2003

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INTRODUCTION

Personal jurisdiction has a nonresident alien problem. Or, more accurately, personal jurisdiction has *two* nonresident alien problems. The first is the extent to which the specter of the nonresident alien defendant has overshadowed—if not unfairly driven—the discourse and doctrine over constitutional personal jurisdiction. The second is that the constitutional right to resist personal jurisdiction enjoyed by the nonresident alien defendant in a civil lawsuit is remarkably out of alignment with that same nonresident alien's ability to assert nearly every other constitutional right. Neither of these observations is new, although the first problem has drawn far more scholarly attention than the second.[1]

In *Personal Jurisdiction and Aliens*,[2] Professors Dodge and Dodson constructed an elegant and persuasive argument for "alienage jurisdiction" using a national contacts approach. Their argument rests on an examination of the constitutional basis for personal jurisdiction in both state and federal court.[3] First, the Article uses the Fifth Amendment's structure to demonstrate the constitutionality of nationwide contacts for foreign defendants in federal court. The Article then extends that argument to the

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1. *See e.g.*, Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 35–36 (2006) (observing that consideration of nonresident aliens clouds a realistic and systematic approach to assessing the theories and doctrines of personal jurisdiction); *see also* Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801 (2013); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006).

2. William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205 (2018).

3. As Professor Parrish observed in 2006, "[t]he assumption—now firmly entrenched—is that the personal jurisdiction standards for domestic defendants and nonresident, alien defendants are the same. But is this assumption sound?" Parrish, *supra* note 1, at 5.

application of nationwide contacts in the Fourteenth Amendment context of state court personal jurisdiction. Their Article is an important contribution to civil procedure literature because it takes two ideas in personal jurisdiction that have traditionally been doctrinal stumbling blocks—alien defendants and the problem of national markets—and shows how they can pave the way to coherent personal jurisdiction doctrine rather than thwart its progress.

In this short response, I add to this discussion by considering the implications of the Supreme Court's jurisprudence concerning the due process rights of aliens, particularly in *United States v. Verdugo-Urquidez*[4] and its progeny. Dodge and Dodson identify this as doctrinal underbrush to be cleared. I argue, however, that when amplified this concept actually *strengthens* their argument. The modern era of discussion surrounding aliens' due process rights began with *Verdugo-Urquidez*. Dodge and Dodson view this line of authority as a potential problem for the concept that aliens can assert the due process right of personal jurisdiction. In their analysis, they correctly conclude that *Verdugo-Urquidez* does not stand for the proposition that aliens are barred from asserting due process claims (including personal jurisdiction claims) in federal and state courts.[5] Dodge and Dodson, however, have missed the opportunity to explore how *Verdugo-Urquidez* establishes a direct link to their argument for a test of nationwide contacts.

Verdugo-Urquidez and its progeny show that the Supreme Court has developed a doctrine in which the exploration of an alien's ability to assert constitutional rights is not a binary question, but a complicated inquiry which rests on the relationship of the alien (and often the conduct at issue in the assertion of the constitutional right) to the United States as a whole. This line of cases, with its emphasis on the relationship of the alien to the United States, bears a remarkable resemblance to the analysis of relationships between litigant, forum, and conduct that are involved in personal jurisdiction analysis. They strengthen the Dodge and Dodson argument that the United States (as opposed to individual states) is the *relevant sovereign* for analyzing the personal jurisdiction of nonresident aliens.

There are two benefits to highlighting this aspect of the Dodge and Dodson Article. The first is to demonstrate that *Verdugo-Urquidez* is far from a problem—it actually figures into Dodge and Dodson's "alienage jurisdiction" solution. The second is realizing that *Verdugo-Urquidez* fits within alienage jurisdiction allows us to directly address what was considered a doctrinal conundrum in personal jurisdiction: How is it that aliens have greater constitutional rights in personal jurisdiction as their connection to the United States lessens, while aliens in all other contexts seem to require a *closer* relationship to the United States? By viewing

4. 494 U.S. 259 (1990).

5. *See* Dodge & Dodson, *supra* note 2, at 1221–22.

Verdugo-Urquidez as a necessary part of the argument for alien personal jurisdiction, focusing on the United States as the relevant sovereign, and clarifying that nationwide contacts are the correct solution, this supposed doctrinal incongruity becomes a harmonious (and even necessary) reconciliation of the two doctrines.

