiction over it, and the Ninth Circuit agreed.[61] It noted that the plaintiff had sought to enforce its temporary restraining order in Luxembourg but was "ultimately unsuccessful" in getting the Luxembourg court to recognize the judgment.[62] As a result, the court concluded, the bank had no obligation to comply with the U.S. court's order.[63] Because its release of funds subject to the asset-freeze order was not a wrongful act, it could not give rise to personal jurisdiction in California—it had not "purposefully directed its activities toward the United States."[64]

The *Reebok* court distinguished *Waffenshmidt* on the basis that the domestic nonparty in *Waffenshmidt* had a clear legal duty not to assist in violating the court's injunction once informed of it; as the *Waffenshmidt* court recognized, "a federal court's injunction is effective anywhere within the United States."[65] A federal court injunction is not effective internationally, however, unless the judgment is either domesticated or the country has an agreement to recognize it.[66]

The court's opinion in *Reebok* highlights another difficulty in using an aiding-and-abetting or effects-test theory to support the exercise of personal jurisdiction over a nonparty: the inextricable merits problem.[67] Basing personal jurisdiction on the existence of a conspiracy to violate a court order (or, similarly, on an aiding-and-abetting theory) requires the court to make a judgment about whether the nonparty had a duty not to violate the order.[68] Most courts, like the *Reebok* court, seem to accept the proposition that external conduct having an effect in the forum gives rise to jurisdiction only if the conduct is wrongful; as the court in *Reebok* pointed out, exercising jurisdiction over a foreign resident for lawful conduct committed abroad would sharply conflict with foreign sovereign-

---

[61] *Id.* at 1395.

[62] *Id.* at 1392.

[63] *Id.* at 1393.

[64] *Id.* at 1394.

[65] Waffenschmidt v. MacKay, 763 F.2d 711, 717 (5th Cir. 1985).

[66] Hilton v. Guyot, 159 U.S. 113, 227 (1895) ("[T]here is hardly a civilized nation on either continent which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money."). Even when courts are willing to recognize a foreign judgment, that judgment would at most be "conclusive between the parties." Whytock & Robertson, *supra* note 25, at 1465.

[67] Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. DAVIS L. REV. 1301, 1326 (2012); *see also* Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 FORDHAM L. REV. 234, 256 (1983) ("The essential problem of basing jurisdiction on conspiracy is the presentation of factual issues inextricable from the substantive merits of the plaintiff's claim.").

[68] Robin E. Wright, Note, *Conspiring to Create Jurisdiction:* Gibbs v. PrimeLending *and the Conspiracy Theory of In Personam Jurisdiction in Arkansas*, 65 ARK. L. REV. 723, 747 (2012) ("Cases utilizing the conspiracy theory of in personam jurisdiction are highly likely to reach the merits of the case because the theory is premised on an effect in a particular forum.").

ty.[69] Problematically, however, at the jurisdictional stage there likely has not been sufficient fact-finding to be able to reliably conclude whether that conduct was wrongful or not—and when courts either guess or make assumptions about that wrongfulness, they reach "unpredictable and conflicting" jurisdictional determinations.[70]

It becomes even more difficult for courts to determine the "wrongfulness" of conduct when evaluating a foreign nonparty's decision to release money in contravention of a U.S. asset-freeze order. In *Reebok* the court noted that a Luxembourg court order required the bank to release funds despite the U.S. restraining order, thus making it clear that, under the foreign sovereign's law, the entity's conduct was not only not wrongful, but was in fact legally required.[71] In other cases, however, the foreign law may be less clear—or the foreign law might privilege certain conduct that contravenes a U.S. order, even if that law does not *require* the entity to violate it. In one case, a U.S. district court upheld personal jurisdiction over Canadian nonparties, reasoning that because "the enforcement of the injunction and the sanctioning of the [foreign nonparties] do not violate any Canadian law, unlike in *Reebok*," jurisdiction based on their assistance in violating the court's injunction would be appropriate.[72] However, the mere fact that following the injunction would not violate foreign law does not by itself give rise to a duty for a foreign nonparty to obey that injunction.[73] In the absence of such an affirmative duty, its conduct in ignoring the injunction should not be held to be the type of wrongful conduct that could give rise to effects-test jurisdiction.

It is problematic at best to assess jurisdiction based on acts that, even though not required by foreign law, are nevertheless permissible under the law of the jurisdiction where the actor is located. Holding that such acts can give rise to extraterritorial personal jurisdiction would logically suggest that privileged conduct with an external effect—for example, non-defamatory speech—could give rise to jurisdiction in other forums where it would have a foreseeable effect. Speech that would be illegal in another country but protected within the United States (for example, political criticism of the North Korean regime and advocacy of a change in leadership) would, under this theory, give rise to jurisdiction in North Korea.[74] This would be an exorbitant exercise of jurisdiction that would

---

[69] *Reebok Int'l Ltd.*, 49 F.3d at 1394.

[70] Robertson, *supra* note 67, at 1326.

[71] *Reebok Int'l Ltd.*, 49 F.3d at 1392.

[72] FilmKraft Prods. India Pvt Ltd. v. Spektrum Entm't, Inc., No. 2:08-CV-1293 JCM (GWF), 2011 WL 2791477, at *3 (D. Nev. July 14, 2011).

[73] Domestic nonparties informed of the federal court injunction would have a duty under Federal Rule of Civil Procedure 65.

[74] *See, e.g.*, Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1581 (2010) ("Without uniform laws on subjects such as hate speech, the speaker may be subject to liability in multiple jurisdictions. As exceptionalists claim, the problem is that each country may impose extraterritorial duties on speakers.").

likely contravene due process.[75] Engaging in banking and financial practices (such as asset distribution or maintaining customer privacy) that are protected under the actor's local law—even if such actions are not definitively required by local law—likewise should not give rise to personal jurisdiction in the United States merely because those actions would have an effect in a U.S. forum where litigation is pending between other parties. Extraterritorial conduct should give rise to personal jurisdiction based on its in-forum effect only when that conduct can be determined wrongful as a matter of law, and only when the legal standards of both countries agree that the conduct is unlawful.[76] In most cases, mere failure to comply with a foreign court's order will not meet this standard.

