Texas Civil Procedure Rule 202 Through the Personal Jurisdiction Looking Glass

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I. INTRODUCTION

Rule 202 of the Texas Rules of Civil Procedure has historically aided plaintiffs investigating potential claims by vesting courts with the authority to order potential defendants to submit to

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pre-suit depositions. The rule requires petitioners to file a Rule 202 petition “in a proper court.”\(^1\)  Recently, the Texas Supreme Court held in a 5–4 decision that a “proper court” under Rule 202 is one where venue would be proper, where the court can exercise jurisdiction over the subject matter, and where the court may assert personal jurisdiction over the defendant.\(^2\)

While the court declined to address the question of whether Rule 202 would violate the Fourteenth Amendment’s Due Process Clause absent a personal jurisdiction requirement,\(^3\) the court’s decision inescapably raises two related constitutional questions: whether submitting to a Rule 202 deposition constitutes a waiver of personal jurisdiction in the ensuing proceedings, and whether a court’s Rule 202 personal jurisdiction judgment binds the parties on that issue at the trial court if the petitioner files suit in a Texas court.

Rule 202 allows a Texas court\(^4\) to order a non-resident defendant to submit to the court’s jurisdiction over what a petitioner identifies as the subject matter of an anticipated suit.\(^5\) One might conclude that failure to object to personal jurisdiction at this pre-suit stage may act as a waiver when a plaintiff files an action concerning the same controversy in a Texas court where venue is proper and when the predicate jurisdictional facts are the same.\(^6\) Likewise, one might conclude that the Rule 202 court’s judgment on the issue is res judicata or that a defendant is estopped from re-litigating the issue at the trial level.\(^7\)

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1. TEX. R. CIV. P. 202.2(b).
2. In re Doe (Trooper), 444 S.W.3d 603, 608 (Tex. 2014).
3. Id. at 604.
4. This Article will refer to courts that hear Rule 202 petitions as “Rule 202 courts” to distinguish pre-suit hearings from hearings that take place when or if an actual suit is filed in a trial court.
5. See TEX. R. CIV. P. 202.1 (“A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person’s own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit.”); Trooper, 444 S.W.3d at 607–08 (stating that subject matter jurisdiction is a prerequisite for the operation of former Rules 187 and 737).
6. Trooper, 444 S.W.3d at 608–09 (noting the risks of delaying a challenge to personal jurisdiction under Rule 120(a)).
7. Id.
Lower courts faced with these issues will vary in their decisions based on where they locate the constitutional interest at stake. The two opinions in *Trooper* offer two historical views governing personal jurisdiction due process concerns; one view centers the due process inquiry on the non-resident defendant’s liberty interest, while the other centers the due process inquiry on the forum’s interest, buffered only by a non-resident’s potential inconvenience.

Part I of this Article begins by providing a brief account of personal jurisdiction waiver. Part II analyzes the majority and dissenting opinions in *Trooper*. Part III provides a brief history of personal jurisdiction due process to uncover its guiding principles, namely, the comity and liberty principles. Part IV offers a way to understand how the comity and liberty principles inform personal jurisdiction due process analyses. Part V argues that lower courts, and eventually the Texas Supreme Court, should find that due process requires a Rule 202 court to possess personal jurisdiction over a non-resident defendant and that, consequently, a Rule 202 court’s personal jurisdiction judgment should bind the parties at the trial level when the predicate jurisdictional facts are the same.

II. PERSONAL JURISDICTION WAIVER AND RULE 202

Personal jurisdiction is a personal right guaranteed by the Fourteenth Amendment’s Due Process Clause. Unlike subject matter jurisdiction—which reinforces separate powers between

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8. *See Trooper*, 444 S.W.3d at 609 (“It is true that the liberty interest protected by the Fourteenth Amendment ‘constrains a State’s authority to bind a nonresident defendant to a judgment of its courts’ and does not prohibit all state court proceedings.” (quoting Walden v. Fiore, 134 U.S. 1115, 1121 (2014))).