I. THE BROADER CONSTITUTIONAL CONTEXT FOR EXTENDING RIGHTS EXTRATERRITORIALLY, OR TO ALIENS

It is true that, in the narrowest sense, *Verdugo-Urquidez* does not apply to personal jurisdiction. Dodge and Dodson engage briefly with the doctrine, primarily to minimize its potential to serve as a barrier to developing a doctrine of national minimum contacts for alien-defendant cases. They note that a few scholars have "argued that aliens may not challenge a U.S. court's exercise of personal jurisdiction because if they lack minimum contacts, they also lack due process rights under the Constitution."[6] Then, they dismiss this contention by noting that "*Verdugo-Urquidez* speaks only to the Fourth Amendment and says nothing about personal jurisdiction."[7] While Dodge and Dodson are not wrong that one can avoid this topic by emphasizing the gulf between the constitutional rights held in Fourth Amendment and those of personal jurisdiction, their analysis misses a deeper issue.

Verdugo-Urquidez is actually part of a much larger doctrinal problem: to what extent does the Constitution apply extraterritorially;[8] and likewise, to what extent does the Constitution apply to noncitizens, even when they are on American soil?[9] Even without the wrinkle of alien status, the scope of constitutional rights varies widely across the different provisions and amendments of the Constitution; the Due Process Clauses of the Fifth and Fourteenth Amendments tie the enforcement of many of these rights together. Due process doctrine is the customary vehicle by which litigants can assert most constitutional rights,[10] and it also provides constitutional protections in civil and criminal proceedings,[11] including the procedural right to resist personal jurisdiction in a forum state.[12] Aliens have never had automatic and unrestricted access to the constitutional protections enjoyed by United States citizens, nor have aliens been categorically denied the

6. Dodge & Dodson, *supra* note 2, at 1221.

7. *Id.*

8. *See* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009).

9. Judge Moore exhaustively studied the relationship of aliens to the Constitution in her New York University Law Review article. Moore, *supra* note 1.

10. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 417–19 (2010) (describing substantive due process).

11. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (establishing the modern three-part test for procedural due process).

12. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (establishing the minimum contacts test for due process in personal jurisdiction); Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (grounding personal jurisdiction in the Fourteenth Amendment).

protections of the United States Constitution. Rather, courts have developed a set of doctrines that attempt to establish the terms and boundaries of constitutional rights that aliens may assert.[13]

The Constitution extends rights to "persons" as well as, in certain instances, to "citizens."[14] The Supreme Court has long grappled with the question of which "persons" are protected under the Constitution and when such persons may enforce various constitutional rights.[15] As a general matter, "[i]n almost every context aliens—even resident aliens—have less due process rights than citizens."[16] The jurisprudence concerning the constitutional rights of nonresident aliens unfolded along two dimensions. One was whether and how to make distinctions across classes of aliens: resident versus nonresident, documented versus undocumented, presence within versus absence from the territory of the United States, and other combinations of these categories.[17] The other was whether and how to make distinctions amongst the various constitutional rights that aliens might assert.[18]

Verdugo-Urquidez was the Supreme Court's major modern statement on the topic.[19] In that case, a Mexican citizen and resident challenged a Fourth Amendment search of his residence in Mexico. The Court held that the nonresident alien defendant was not entitled to Fourth Amendment protection for a search that occurred entirely outside of the United States. The Court did not categorically exclude noncitizens from constitutional protections,[20] but the Court did emphasize that "aliens receive constitutional protections when they have come within the territory of the United States and developed *substantial connections* with this country."[21] Although Justice

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13. *See* Moore, *supra* note 1; RAUSTIALA, *supra* note 8.

14. Moore, *supra* note 1, at 806 ("The Constitution variously refers to . . . a 'natural born Citizen'; a 'Citizen' or 'Citizens'; 'the people' or 'the People'; a 'Person' or 'Persons.' ") (footnotes omitted); *see also* Hernandez v. United States, 757 F.3d 249, 262 (5th Cir. 2014) ("Not all constitutional provisions will have equal extraterritorial application, if any.").

15. *See* Plyler v. Doe, 457 U.S. 202 (1982) (holding undocumented immigrant children are entitled to public education as a matter of nondiscrimination under the Equal Protection Clause of the Fourteenth Amendment); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."); Wong Wing v. United States, 163 U.S. 977 (1896) (holding aliens are entitled to certain Fifth Amendment rights in a criminal case).