III. A BALANCED APPROACH TO PERSONAL JURISDICTION

If foreign nonparties (particularly foreign multinational financial institutions) are no longer subject to personal jurisdiction in transnational cases either on a general jurisdiction theory or on an effects or aiding-and-abetting theory, then courts will have to determine whether some other basis establishes jurisdiction over them. If personal jurisdiction cannot be obtained against such institutions, their absence would cause significant disruption to international business. Commerce, after all, requires that participants "feel that there is a sure and effective remedy" available if and when disputes arise.[77]

Thus, there is likely to be substantial pressure to find other means by which courts can exercise jurisdiction over foreign nonparties. The Supreme Court's decisions in *Walden* and *Daimler* may limit the exercise of certain exorbitant forms of jurisdiction, and it is true that the Supreme Court has limited the extraterritorial reach of U.S. courts in other areas as well.[78] However, the issues raised by *Gucci* and *Tiffany* demonstrate that not all assertions of personal jurisdiction over foreign entities are exorbitant; these cases do not raise issues of transnational forum shopping, but instead demonstrate the need for an effective forum to resolve disputes about commerce that traverses national boundaries.[79] As a result, the ju-

---

[75] Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014) ("Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority."); *id.* at 763 (applying "[c]onsiderations of international rapport" to the due process analysis).

[76] Robertson, *supra* note 67, at 1343 (noting that, in a small number of cases, effects-test jurisdiction should be allowed when "the judge could make a pretrial determination of wrongfulness and harm without infringing on the right to a jury trial").

[77] Carlos Fabano, Note, *Maximizing Plaintiff Protection in the World of Asset Freezing and Bypassing the Due Process Requirement of Notice: The* Mareva *Injunction as an Alternative to the American Legal Remedies*, 9 ILSA J. INT'L & COMP. L. 131, 147 (2002).

[78] Linda S. Mullenix, *Personal Jurisdiction Stops Here: Cabining the Extraterritorial Reach of American Courts*, 45 U. TOL. L. REV. 705, 719 (2014).

[79] *See* Donald Earl Childress III, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67, 75 (2013) (arguing in favor of tightened

risdictional equilibrium is likely to shift toward other theories that can support jurisdiction consistently with principles of due process.[80]

In a recent article, we observed that the limitations of *Daimler* and *Walden* should lead parties and courts to consider whether cases previously founded on general jurisdiction can fit into either the more narrowly tailored requirements for specific jurisdiction or a framework of jurisdiction by consent.[81] We argued that a party's extensive forum contacts (that is, those rising to the traditional formulation of "systematic and continuous" contacts) are still relevant to the jurisdictional analysis, and should be imported into the specific jurisdiction framework.[82] In particular, we argued that the personal jurisdiction analysis should include consideration of both the forum state's regulatory interest in applying forum law and its non-regulatory interests in protecting its inhabitants and in providing a forum for effective redress of its citizens' claims.[83] When these issues are taken into consideration, we conclude that many cases formerly founded on general jurisdiction can indeed fit into a balanced jurisdictional inquiry—albeit one that requires a greater connection to the forum than pre-*Daimler* general jurisdiction would have required.

In this Article, we apply our earlier analysis to the particular problems raised in transnational litigation when courts seek to exercise jurisdiction over nonparties. We focus on situations where the nonparties have long-term, extensive contacts within the forum state[84]—the para-

---

jurisdictional standards to avoid "unleashing a brave new world of transnational litigation where litigants demand that courts compete for these cases").

[80] *See, e.g.*, Gwynne L. Skinner, *Beyond* Kiobel*: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-*Kiobel*) World*, 46 COLUM. HUM. RTS. L. REV. 158, 265 (2014) (arguing that "policymakers should ensure that businesses that have the privilege of engaging in a substantial amount of business in the United States agree to both the personal and subject matter jurisdiction of U.S. courts in exchange for that privilege," and pointing out that such a jurisdictional policy is not contrary to business interests, as U.S. courts can provide a "stable and predictable" forum for dispute resolution).

[81] Rhodes & Robertson, *supra* note 13, at 228–29.

[82] *Id.* at 263.

[83] *Id.* at 265–66.

[84] While some scholars have made persuasive arguments that personal jurisdiction over alien defendants should, in all cases, be predicated on nationwide rather than state forum contacts, such as Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 816–17 (1988) (arguing that personal jurisdiction over alien defendants depends on the contacts "the defendant has had with the nation as a whole . . . regardless of whether the court addressing the question is state or federal or whether the case is premised on an alleged violation of state or federal law"), the Supreme Court's decisions examine the alien defendant's contacts with the forum state, at least in state law cases. *E.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789–90 (2011); Asahi Metal Indus. Co. v. Superior Court., 480 U.S. 102, 113 n.* (1987). Nevertheless, evaluating nationwide contacts may be appropriate in cases pending in federal court, especially under nationwide service of process statutes or the federal district court's subpoena power under Fed. R. Civ. P. 45(b)(2), as highlighted in several other contributions to this symposium. *E.g.*, Allan Erbsen,

digm example being the financial institution with a branch office in New York City. We offer two suggestions for rebalancing the jurisdictional equilibrium to allow jurisdiction over nonparties consistent with due process. First, we suggest that courts relax the "connectedness" requirement in specific jurisdiction when the entity's contacts with the forum meet the continuous and systematic standard. Second, we raise the possibility that a state may validly obtain an entity's consent to jurisdiction in those cases implicating sufficient state regulatory and protective sovereign interests, as an exchange for the privileges granted by the state authorizing the entity to conduct intrastate business and to seek redress in the forum's courts.

A. Reframing the Connectedness Requirement

An assertion of general jurisdiction, such as that at issue in *Daimler*, is dispute-blind—that is, unconnected to the forum.[85] Specific jurisdiction, on the other hand, requires that the operative events of the lawsuit be linked in some fashion to the forum. But while such "case-linked" jurisdiction requires an "affiliatio[n] between the forum and the underlying controversy,"[86] the Supreme Court has yet to explain the reach of the necessary relationship, rendering this requirement jurisdiction's "least developed prong."[87] Without Supreme Court guidance, several different—and conflicting—approaches have been employed by the lower courts.[88]

Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty after Walden v. Fiore, 19 LEWIS & CLARK L. REV. 769, 776 (2015) ("[A]ll the federal appellate courts that have addressed the issue agree that when Congress authorizes nationwide service, the Constitution requires minimum contacts with the United States rather than with the forum state."); Daniel Klerman, Walden v. Fiore *and the Federal Courts: Rethinking FRCP 4(k)(1)(A) and* Stafford v. Briggs, 19 LEWIS & CLARK L. REV. 713, 716 (2015) ("The constitutional authority of a federal court to assert jurisdiction based on contacts with any part of the United States is the justification for statutes that give the federal courts 'nationwide service of process' and thus nationwide personal jurisdiction in antitrust, securities, and some other areas of federal law."); Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 683 (2015) ("When a non-U.S. defendant causes injury in the United States, a U.S. court should be able to assert jurisdiction over such a defendant if the defendant's contacts *with the United States as a whole* satisfy due process."). For purposes of our analysis here, though, it is unnecessary to address nationwide contacts; thus, we will proceed on the narrower assumption that the foreign defendant's contacts must be with the forum state.

[85] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014).

[86] Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (alteration in original) (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966)).

[87] Ticketmaster-N.Y., Inc. v. Alioto, 26 F.3d 201, 206 (1st Cir. 1994).

[88] For descriptions and critiques of the various approaches, see Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1026–47

Our proposal for resolving this conflict—and for obtaining equilibrium in jurisdiction doctrine after the demise of general contacts jurisdiction—returns to the original source of the jurisdictional contacts analysis, *International Shoe Co. v. Washington*.[89] In discussing the circumstances now known as "general jurisdiction" and "specific jurisdiction," *International Shoe* described three situations supporting jurisdiction over an out-of-state defendant: (1) "when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on"; (2) when "the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action . . . entirely distinct from those activities"; and (3) when "the commission . . . of such [single or occasional] acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient."[90] The second listed scenario, basing jurisdiction on activities "entirely distinct" from the alleged cause of action, describes the category now known as general jurisdiction. Yet the first and third scenarios are two different categories of specific jurisdiction.

The Supreme Court's most recent jurisdictional decisions affirm the existence of these two distinct specific jurisdiction categories. In *Daimler*, Justice Ginsburg explained that specific jurisdiction is appropriate either when (1) the defendant's continuous and systematic in-state activities give rise to the suit, or (2) the suit relates to certain "single or occasional" forum acts.[91] *Goodyear Dunlop Tires Operations, S.A. v. Brown* likewise detailed that specific jurisdiction encompasses both of "these two *International Shoe* categories," one for continuous and systematic acts and one for single or isolated forum acts.[92]

We propose that the connectedness or relationship requirement of specific jurisdiction varies depending on the categorization of the nonresident defendant's forum activities as either "single or isolated" or "continuous and systematic." Indeed, the Court's recognitions—and recent reaffirmations—of two different specific jurisdiction categories appear pointless if both categories necessitate the same relationship between the asserted cause of action and a wide potential range of the defendant's forum activities, from a single forum act to substantial, ongoing business operations in the state.

When a nonresident defendant conducts only "single or occasional" forum activities, only a relatively tight connection between those pur-

(2012); Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, but "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 201–07 (2005); Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343, 348–73 (2005).

[89] 326 U.S. 310, 317–18 (1945).

[90] *Id.*

[91] *Daimler AG*, 134 S. Ct. at 754.

[92] Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853 (2011).

poseful forum acts and the ensuing litigation should support specific jurisdiction. Such a tight connection ensures both that the state has a sufficient regulatory interest to adjudicate the claim and that the burdens on the nonresident to defend in the forum are minimized.[93] The state's adjudicative jurisdiction should thus only extend, we believe, to those purposeful single or occasional forum acts that are conditions or components of the lawsuit's allegations, which precisely tailors the nonresident defendant's limited forum activities to the state's interest in regulating in-state conduct and adjudicating resulting disputes.[94]

But the calculus changes when the foreign entity is conducting extensive forum activities—such as operating a branch of a multinational bank within the forum. In such situations, the "estimate of the inconveniences" of litigation in the forum is sharply curtailed,[95] especially if, as we propose here, considerations involving comity and choice of law are analyzed separately. With the defendant's burdens minimized, the state's interests in providing a procedure for resolving disputes between its citizens and those conducting activities within the state, protecting from harms suffered within the state, and providing a convenient forum for its citizens often will justify adjudicative jurisdiction.[96] While it is true that the lawsuit itself did not "arise from" the nonparty's forum contacts, it is sufficiently "related" to those contacts to support specific jurisdiction when the defendant is conducting continuous, ongoing, and substantial business activities in the forum.

In transnational cases involving nonparty foreign financial institutions with branch businesses in the forum, then, the financial institution often should be amenable to specific jurisdiction to provide an effective remedy against its customers sued in the state, even if the provided financial services were performed elsewhere. The financial institution's continuous and systematic forum business activities should authorize jurisdiction as long these activities are substantially similar to the conduct sought to be regulated that implicate state sovereign interests. New York, as one of the world's financial capitals, has strong interests in adjudicating international business claims and ensuring an effective remedy for its corporate citizens suffering financial harms. Subjecting the financial institution to jurisdiction in New York can hardly be said to be an undue burden when the institution is engaging in intentional conduct on a continuous and systematic basis providing similar services to the New York financial market. The very reason for the presence of the banks in New York is to benefit from the New York capital markets; the banks should

---

[93] Rhodes & Robertson, *supra* note 13, at 237–38.

[94] *See id.*

[95] *See Int'l Shoe*, 326 U.S. at 317 (quoting Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930)).

[96] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984); Shaffer v. Heitner, 433 U.S. 186, 214 (1977).

therefore be subject to obligations that arise from their substantially similar activities elsewhere that implicate New York's need to provide an effective remedy in transnational business litigation. Nonparty banks should not be able to avoid jurisdiction, when operating on a systematic and continuous basis in the forum, merely because the party defendants traversed national lines in structuring their banking transactions; rather, the necessary relationship for specific jurisdiction should typically be found to be present.

B. Extracting Consent Through State Registration

Another potential avenue for personal jurisdiction over nonparties is consent. Unlike subject matter jurisdiction, which can never be waived, a court may obtain personal jurisdiction over those either failing to timely object to jurisdiction or consenting affirmatively to jurisdiction.[97] Since *Daimler*, plaintiffs increasingly have asserted, as predicted in our previous work, that effective consent has been granted when nonresidents designate a corporate agent for service of process in the forum under state registration statutes.[98]

The corporate laws of all the states require nonresident corporations to register and appoint an agent for service of process before transacting specified intrastate business.[99] Plaintiffs are now more frequently alleging that, once this registered corporate agent is properly served within the state, the nonresident corporation is amenable to suit—irrespective of any contacts or due process analysis—under its bargained-for exchange for the privileges of conducting in-state business and accessing the state's

---

[97] Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.").

[98] *See* Rhodes & Robertson, *supra* note 13, at 259–60 ("Given the constriction of general jurisdiction in *Bauman*, the natural next step for plaintiffs is to seek other grounds for general jurisdiction, and the most obvious place to look for such consent is in a state registration filing that designates a corporate agent for service of process."). Some recent case examples since *Daimler* where plaintiffs successfully raised such an argument include Perrigo Co. v. Merial Ltd., No. 8:14-CV-403, 2015 WL 1538088 (D. Neb. Apr. 7, 2015); Otsuka Pharm. Co. v. Mylan Inc., No. 14-4508 JBS, 2015 WL 1305764 (D.N.J. Mar. 23, 2015); Novartis Pharm. Corp. v. Mylan Inc., No. CV-14-777-RGA, 2015 WL 1246285 (D. Del. March 16, 2015); Forest Lab., Inc. v. Amneal Pharm. LLC, No. CV-14-508-LPS, 2015 WL 880599 (D. Del. Feb. 26, 2015), *report and recommendation adopted*, CV 14-508-LPS, 2015 WL 1467321 (D. Del. Mar. 30, 2015); Acorda Therapeutics, Inc. v. Mylan Pharm. Inc., No. CV-14-935-LPS, 2015 WL 186833 (D. Del. Jan. 14, 2015). *But see* Neeley v. Wyeth LLC, No. 4:11-cv-00325-JAR, 2015 WL 1456984 (E.D. Mo. Mar. 30, 2015); Chatwal Hotels & Resorts LLC v. Dollywood Co., No. 14-CV-8679(CM), 2015 WL 539460 (S.D.N.Y. Feb. 6, 2015); AstraZeneca v. Mylan, No. CV-14-664-GMS. 2014 WL 5778016 (D. Del. Nov. 5, 2014), *motion to certify appeal granted sub nom.* Astrazeneca v. Aurobindo Pharma Ltd., CV 14-664-GMS, 2014 WL 7533913 (D. Del. Dec. 17, 2014).