16. Parrish, *supra* note 1, at 29.

17. Moore, *supra* note 1, at 815–22.

18. Parrish, *supra* note 1; Moore, *supra* note 1.

19. 494 U.S. 259 (1990).

20. *Id.* at 272–73 (emphasizing that the unique connection of each alien to the United States would determine the scope of constitutional protection).

21. *Id.* at 271 (emphasis added). There has been some disagreement as to whether the "substantial connection" language is binding, as it comes from a part of a plurality opinion in which Justice Kennedy did not join. But, several courts followed the "substantial connections" approach, reasoning, for example, that "the 'sufficient connection' phrase and language akin to

Kennedy grounded the "substantial connections" language, at least partially, in the fact that the Fourth Amendment (along with the First and Second Amendments) refers to "the people,"[22] lower courts have extended the substantial connections language and standard to the evaluation of other constitutional rights' extraterritoriality.[23]

Verdugo-Urquidez, then, was not a cut and dry rejection of a nonresident alien's ability to assert a singular constitutional right.[24] Rather, it established a broader doctrine (or collection of doctrines) that tasks courts with evaluating the *relatedness* of a potential constitutional rights holder to the United States. The *Verdugo-Urquidez* court opined that an alien "has been accorded a generous and ascending scale of rights as he increases his identity with our society."[25] Of course, a "relatedness inquiry" is precisely the type of analysis that the Court demands of defendants challenging personal jurisdiction, but with opposite results to *Verdugo-Urquidez*: the weaker a defendant's relationship is with the forum state, the stronger her constitutional right will be.[26]

Courts confronting the issue of a nonresident alien's ability to assert constitutional rights have not mechanically applied the bare holding in *Verdugo-Urquidez*, but instead have focused on the "substantial" and "sufficient" connections language.[27] Some courts emphasized the extent of

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it is found throughout the *Verdugo-Urquidez* opinion." United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1261 (D. Utah 2003).

22. 494 U.S. at 265 (suggesting the Fourth Amendment, like the First and Second, is directed at "the people," a "class of persons who are part of a national community or who have otherwise developed *sufficient connection with this country* to be considered part of that community") (emphasis added).

23. *See, e.g.*, United States v. Ali, 71 M.J. 256, 268 (C.A.A.F. 2012) (using the "substantial connections" standard to evaluate whether Fifth and Sixth Amendment protections apply to a non-resident alien defendant in a military criminal justice proceeding); United States v. Huitron-Guizar, 678 F.3d 1164, 1168 (10th Cir. 2012) ("*Verdugo–Urquidez* teaches that 'People' is a word of broader content than 'citizens,' and of narrower content than 'persons.' ").

24. *See* Atamirzayeva v. United States, 524 F.3d 1320, 1324–29 (Fed. Cir. 2008) (applying *Verdugo-Urquidez* to the Fifth Amendment); *see also* Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 202 (D.C. Cir. 2001) ("Neither the word 'only' [in *Verdugo-Urquidez*] nor anything else in the holding purports to establish whether aliens who have entered the territory of the United States and developed connections with this country but not substantial ones are entitled to constitutional protections.").

25. 494 U.S. at 269 (quoting Johnson v. Eisentrager, 339 U.S. 763, 770 (1950)) (internal quotations omitted).

26. *See* Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 872 (2012) (emphasis added) ("The relatedness problem in personal jurisdiction has two dimensions .... the relationship between the *defendant* and the forum state .... [and] the relationship between the *lawsuit* and the forum state.").

27. *See, e.g.*, Martinez-Aguero v. Gonzalez, 459 F.3d 618, 625 (5th Cir. 2006) ("[R]egular and lawful entry of the United States pursuant to a valid border-crossing card and ... acquiescence in the U.S. system of immigration constitute ... voluntary acceptance of societal obligations, rising to the level of 'substantial connections.' ") (footnotes omitted).

voluntariness inherent in the connection.[28] Others opined that simple acts such as "acquiescence in the U.S. system of immigration" constitute a substantial connection.[29] Acceptance of societal obligations (such as working or attending school) can demonstrate a substantial connection to the United States and is not necessarily diminished by criminal or antisocial behavior.[30]