[99] *See* Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 856 (2004).

courts. Nonresident defendants and nonparties, on the other hand, counter that merely appointing an in-state agent for service of process does not establish all-purpose amenability to suit, and that such an exorbitant jurisdictional reach would violate Due Process, Equal Protection, and Dormant Commerce Clause principles. Yet the ultimate resolution of this conflict is unclear: the Supreme Court has not provided meaningful guidance,[100] leading to sharp divisions among and between the state and federal courts addressing whether consent via registration statutes is a viable jurisdictional basis.[101]

While the Supreme Court in the nineteenth century frequently upheld jurisdiction based on a corporation's appointment of a registered agent to accept process, in exchange for corporate privileges to conduct business within the state, these early cases all involved claims that had at least a minimal transactional relationship to the corporation's in-state business.[102] Only in the early twentieth century did the Supreme Court indicate in some cases that such an exchange could support all-purpose adjudicative authority, but other cases from the same time period evince some discomfort with the proposition and opine the issue had not been definitively resolved.[103] Since *International Shoe*, with its general expansion of adjudicative authority, the Court has never returned to the issue except in dicta, which has generated the deep split regarding the jurisdictional consequences of such an arrangement.[104] Now, after the demise of general contacts jurisdiction, resolving this split will only become more salient to jurisdictional disputes.[105]

But despite the unanswered questions, certain foundational governing principles appear evident. First, for consent to be appropriate, the bound party should have legally sufficient notice of the terms of the exchange.[106] Consent to jurisdiction under registration statutes, then, cannot extend beyond the limits specified by either the terms of the relevant statutes or their case-law interpretation.[107]

---

[100] *See id.* at 856–60.

[101] *See* ROBERT C. CASAD & WILLIAM B. RICHMAN, 1 JURISDICTION IN CIVIL ACTIONS § 3.02[2][a] (4th ed. 2014) (collecting conflicting authorities).

[102] *See* Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 436–37 (2012).

[103] *See id.* at 437–40.

[104] *See id.* at 440–41.

[105] Rhodes & Robertson, *supra* note 13, at 262–63.

[106] *See* Verity Winship, *Jurisdiction over Corporate Officers and the Incoherence of Implied Consent*, 2013 U. ILL. L. REV. 1171, 1197 (2013) (criticizing the implied-consent framework and recommending a move to express forms of consent for jurisdiction over corporate officers).

[107] *E.g.*, Morris & Co. v. Skandinavia Ins. Co., 279 U.S. 405, 409 (1929) (concluding, "in the absence of language compelling it," a registration statute should not authorize state courts "to take cases arising out of transactions so foreign to its interests"); Robert Mitchell Furniture Co. v. Selden Breck Constr. Co., 257 U.S. 213, 216 (1921) (explaining the limits of amenability based on service of a registered agent depend on whether "state law either expressly or by local construction gives to

Second, for such an exchange to be an exchange—and not merely a fictional implied consent that the Supreme Court has disavowed[108]—the state must have something to exchange. States are generally free to enact conditions on the conferral of benefits, as long as the conditions do not violate the unconstitutional-conditions doctrine or another constitutional prohibition.[109] When the state possesses this authority, the corporation is merely trading a guarantee of its amenability to suit in the forum in exchange for the privileges of conducting business operations within the state and accessing the state's courts. This bargain is certainly not unconscionable with respect to the corporation's amenability for those claims implicating state sovereign interests in regulating conduct subject to its substantive law or in redressing harms suffered by its citizens.

The state has substantial interests in providing both a forum for its injured residents and a mechanism for serving nonresident corporations.[110] Corporations obtaining economic benefits from their in-state business activities do not suffer an undue burden by being required to answer for their obligations to state citizens.[111] Indeed, the burden imposed on such corporations is often less than the burden imposed by contractual consent to jurisdiction or forum selection clauses (especially those in form contracts)—and such clauses have routinely been upheld by the Supreme Court.[112] The corporation has a choice if it views the

---

the appointment a larger scope"). As Professor Tanya Monestier highlighted in a recent comprehensive article, only one state, Pennsylvania, currently explicitly attempts to codify registration to do business as a consent to all-purpose jurisdiction within the forum. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1366–68 (2015). In a handful of other states, statutory provisions are, or have been, arguably ambiguous regarding whether registration subjects the corporation to jurisdiction, but in most states the effect of service on a registered agent is not explicitly discussed in any statute. *See id.* at 1366–69 & nn.118, 121–22. Yet several state high courts have nonetheless long interpreted their vague, ambiguous, or even silent statutory registration and jurisdictional statutes and their predecessors as an all-purpose amenability hook. *E.g.*, Sternberg v. O'Neil, 550 A.2d 1105, 1113–16 (Del. 1988); Confederation of Can. Life Ins. Co. v. Vega y Arminan, 144 So. 2d 805, 808–10 (Fla. 1962); Mittlestadt v. Rouzer, 328 N.W.2d 467, 469 (Neb. 1982); Bagdon v. Phila. & Reading Coal & Iron Co., 111 N.E. 1075, 1077 (N.Y. 1916).

[108] *See, e.g.*, Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 169 (2001) (arguing that "wholly fictional notions of 'implied' and 'hypothetical' consent . . . [do not] seem to be a promising foundation upon which to build the house of jurisdiction, and this is why the Supreme Court abandoned the metaphor after a century or so of experimenting with it.").

[109] The state may not have this authority, for instance, if the corporation is exclusively engaged in interstate commerce. *See, e.g.*, Davis v. Farmers' Coop. Equity Co., 262 U.S. 312, 315–17 (1923).

[110] *E.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473–74 (1985); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984).

[111] *E.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[112] *E.g.*, Atl. Marine Constr. Co. v. U.S. District Court, 134 S. Ct. 568, 581–82 (2013); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 589 (1991); Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964). While Professor Monestier makes

state-imposed burdens as excessive: it can refrain from "doing business" in the state and not appoint the required agent.[113] We therefore propose that a state can typically obtain a nonresident corporation's consent to jurisdiction through the appointment of a registered agent for service of process, as a necessary condition for the corporation to conduct intrastate business and access forum courts, in those actions implicating sufficient state sovereign interests, including state interests in prescribing the substantive law governing the action or providing a convenient forum for its injured residents.

The more difficult issues arise when the registration statute is used as a basis for amenability for claims wholly unrelated to either the defendant's forum activities or other significant state sovereign interests. In these cases, the states may overreach by attempting to subject the corporation to dispute-blind general jurisdiction for any and all causes of action, regardless of whether the claims have any relationship to the state.[114] In addition, requiring a corporation to subject itself to all-purpose jurisdiction may violate the dormant Commerce Clause by imposing unconstitutional burdens on out-of-state businesses.[115] Such all-purpose jurisdictional assertions also implicate the Court's stated concern in *Daimler* that defendants have some ability to structure their operations to limit forum shopping.[116]

---

a forceful argument that the use of consent via a registration statute to support amenability for any and all claims against the corporation may be more coercive than a forum-selection clause due to the scope of the consent and the relationship of the parties to the agreement, *see* Monestier, *supra* note 107, at 1383–84, these concerns, we believe, are largely alleviated under our proposal here that limits the scope of the consent to those cases falling within the state's prescriptive or protective spheres.

[113] *See Burger King*, 471 U.S. at 472; World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Although some commentators have suggested that refraining from doing business in the state is not really a viable economic option for a corporation, *see* Monestier, *supra* note 107, at 1390, alternatives do exist for those corporations desiring to obtain economic benefits from a state without registering to do business. A corporation could conduct only interstate commerce, which bars the state from requiring its registration. *See Davis*, 262 U.S. at 315–17. And, to the extent that the corporation sought to conduct intrastate business within the forum, a corporate subsidiary or related corporate entity could "do business" within the forum, with any jurisdictional consent extending only to the registering entity (unless, perhaps, an alter ego theory justified piercing the corporate veil). *Cf.* Perrigo Co. v. Merial Ltd., No. 8:14-CV-403, 2015 WL 1538088 (D. Neb. Apr. 7, 2015) ("The Court is aware of no authority suggesting that Merial LLC's consent to jurisdiction is imputable to Merial SAS simply by virtue of their corporate affiliation.").

[114] *See* Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 29 (1989) (arguing that any right the state has to regulate the corporation's local conduct "does not necessarily entitle the state to regulate [its] activities elsewhere").

[115] *E.g.*, T. Griffin Vincent, Comment, *Toward A Better Analysis for General Jurisdiction Based on Appointment of Corporate Agents*, 41 BAYLOR L. REV. 461, 493 (1989) ("Only if the state interest is cognizable . . . will a court be justified in finding that such an exercise of jurisdiction comports with the Commerce Clause's protections.").

[116] Daimler AG v. Bauman, 134 S. Ct. 746, 762 (2014).

These issues are not necessary to resolve in *Gucci*, we believe, as New York likely possesses the requisite state interests to trump such concerns with respect to the Chinese nonparty financial institutions. First, New York cases have routinely over the last century interpreted the current registration statute and its predecessors as providing a consent to jurisdiction for claims filed against the registering corporation in New York courts.[117] Sophisticated multinational banks carrying on continuous financial business in New York can hardly claim ignorance of this century-old interpretation. Even under the concession that the judiciary's interpretation of this registration scheme could violate constitutional limits by requiring a registering corporation to submit to jurisdiction for any and all claims arising anywhere in the world, the scheme would still provide the requisite notice for a more limited jurisdictional submission based on the state's prescriptive or protective regulatory interests.[118]

---

[117] *E.g.*, STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd., 560 F.3d 127, 131 (2d Cir. 2009); Bagdon v. Phila. & Reading Coal & Iron Co., 111 N.E. 1075, 1077 (N.Y. 1916); Doubet LLC v. Trs. of Columbia Univ., 952 N.Y.S.2d 16, 18 (N.Y. App. Div. 2012); Augsbury Corp. v. Petrokey Corp., 470 N.Y.S.2d 787, 789 (N.Y. App. Div. 1983). Although the registration statute does not specify that the nonresident corporation's designation of the secretary of state as its agent upon whom process may be served operates as a consent to jurisdiction, *see* N.Y. BUS. CORP. LAW § 1304(a)(6) (McKinney 2013), the longstanding New York interpretations of this statute should suffice to support at least some form of consent-based jurisdiction, as state law controls the agency's scope. *Cf.* Robert Mitchell Furniture Co. v. Selden Breck Constr. Co., 257 U.S. 213, 215–16 (1921) (examining whether "state law either expressly or by local construction gives to the appointment a larger scope"). During its last two sessions, the New York legislature has considered but not (at least yet) succeeded in amending the New York Business Corporation Act to make this longstanding caselaw interpretation explicit: "A foreign corporation's application for authority to do business in this state, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such corporation." *E.g.*, A. 6714, 201st Leg., Reg. Sess. (N.Y. 2015); *accord* S. 7078, 200th Leg. Reg. Sess. (N.Y. 2014).

New York's banking law, interestingly enough, appears to require a connection between the foreign bank's New York activities and the suit for service on the banking superintendent: "No foreign banking corporation, other than a bank organized under the laws of the United States, shall transact in this state the business of [banking] . . . unless such corporation shall have: . . . (3) [f]iled in the office of the superintendent (a) a duly executed instrument in writing . . . appointing the superintendent . . . its true and lawful attorney, upon whom all process in any action or proceeding against it on a cause of action arising out of a transaction with its New York agency or agencies or branch or branches, may be served . . . ." N.Y. BANKING LAW § 200 (McKinney 2013). As discussed in the prior Subsection, at least some connection arguably exists between the causes of action asserted by Gucci America and Tiffany & Co. against the counterfeiters and the Chinese banks' New York business, which might authorize jurisdiction under this statutory provision.

[118] *Cf.* Monestier, *supra* note 107, at 1399–1401 (acknowledging that a registration statute could be constitutionally interpreted to provide "a limited form of consent" that possibly could provide a lower jurisdictional threshold than the traditional minimum-contacts test).

Second, New York has sufficiently strong sovereign interests here to support such a limited jurisdictional submission; specifically, ensuring that its corporate citizens, have an effective remedy for injuries suffered in transnational cases that were caused by customers of multinational financial institutions deriving substantial benefits from their New York offices. These multinational financial institutions use their New York branches to reach a larger customer base and finance international deals from one of the financial capitals of the world.[119] This is not a case of transnational forum shopping, but merely an attempt by two New York corporations to obtain an effective forum to resolve an international commercial dispute causing injury to them in the United States. Under these circumstances, requiring the banks' amenability in New York when transnational business goes awry does not appear to be an undue burden under the dormant Commerce Clause, an unconstitutional condition for the privilege of conducting business in New York and accessing its courts, or an arbitrary jurisdictional assertion or classification in violation of due process or equal protection principles.