Fifteen years after *Verdugo-Urquidez*, the Supreme Court decided *Boumediene v. Bush*,[31] a high-profile opportunity to engage with the question of nonresident aliens' ability to assert claims that their constitutional rights were violated. The Supreme Court held that legislation barring Guantanamo inmates from applying for a writ of habeas corpus was a violation of the Suspension Clause[32] and that the Guantanamo detainees were entitled to raise constitutional challenges.[33] The Court was clear in noting that the detainees were nonresident aliens[34] and that they were detained within the borders of Cuba, which retained *de jure* sovereign authority over the territory that includes the Guantanamo Bay naval base.[35] Although the defendants lacked the voluntary connections per *Verdugo-Urquidez* to indicate that one identifies oneself with American society, the Court insisted on extraterritorial application of the habeas right given the importance of the right itself and its importance as "an indispensable mechanism for monitoring the separation of powers."[36] Taken together, then, the *Verdugo-Urquidez* cases alongside *Boumediene* stand for two propositions. First, the nature of the relationship of the person to the United States sovereign matters in evaluating the extraterritorial application of constitutional rights. Second, further constitutional concerns internal to the structure of the Constitution itself are relevant to the decision to apply a constitutional right either extraterritorially or to nonresidents (or both). Both of these propositions should be part of an analysis of whether and how to apply the right to resist personal jurisdiction to nonresident aliens.

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28. *Verdugo-Urquidez*, 494 U.S. at 271 (considering the "significant *voluntary* connection with the United States") (emphasis added).

29. *Martinez-Aguero*, 459 F.3d at 625. *Compare* Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 996 (9th Cir. 2012) ("Under *Verdugo–Urquidez*, the inquiry is whether the alien has voluntarily established a connection with the United States, not whether the alien has voluntarily left the United States."), *with* United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1271 (D. Utah 2003) ("[A]n individual previously deported alien felon is not free to argue that, in his particular case, he possesses a sufficient connection to this country to receive Fourth Amendment coverage (unless, of course, he could prove he was in this country lawfully). Any other determination would reward unlawful behavior.").

30. *See* United States v. Mesa-Rodriguez, 798 F.3d 664, 671 (7th Cir. 2015).

31. 553 U.S. 723 (2008).

32. *Id.* at 795–98.

33. *See id.* at 755.

34. *Id.* at 723, 755.

35. *Id.* at 753.

36. *Id.* at 765–66.

II. SITUATING PERSONAL JURISDICTION IN THE LARGER CONSTITUTIONAL CONTEXT

Personal jurisdiction figures into this problem because it is enforced, constitutionally, via the Due Process Clauses of the Fifth and Fourteenth Amendments.[37] There is a long tradition of scholarly unease with the due process foundation of personal jurisdiction. Commentators have written numerous works challenging the historical, doctrinal, and policy arguments for locating the constitutional right to challenge personal jurisdiction in the Due Process Clauses, or even in the Constitution at all.[38] For the purposes of this paper, I do not take a position on the matter of whether the Due Process Clauses provide the best or any basis for enforcement of the right to resist personal jurisdiction. For now, it is sufficient to shore up arguments for the world we live in, and that is a world in which—scholarly commentary notwithstanding—the Supreme Court has repeatedly reaffirmed and even emphasized the due process basis of personal jurisdiction.[39] Because the Court shows no signs of backing away from due process anytime in the near future, it remains important to grapple with the problems internal to that doctrinal choice, even though a longer-term scholarly project of pushing the Court to reexamine the constitutional basis of personal jurisdiction is also a worthwhile pursuit.

The Court has never made any formal distinctions between domestic and foreign defendants in applying the Due Process Clauses to personal jurisdiction. In fact, "[t]he Court's application of domestic jurisdictional standards to alien defendants . . . appears not to have been the result of considered reflection."[40] As Dodge and Dodson note, although there are some isolated personal jurisdiction factors for which alien defendants are treated differently, "the conventional approach to the minimum-contacts requirement of personal jurisdiction is that . . . the same standard [applies]

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37. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (establishing the minimum contacts test to satisfy due process in personal jurisdiction); Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (grounding personal jurisdiction in the Fourteenth Amendment). This fact has been the subject of decades-long criticism. *See, e.g.*, Wendy Collins Perdue, *What's Sovereignty Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729 (2012); Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567 (2007); Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249 (2017).