IV. COMPARATIVE INSTITUTIONAL CHOICE IN TRANSNATIONAL LITIGATION

Of course, the personal jurisdiction inquiry is only one small piece of the larger court-access question in transnational litigation. Even when personal jurisdiction is present, other doctrines may counsel in favor of dismissal.[120] Such doctrines were developed to protect defendants' due process interests, but they may be even more important in protecting nonparties who are not alleged to have engaged in any wrongdoing. Even when the underlying litigation is appropriately heard in a U.S. court, and even when the court has jurisdiction over foreign nonparties, these factors are not necessarily sufficient for the court to require a nonparty to comply with its order; instead, the court must conduct a separate comity analysis to ensure that requiring compliance will not unduly infringe on foreign sovereign interests.[121]

---

[119] J. Zeevi & Sons v. Grindlays Bank (Uganda) Ltd., 333 N.E.2d 168, 172 (N.Y. 1975) ("[New York] is a financial capital of the world, serving as an international clearinghouse and market place for a plethora of international transactions . . . .").

[120] Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1094 (2010) (observing that "forum non conveniens plays a growing role in controlling court access").

[121] Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 139 (2d Cir. 2014) ("[C]omity principles required the district court to consider the Bank's legal obligations pursuant to foreign law before compelling it to comply with the Asset Freeze Injunction."). For a comprehensive and insightful account of all the various forms of international comity applied by U.S. courts, see William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. (forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2558175. The aspect of international comity authorizing dismissal of a suit due to concerns regarding the appropriate sovereign to prescribe the applicable rules of conduct can be traced to the founding. *See* Gardner

The Supreme Court's opinion in *Hilton v. Guyot*—decided more than a century ago, but still influential for its articulation of the principle's importance—defines comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[122] The *Gucci* court held that such a comity analysis must consider the extent of the forum's legislative jurisdiction—that even if the court could constitutionally exercise personal jurisdiction over the nonparty, it should also consider whether an exercise of such authority would exceed the forum's authority to prescribe substantive law.[123] The court cited to section 403, "Limitations on Jurisdiction to Prescribe," of the *Restatement (Third) of Foreign Relations Law*, which sets out a list of factors to analyze the appropriate reach of the state's prescriptive jurisdiction. Restatement factors include "the link of the activity to the territory of the regulating state," the "importance of regulation to the regulating state," "the extent to which the regulation is consistent with the traditions of the international system," and "the likelihood of conflict with regulation by another state."[124]

---

v. Thomas, 14 Johns. 134, 137–38 (N.Y. Sup. Ct. 1817) (refusing to exercise jurisdiction as a matter of discretion in a suit between two British subjects regarding an incident at sea, even though the defendant was present in the forum, because hearing the case might disrupt commerce and interfere with international relations). *See also* Brinley v. Avery, 1 Kirby 25 (Conn. Super. Ct. 1786) (similar holding).

[122] Hilton v. Guyot, 159 U.S. 113, 164 (1895). Yet commentators have rightly noted the ambiguity in the precise definition and scope of comity. Dodge, *supra* note 121, at *4–5; Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893, 895 (1998). Professor Dodge has championed a helpful alternative formulation, defining comity in international cases as "deference to foreign government actors that is not required by international law but is incorporated in domestic law." Dodge, *supra* note 121, at *9 (emphasis omitted).

[123] *Gucci*, 768 F.3d. at 139 & n.20.

[124] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403. The eight factors are:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

The *Gucci* court's requirement of a separate comity analysis that focuses on legislative jurisdiction is, in many ways, a welcome relief. Several scholars (including some in this symposium) have recently urged that courts tighten the relationship between legislative (or prescriptive) jurisdiction and adjudicative (or personal) jurisdiction.[125] Professor Donald Childress has explored the relationship between comity and conflict of laws, and has urged courts to consider the scope of the forum's legislative jurisdiction before exercising personal jurisdiction over foreign defendants.[126]

The *Gucci* opinion requires this analysis to be separate and explicit, rather than hidden as a factor within the "fairness" prong of the personal jurisdiction doctrine.[127] Making the comity analysis a separate analytical step—and including an assessment of prescriptive jurisdiction within the comity analysis—improves the chances that courts will give it due attention.[128] But more importantly, it avoids some of the concerns that come from the Court's retrenchment of extraterritorial jurisdiction more broadly. Specifically, it avoids crystallizing narrow jurisdictional require-

---

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

[125] *E.g.*, Stanley E. Cox, *Personal Jurisdiction for Alleged Intentional or Negligent Effects, Matched to Forum Regulatory Interest*, 19 LEWIS & CLARK L. REV. 725, 727 (2015) (urging "personal jurisdiction should presumptively match with constitutional ability to apply forum law"); John T. Parry, *Rethinking Personal Jurisdiction after* Bauman *and* Walden, 19 LEWIS & CLARK L. REV. 607, 630 & nn.104–05 ("[A] rebuttable presumption should exist that state courts have personal jurisdiction when the state has prescriptive jurisdiction. Any other result would hamstring the states by undercutting their legitimate regulatory authority." (footnote omitted)); Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1165 (2013) ("Not surprisingly, choice of law is the 'elephant in the room' in most personal jurisdiction cases.").

[126] Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1548 (2013) (bringing comity and conflicts principles into the personal jurisdiction analysis by arguing that courts should not exercise personal jurisdiction over a foreign defendant unless "the state has a constitutionally sufficient interest in applying its law or adjudicating a controversy involving its domiciliaries" and "the policies of other interested nations whose laws would be arguably applicable are given due respect and consideration and would not be adversely affected by the exercise of jurisdiction"); Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 78 (2010) ("A principled approach requires the historical recognition that comity is a conflict of laws doctrine designed at its core to ameliorate conflicts between sovereigns and their laws.").

[127] *Gucci*, 768 F.3d. at 139 & n.20.

[128] *See* Theodore J. Folkman, *Two Modes of Comity*, 34 U. PA. J. INT'L L. 823, 826 (2013) ("Two key concerns that face U.S. courts when they speak of comity are the fear of being seen to sit in judgment on the courts of other nations and the fear of causing diplomatic problems for the United States."). Performing a separate comity analysis increases the attention given to both concerns.

ments into constitutional doctrine, and allows the political branches room to act.[129]

Applying a broader constitutional standard—rather than adopting a set of tightly circumscribed rules—does not mean decoupling the personal jurisdiction analysis from constitutional law.[130] It does mean, however, that courts should operate in a broad sphere that balances governmental and individual interests and focuses on the big picture of due process—even if that means, at times, that the constitutional standard alone cannot determine the full contours of jurisdiction.[131] Other doctrines are available to fill many of the gaps left behind: the comity analysis itself may counsel against exercising jurisdiction,[132] or the forum non conveniens doctrine may suggest that the court should dismiss the entire case even when personal jurisdiction could be exercised consistent with constitutional safeguards.[133]

---

[129] *See, e.g.*, Kate Bonacorsi, Note, *Not at Home with "At-Home" Jurisdiction*, 37 FORDHAM INT'L L.J. 1821, 1857 (2014) (arguing in favor of a personal jurisdiction standard "decoupled from Constitutional Due Process," and "focused instead on alignment with international law norms").

[130] *See* Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 643 (2007) ("[A] constitutionalization of personal jurisdiction under the Due Process Clause is historically sound, and the minimum contacts test can be reconciled with other strands of substantive due process."). A constitutional approach is not without cost, however. *See* John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court's Decisions in* Goodyear Dunlop Tires *and* Nicastro, 90 WASH. U.L. REV. 1707, 1749–50 (2013) ("If the court were to rule that foreign businesses are not entitled to the same jurisdictional rules available to citizens, it could then begin the process of fashioning a new law of personal jurisdiction more appropriate for the increased global nature of the world today."); Joan M. Shaughnessy, *The Other Side of the Rabbit Hole: Reconciling Personal Jurisdiction Jurisprudence with Jurisdiction to Terminate Parental Rights*, 19 LEWIS & CLARK L. REV. 811, 814 (2015) (noting the "doctrinal instability" from constitutionalizing state court jurisdictional limitations).

[131] Rhodes, *supra* note 130, at 643 ("Such balancing, of course, will lead to indeterminate results in some cases. Yet similar uncertainty is present in all constitutional doctrines attempting to protect individual rights under the American conception of justice.").

[132] While the comity analysis will typically provide another jurisdictional barrier, this is not necessarily detrimental to plaintiffs' interests. A judgment violating comity principles is unlikely to be recognized or enforced abroad, *see* Austen L. Parish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 51 (2006), which may prevent plaintiffs from obtaining an effective remedy if the foreign defendant is without U.S. assets. Refusing to exercise jurisdiction due to comity principles can therefore actually assist plaintiffs in those states adopting tort reform measures in products-liability cases precluding suits against retailers and merchants when the manufacturer is amenable to jurisdiction. *E.g.*, COLO. REV. STAT. § 13-21-402(2) (2013); 735 ILL. COMP. STAT. ANN. 5/2-621(b) (West 2013); MINN. STAT. ANN. § 544.41(2)(3) (West 2014); TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a)(7)(B) (West 2013); WASH. REV. CODE § 7.72.040(2)(a) (2012).

[133] Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014) ("The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of

Nevertheless, a broad due process standard can still leave room for lawmaking outside the constitutional sphere—and, most importantly, will leave room for input from the political branches. As other scholars have pointed out, the Court's recent jurisdictional rulings seem to be founded on a concern that U.S. courts are overreaching their authority and engaging in "abusive jurisdiction."[134] There is disagreement among onlookers about whether this fear is founded, but even a perception of such abusive jurisdiction can have real-world effect. Thus, for example, the Court in *Daimler* quoted the Solicitor General's warning that exorbitant jurisdiction could cause difficulty in negotiating procedural agreements: "The Solicitor General informs us, in this regard, that 'foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.'"[135] Likewise, some onlookers have suggested that permitting jurisdiction over multinational financial institution nonparties could cause those entities to move from New York.[136] These are considerations more appropriate for political branch involvement, and courts should be wary of adopting a constitutional standard for personal jurisdiction that would foreforeclose political action.

A framework for comparative institutional choice can help guide policymakers in framing a more coherent court-access doctrine.[137] Such a

---

general jurisdiction posed."); Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 139 (2d Cir. 2014) (explaining the importance of the comity analysis); Robertson, *supra* note 120, at 1091.

[134] Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After* Daimler AG v. Bauman, 76 OHIO ST. L.J. 101, 159 n.262 (2015) ("There is no question that members of the Court are convinced that abusive jurisdiction is a real danger requiring a constitutional solution."); *see also* Pamela K. Bookman, *Litigation Isolationism,* 67 STAN. L. REV. 1081 (2015).

[135] *Daimler AG*, 134 S. Ct. at 763 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 2, *Daimler AG*, 134 S. Ct. 746 (No. 11-965), 2013 WL 3377321, at *2).

[136] Gus Lubin, *The New York Fed Is Protecting Chinese Banks from a Historic Lawsuit by Gucci and Tiffany*, BUS. INSIDER (OCT. 5 2011), http://www.businessinsider.com/gucci-and-tiffany-china-banks-2011-10 ("If every global bank in New York can be subpoenaed globally, it doesn't matter what country it's from, the answer will be, 'I'm outta here . . . .We'll just do our business in London.'") However, this statement seems relatively unlikely in light of courts' long-standing assumption, prior to *Daimler*, that banks with New York branches are subject to general jurisdiction in New York. *See supra* notes 30–32.

[137] *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5–6 (1994) (explaining the process of comparative institutional analysis); Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 TUL. L. REV. 157, 209 (2008) (concluding that a comparative institutional framework can usefully be applied to procedural questions); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1738 (2005) ("[I]nstitutional analysis may be employed best at the stage of interpretive choice, that is, in shaping the particular doctrines that courts adopt in various different federalism contexts.").

framework combines an articulation of the policies at issue with an analysis of the strengths and weaknesses of the institutions with the ability to act.[138] It asks "not only what changes should be made to legal rules, but also who should make them," and "analyzes which institution is the most appropriate vehicle for legal reform."[139] For issues of court access in transnational litigation, the goals may include issues that are central to litigation generally—such as providing an effective forum for plaintiffs to vindicate claims and ensuring that defendants do not suffer undue inconvenience—but are also likely to include larger policy goals such as promoting international commerce and avoiding causing offense to foreign sovereigns.[140]

When the relevant goals and interests are explicitly set out, it becomes clear that the judiciary cannot act in a vacuum—and it becomes similarly apparent that no institution is likely to be effective on its own. First, courts act from a limited data set: they do not get to choose the cases or issues that come before them, but must work with the cases one by one.[141] Thus, relying on court decisions alone is unlikely to lead to a standardized or coherent court-access doctrine.[142] Congressional action could easily provide a clearer personal jurisdiction doctrine that merges procedural safeguards with policy considerations (and commentators have urged it to do so),[143] but Congress is also subject to interest-group capture and political paralysis.[144] Executive branch action can be helpful in conjunction with both judicial and congressional activity. Thus, for example, the executive branch will presumably continue to engage in negotiating multilateral conventions (perhaps one day a revitalized judgments convention that explicitly negotiates jurisdictional bases),[145] and will con-

---

[138] Robertson, *supra* note 120, at 1114–16.