38. *See* Sachs, *supra* note 37, at 1254–55 (collecting sources criticizing the due process basis of personal jurisdiction and suggesting the alternative constitutional and general law theories that scholars have posited as more plausible).

39. *See, e.g.*, Bristol–Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1779–81 (2017); 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."); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918 (2011) ("A state court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause."); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877 (2011) ("Due process protects the defendant's right not to be coerced except by lawful judicial power.").

40. Parrish, *supra* note 1, at 26.

to both alien and domestic defendants."[41] On rare occasion, a lower court might flirt with this observation and suggest further judicial scrutiny or congressional action. For example, Judge Williams of the U.S. Court of Appeals for the D.C. Circuit suggested in a concurring opinion that "in a suitable case it may be valuable for courts to reconsider both the merits of the assumption in *Asahi Metal* and kindred cases that private foreign corporations deserve due process protections . . . ."[42]

The application of the same constitutional standard to foreign and domestic defendants has given rise to something of a due process paradox. This paradox, namely, is that a litigant's alien status is often a barrier to a full or robust assertion of many due process rights, but alien status is simultaneously the foundation of the strongest possible assertion of the due process protection of resisting the personal jurisdiction of an American court. Austen Parrish characterized the problem as follows:

> [T]he notion that nonresident alien defendants can assert due process protections within the context of personal jurisdiction leads to an inexplicable result. Aliens abroad with no connection to the United States have no constitutional rights but, under current personal jurisdictional law, paradoxically have the strongest claim that the Due Process Clause prohibits a U.S. court from asserting jurisdiction over them. Conversely, aliens with substantial U.S. connections are entitled to constitutional protections but cannot resist jurisdictional assertions because, if they have substantial connections, they certainly must meet the minimum contacts test.[43]

Likewise, Judge Karen Nelson Moore has observed that "the extension of due process rights to aliens abroad in the civil procedure context stands in contrast with the treatment of [other constitutional rights] . . . where courts have extended fewer protections to aliens, especially those outside U.S. borders."[44]

Periodically, a federal court has taken note of the conflict that *Verdugo-Urquidez* causes with personal jurisdiction. As a D.C. district court judge recently observed:

> [W]hy [should] foreign defendants, other than foreign sovereigns . . . be able to avoid the jurisdiction of United States courts by invoking the Due Process Clause when it is established in other contexts that nonresident aliens without connections to the United States typically do not have rights under the United States Constitution[?][45]

Dodge and Dodson take note of this conflict, especially to the extent that *Verdugo-Urquidez* would appear to limit the application of personal

41. Dodge & Dodson, *supra* note 2, at 1207.

42. GSS Grp. Ltd. v. Nat'l Port Auth., 680 F.3d 805, 819 (D.C. Cir. 2012).

43. Parrish, *supra* note 1, at 33.

44. Moore, *supra* note 1, at 847.

45. GSS Grp. Ltd. v. Nat'l Port Auth., 774 F. Supp. 2d 134, 139 (D.D.C. 2011).

jurisdiction due process rights. They minimize this conflict by tucking *Verdugo-Urquidez* away to its Fourth Amendment corner.[46] But this is a temporary fix. Although it creates doctrinal space for courts to allow nonresident aliens to assert personal jurisdiction due process rights under the Fifth and Fourteenth Amendments, it does not wipe away the tension between personal jurisdiction and the assertion of almost every other constitutional right. As it turns out, *Verdugo-Urquidez* is not merely an inconvenient obstacle, albeit one that is easily explained away. It actually provides yet another conceptual path to making the doctrinal case for treating nonresident aliens separately in personal jurisdiction and using a nationwide contacts test as the basis for personal jurisdiction analysis.

III. A RELATIONSHIP OF AVOIDANCE WITH THE UNITED STATES SOVEREIGN

Previous commentators who addressed the tension between personal jurisdiction over aliens and other due process rights of aliens have suggested various resolutions to the paradox. Austen Parrish concludes that the problem rests with locating personal jurisdiction in the Due Process Clause in the first place. He argues that personal jurisdiction is first and foremost about territoriality, and when it is properly reconceptualized as such, the tension disappears because there is no longer a personal jurisdiction due process right with which other due process rights conflict.[47] I take, as Dodge and Dodson do, the due process status of personal jurisdiction as a given,[48] even though there are serious and credible grounds for challenging this entire framework. That is a worthy endeavor, and one that has been ably performed by many other scholars in longer and more sustained articles. For now, it is useful to explain how courts and scholars can use existing due process framework to construct a meaningful doctrine of "alienage jurisdiction."