[139] *Id.* at 1114.

[140] *See id.* at 1114–18 (explaining the policy goals inherent in transnational litigation and forum non conveniens determinations); Cassandra Burke Robertson, *The Politicization of Judgment Enforcement*, 45 CASE W. RES. J. INT'L L. 435, 436 (2012) ("There is no doubt that questions of court access and foreign judgment enforcement implicate both foreign policy and economic vitality.").

[141] Young, *supra* note 137, at 1738.

[142] Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 356 (2008) ("[I]t is a leap of faith to infer that the American legal system will respond systematically and not incrementally and marginally, as it has in the past.").

[143] Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1349 (2014) ("[F]ixing personal jurisdiction by judicial rulemaking is only a second-best solution, a legally shaky means to implement changes that would be better negotiated by Congress.").

[144] Robertson, *supra* note 120, at 1123 ("Congress's most significant disadvantage—its vulnerability to interest-group capture—is the flip side of its advantage in openness and participation.").

[145] *See* Jeffrey Talpis & Nick Krnjevic, *The Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant that Gave Birth to a Mouse*, 13 SW. J.L. & TRADE AMERICAS 1, 3–4 (2006) (explaining that the failure of the Hague Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and

tinue to file amicus briefs on politically sensitive procedural issues, as it did in the *Gucci* case, where the United States explicitly asked the court to conduct a more thorough comity analysis that included attention to "the competing sovereign interests at stake."[146] Nevertheless, unilateral executive action in international comity is no panacea; the President's foreign policy agenda, which often depends on selective preferentialism and nuance, may, as Professor William Dodge has persuasively argued, compromise judicial independence, contravene the rule of law, and even harm some foreign relationships.[147]

Given the varying institutional competencies, it is important that personal jurisdiction doctrine leave room for the three branches to act in tandem—especially in cases that affect international interests. It may seem counterintuitive to suggest that action from all three branches is needed to create a more coherent policy; this action may appear confusing to foreign entities, who are less familiar with the intricacies of our divided system of government.[148] However, the alternative to coordinated action is *un*coordinated action—and uncoordinated action is largely what has gotten us into the confused jurisdictional state we presently confront, with piecemeal, case-by-case Supreme Court opinions that implicate broader issues of foreign relations.[149] Conversely, if the court's role is limited to a broader jurisdictional inquiry focused on fundamental due process questions, the other branches will have room to act.[150]

In practical terms, this would mean separating the constitutional concerns of due process from the more prudential concerns of international comity. Courts would still engage in both analyses, and would decline to exercise jurisdiction if comity concerns counseled against it. However, maintaining an intellectual separation between the two anal-

---

Commercial Matters was due in part to "sticking points" that included an inability to agree on appropriate bases for jurisdiction).

[146] Brief for the United States of America as Amicus Curiae at 16, Gucci Am., Inc. v. Weixing Li, 768 F.3d 122 (2d Cir. 2014) (Nos. 11-3934, 12-4557).

[147] Dodge, *supra* note 121, at 73–75.

[148] Political divisions between states, the federal government, and the three branches of government combine to create additional challenges. *See* Strong, *supra* note 26, at 85 ("[I]t is extremely difficult for foreign parties to understand the complex web of constitutional, statutory, and common law that arises as a matter of state and federal law.").

[149] Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014) (using comity concerns to bolster the Court's jurisdictional decision); *see also* Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1222 (2007) (explaining that court decisions have the "potential to embarrass the executive in the conduct of foreign relations" when they engage in foreign policymaking).

[150] *See, e.g.*, Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 175 (2004) (explaining the risks of over-constitutionalization of procedural issues, with a focus on foreign judgment enforcement, and noting that "the illusion of unconstitutionality has hidden the fact that whether Un-American Judgments are to be enforced is not predetermined by the Constitution, but instead must be decided on the basis of policy").

yses would avoid the risk of over-constitutionalizing court-access doctrine in a way that precludes the other branches of government from setting court-access policy in the transnational context.

V. CONCLUSION

The Supreme Court's recent decisions in *Daimler v. Bauman* and *Walden v. Fiore* continue to have significant and expected consequences for courts and litigants. One of those consequences is uncertainty over the trial court's power to exercise jurisdiction over nonparty multinational financial institutions. In the past, courts and commentators assumed that courts could exercise jurisdiction over such entities as long as they maintained a branch office within the forum. Now, however, that jurisdictional basis is no long viable after *Daimler*. In addition, the other common rationale for jurisdiction over nonparties, both foreign and domestic, was an "aiding and abetting" standard that relied on an effect-test rationale. This approach appears less viable in the wake of *Walden*, and is especially suspect in the case of foreign nonparties who may not have any legal obligation to comply with a foreign court order.

Narrower jurisdictional standards are not the end of the story, however. International trade and commerce depend on having a fair and efficient forum in which to resolve disputes. Contract cases could perhaps be heard in an extra-national forum such as an arbitral tribunal, but tort cases such as the trademark infringement suit in *Gucci* and *Tiffany* require effective access to national courts. Thus, we predict that jurisdictional doctrine will shift toward a new equilibrium that broadens the standards for specific jurisdiction and consent-based jurisdiction in response to the narrowing of general jurisdiction.

We argue that the type of continuous and systematic contacts present when multinational corporations maintain a local office are strong enough to warrant relaxing the connectedness requirement in specific jurisdiction. Although such contacts are not enough to permit jurisdiction in the absence of a forum connection, that forum connection need not be as substantial as it would need to be if the entity's contacts were sporadic and of lesser quality. When the nature of the entity's in-forum activities are related to the state's sovereign interests in the case, such as when a multinational financial institution provides in-forum banking services and the court is seeking the bank's assistance in enforcing an asset freeze, then the connectedness standard should be met. Likewise, when an entity intentionally obtains benefits from state registration (such as the ability to conduct intrastate business and sue in the forum as a plaintiff), the state may, in exchange, have the power to ask the entity to consent to in-state jurisdiction, at least for those cases implicating sufficient protective and prescriptive state sovereign interests.

Finally, although we advocate for a somewhat broader constitutional jurisdiction standard that balances state regulatory, individual, and business interests, we also favor a strong comity analysis that incorporates for-

eign sovereign interests and ensures that courts' exercise of adjudicative power is bounded by the forum's legislative jurisdiction. We argue that this comity analysis should be separate from personal jurisdiction, both to ensure that it receives the court's undivided attention and to leave room for the other branches of government to participate in developing a coherent doctrine of court access in cases affecting foreign interests.