Judge Moore takes a different approach, suggesting that the tension is mostly illusory and that beneath the so-called paradox, the rationales behind each doctrine are in fact harmonious. The problem has been that "a rigid focus on doctrinal tensions may obscure the fact that this outcome is broadly consistent with a view of aliens' rights increasing alongside their connection to the United States."[49] I extend Judge Moore's argument even further, and suggest that not only are the rationales harmonious, but that the foundations of the *Verdugo-Urquidez* analysis can be applied to *reform* personal jurisdiction doctrine so as to shore up the nationwide minimum contacts approach that Dodge and Dodson so elegantly suggest in their Article.

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46. Dodge & Dodson, *supra* note 2, at 1221 ("*Verdugo-Urquidez* speaks only to the Fourth Amendment and says nothing about personal jurisdiction.").

47. Parrish, *supra* note 1.

48. *See* Dodge & Dodson, *supra* note 2, at 1211 (noting that their paper focuses on Congress's ability to authorize a national contacts approach applicable even in state courts via a "sustained analysis of the proper scope of the Due Process Clauses").

49. Moore, *supra* note 1, at 847–48.

Verdugo-Urquidez and the other lower court cases briefly outlined above show that the applicability of constitutional rights to nonresident aliens is neither absolutely guaranteed nor absolutely barred.[50] Rather, it is contingent on the person's *relationship* with the sovereign—the United States as a whole— to which the Constitution adheres. Extending this framework to personal jurisdiction, one finds that the concept of sovereignty plays not one but two roles. The key is to separate sovereignty as a source of authority for the right to *resist* personal jurisdiction from sovereignty as a source of authority for a state to *exercise* personal jurisdiction. Where nonresident alien defendants are concerned, the United States is the *only* relevant sovereign for the former, while there can be many relevant sovereigns for the latter.

Acknowledging the United States' central role as the relevant sovereign for personal jurisdiction over nonresident alien defendants lends significant support to the single-market theory under which (if adopted) a nonresident alien defendant may be subject to personal jurisdiction in a constituent forum state based on aggregate national contacts with the United States as a whole.

Justice Ginsburg advanced this idea in her *J. McIntyre Machinery, Limited v. Nicastro*[51] dissent, in which she argued for a single-market theory as a matter of logic: an alien manufacturer defendant " 'purposefully avail[s] itself' of the United States market nationwide, not a market in a single State or a discrete collection of States. [The defendant] thereby *availed itself of the market of all States* in which its products were sold."[52] She also argued for a single-market theory as a policy matter of aligning personal jurisdiction doctrine with modern economic realities: "Like most foreign manufacturers, [the defendant] was concerned not with the prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States."[53] In his plurality opinion, Justice Kennedy rejected this proposition, insisting that "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign analysis."[54] Thus, purposeful availment of the United States as a whole cannot necessarily include purposeful availment of any given state.[55]

But the *Verdugo-Urquidez* case reveals Justice Kennedy's error. Even if personal jurisdiction requires a sovereign-by-sovereign analysis, when a nonresident alien defendant is involved, this inquiry *necessarily includes* the

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50. *See supra* notes 21–30 and accompanying text.

51. 564 U.S 873, 904–06 (2011) (Ginsburg, J., dissenting) (emphasis added).

52. *Id.* at 905 (emphasis added) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

53. *Id.* at 904.

54. *Id.* at 884 (Kennedy, J., plurality). Justice Breyer questioned this "strict no-jurisdiction rule" in his concurrence, *id.* at 890–91 (Breyer, J., concurring), but did not endorse Justice Ginsburg's single-market theory. Notably, his hypothetical cautionary tales included both foreign and domestic defendants and did not distinguish between them.

55. *Id.*

United States as sovereign. Otherwise, there is no constitutional grounding for the existence and applicability of that right. Thus, the nonresident alien defendant's contacts (or lack thereof) with the United States as a whole are a prerequisite for any analysis that follows. The *Verdugo-Urquidez* doctrine itself provides the perfect template for such an analysis because it focuses on voluntariness and relatedness. The fact that a weak connection with the United States increases the personal jurisdiction right might look like a paradox or mirror image of how the Court viewed the Fourth Amendment in *Verdugo-Urquidez*. Despite this, a national aggregate contacts approach for nonresident alien defendants is in fact entirely consistent with that case. This is because the relevant relationship here is a relationship of avoidance. While it might seem counterintuitive at first, avoidance of the forum is *itself* a type of relationship, and here, it is that relationship that matters. In other words, the United States is the relevant sovereign for establishing the constitutional right, such a right depends on a type of relationship with the sovereign, and evaluating aggregate contacts (particularly market-based contacts) with the United States is an excellent fit for evaluating a relationship based on voluntariness and relatedness.

Layered on top of *Verdugo-Urquidez* is *Boumediene* and the Court's concern for accounting for constitutional values such as separation of powers when determining the extraterritorial scope of a constitutional right.[56] One can draw an analogy between the concern for separation of powers in *Boumediene* and the concern for sovereignty and territoriality in personal jurisdiction.[57] Concerns about alien defendants, particularly nonresident alien defendants, have driven much of the broader discourse about the outer boundaries of personal jurisdiction. As Dodge and Dodson astutely observe, "[s]eparating the due process analyses for alien and domestic defendants would not only recognize these fundamental differences but would also relieve the Court from the concern that a national-contacts approach to alien-defendant cases would have unintended consequences in domestic-defendant cases."[58] If the Court is as genuinely concerned as some of the justices purport to be about the values of territoriality and sovereignty as they relate to due process and personal jurisdiction,[59] then tying the extension of the personal jurisdiction right to *Verdugo-Urquidez*, and thus recognizing the United States as the relevant sovereign, would allow the Court to bring some clarity and integrity to the issues of sovereignty, territoriality, and federalism when cases involve domestic defendants. *Boumediene* is instructive because it demonstrates that this structural concern regarding the Constitution is itself legitimate grounds

56. *See supra* note 36 and accompanying text.

57. To reiterate an earlier point, this does not constitute an endorsement of sovereignty or territoriality as an appropriate approach or an appropriate part of due process. It simply recognizes a constitutional path forward based on current law. *See supra* Part II.

58. Dodge & Dodson, *supra* note 2, at 1209.

59. As Dodge and Dodson note, this concern first reappeared in the *J. McIntyre* case and then resurfaced again in the due process analysis in *Bristol-Myers Squibb*. *See id.* at 1229–30.

for construing the source and scope of a constitutional right of nonresident aliens.

Note that this approach works well in *both* the Fifth Amendment and the Fourteenth Amendment context. The Fifth Amendment context is certainly the more obvious case because the adjudicating courts (federal trial courts) are the courts of the relevant sovereign, the United States.[60] The fact that these courts rely primarily on state law long-arm statutes is the result of legislative choice and not constitutional design; it is no surprise that there has been vigorous renewed interest in congressional action to draft new nationwide jurisdictional statutes or rules that are much broader in scope than the current limited options.[61] But this approach also works for the Fourteenth Amendment right that restrains the exercise of personal jurisdiction in state courts. The Fourteenth Amendment constrains state actors, but the right itself is federal in nature. Extending *Verdugo-Urquidez* from its Fourth Amendment origins to the Fourteenth Amendment is no different than importing the standard from the Fourth Amendment to the Fifth. Just as federal courts have used *Verdugo-Urquidez* and associated cases as a basis for evaluating the extraterritorial application of constitutional rights, state courts have also cited *Verdugo-Urquidez* as the relevant authority for determining the boundaries of extraterritorial constitutional application.[62]

Thus, the conditions under which a nonresident alien can exercise the Fourteenth Amendment right are controlled by the relationship to the United States as a whole, not by a relationship to a particular state. Although each state may, of course, promulgate long-arm statutes that are stricter than the outer constitutional limits, this should not change the understanding of

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60. *See* Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 3 (1984) (offering a lengthy consideration of the constitutional basis for aggregate nationwide minimum contacts).

61. *See, e.g.*, Jonathan Remy Nash, *National Personal Jurisdiction* (Feb. 6, 2018) (unpublished manuscript) (available at https://ssrn.com/abstract=3119383); Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, VA. J. INT'L L. (forthcoming 2018) (available at https://ssrn.com/abstract=3108729); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301 (2014). This scholarship is not only a recent phenomenon.

62. *See, e.g.*, Rosales v. Battle, 7 Cal. Rptr. 3d 13, 19 (Cal. Ct. App. 2003) (evaluating the extraterritorial application of the Equal Protection Clause under *Verdugo-Urquidez*); HL Farm Corp. v. Self, 820 S.W.2d 372, 375 (Ct. App. Tex. 1991), *rev'd on other grounds*, 877 S.W.2d 288 (Tex. 1994) (evaluating the extraterritorial application of the Equal Protection Clause under *Verdugo-Urquidez*), HL Farm Corp. v. Self, 877 S.W.3d 288 (Tex. 1994); Torres v. State, 818 S.W.2d 141, 143 n.1 (Ct. App. Tex. 1991), *vacated in part on other grounds*, 825 S.W.2d 124 (Tex. Crim. App. 1992) (applying *Verdugo-Urquidez* to alleged Fourth Amendment violation by state actors). *Cf.* State v. Rodriguez, 854 P.2d 399, 416 n.14 (Or. 1993) (en banc) (assuming that application of Fourth Amendment rights to aliens in state court proceedings is controlled by *Verdugo-Rodriguez*); Riechmann v. State, 581 So. 2d 133, 138 (Fla. 1991) (evaluating defendant's Fourth Amendment right under the *Verdugo-Urquidez* voluntary attachment standard).

what the Fourteenth Amendment itself requires. To the extent that it may seem strange or awkward to apply a nationwide contacts approach to a right that is at least partially rooted in state sovereignty and territoriality,[63] *Boumediene* and its constitutional structural concerns notwithstanding, the awkward fit simply shores up the arguments for taking seriously the concerns about linking the *entirety* of the personal jurisdiction right and its analysis to the Due Process Clauses.[64] Exploring the constitutional standard of nationwide minimum contacts in state court cases is not new,[65] and Dodge and Dodson's Article reinforces the doctrinal and policy arguments for using that standard of nationwide minimum contacts over aliens in state court cases.[66] Various scholars offer serious arguments that such an extension is unwarranted;[67] I believe, however, that the *Verdugo-Urquidez* line of inquiry gives yet another reason that this standard is not only constitutionally acceptable, but is constitutionally required when the case at bar involves extraterritorial application of the Due Process Clauses.

CONCLUSION

The foregoing analysis reveals a crucial analytical error in personal jurisdiction analysis: in failing to consider the ways in which a nonresident alien defendant's constitutional rights may differ from domestic defendants, courts have missed the opportunity to recognize that the United States as sovereign is *always* playing an active and important role. It is not quite fair to accuse courts of deliberately stripping the United States of its sovereign role. It is rather that courts have taken the United States as a sovereign with regard to personal jurisdiction due process rights as trivially true: the Constitution produces the right, but from there the meaningfulness of the United States as sovereign is abandoned. But *Verdugo-Urquidez* demonstrates that United States' sovereignty is ever-present in any rights determination. Courts have focused almost exclusively on that second aspect of sovereignty—the ability of a forum state to exercise personal jurisdiction. This means that they have missed the opportunity to engage with the significance of the United States as sovereign, particularly when that relationship must (or should) be established and re-established as a predicate to the exercise of that right.

Acknowledging the role of *Verdugo-Urquidez* and like cases gives yet another solid doctrinal basis for Dodge and Dodson's path-breaking

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63. *Cf.* Nash, *supra* note 61, at 35 ("[I]t nevertheless is incongruous that whatever protection the Fourteenth Amendment *does provide* should be wholly detached from *state* sovereignty.").

64. *See supra* notes 37–39 and accompanying text; *see also* Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 145 (1983) (arguing nationwide minimum contacts over aliens in state court cases would require "*International Shoe* . . . to be recast, principally to rest upon factors of reasonableness and convenience.").

65. *See* Lilly, *supra* note 64, at 145–49.

66. *See* Dodge & Dodson, *supra* note 2, at 1235–41.

67. *See, e.g.*, Nash, *supra* note 61 at 32–36.

suggestions for a law of alienage jurisdiction, particularly as it concerns personal jurisdiction in the state courts.