9. *See id.* at 613, 614–15 (Lehrmann, J., dissenting) (noting that “personal jurisdiction over a party is predicated on an analysis of his connections with the forum state” but deferring to a cost–benefit analysis conducted by Texas Judges under Rule 202).

governmental branches by limiting judicial power—a defendant can waive or forfeit her personal jurisdiction objection by her conduct. The most common personal jurisdiction waiver in Texas occurs when a non-resident defendant enters a general appearance.

A party may enter a general appearance “when it (1) invokes the judgment of the court on any question other than the court’s jurisdiction, (2) recognizes by its acts that an action is properly pending, or (3) seeks affirmative action from the court.” Under Texas’s “due-order-of-pleading” requirement, a defendant waives its personal jurisdiction objection by neglecting to enter a special appearance before filing any other motion or pleading. Furthermore, Texas’s “due-order-of-hearing” requirement dictates that the defendant’s personal jurisdiction motion must be heard before any other motion or pleading. In other words, a defendant can easily waive its constitutional right to object to a foreign


13. See, e.g., In re Guardianship of Parker, 275 S.W.3d 623, 628 (Tex. App.—Amarillo 2008, no pet.) (“[A] party waives the right to contest personal jurisdiction over it when it makes a general appearance before the court.”).


15. See TEX. R. CIV. P. 120a(1) (“The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.”); Trejo, 142 S.W.3d at 305 (holding Rule 11 agreement filed before special appearance did not constitute a general appearance because Rule 11 agreement is not a plea or motion).

16. See Gryenberg v. M–I L.L.C., 398 S.W.3d 864, 876 (Tex. App.—Corpus Christi 2012, pet. filed) (“In addition to the due-order-of-pleading requirement, rule 120a also entails a due-order-of-hearing requirement, which means that a special appearance motion shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard.” (quoting First Oil PLC v. ATP Oil & Gas Corp., 264 S.W.3d 767, 776 (Tex. App.—Houston [1st Dist.] 2008, pet. denied)) (internal quotation marks omitted)).
tribunal’s assertion of personal jurisdiction by a slight oversight or mistake.  

When a non-resident defendant takes action in ancillary proceedings, Texas courts generally do not consider such action a general appearance. For example, filing a Rule 11 agreement prior to a special appearance does not waive personal jurisdiction. Additionally, an agreement to extend a temporary restraining and injunction order does not constitute a general appearance. Generally, a defendant may also participate in discovery without entering a general appearance as long as a non-resident defendant does not seek affirmative relief on an issue, such as a motion to compel, before the jurisdictional issue.

17. Before Rule 120a, Texas historically maintained what Professor William V. Dorsaneo III coined “jurisdictional provincialism,” asserting personal jurisdiction over non-residents who made virtually any appearance, even an appearance to challenge the court’s jurisdiction. See William V. Dorsaneo, III, The History of Texas Civil Procedure, 65 Baylor L. Rev. 713, 761 (2013) (explaining that, before Rule 120a’s adoption, non-resident defendants who contested jurisdiction by making an appearance in Texas courts were deemed to have consented to jurisdiction, even when they were otherwise not amenable to process). Professor Dorsaneo argues that Rule 120a did not eliminate jurisdictional provincialism, as evidenced by the fact that the rule makes special appearance an exception to general appearance Rules 121, 122, and 123. Special appearance practice is complicated by strict rules such as due-order-of-pleading and hearing, and special appearance practice places the burden on the non-resident to negate a plaintiff’s asserted personal jurisdiction grounds. Id. at 762–63.

18. Grynberg, 398 S.W.3d at 878.

19. Trejo, 142 S.W.3d at 305.

20. See Carey v. State, No. 04-09-00809-CV, 2010 Tex. App. LEXIS 5683, at *8–9 (Tex. App.—San Antonio 2010, pet. denied) (holding that an agreement to extend temporary restraining and injunction orders does not constitute a general appearance because this agreement involves ancillary matters that occurred prior to the main suit); see also Minucci v. Sogevalor, S.A., 14 S.W.3d 790, 800 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (holding that the defendant did not waive special appearance by filing notice of oral hearing on motion to dissolve garnishment writ).

21. See Tex. R. Civ. P. 120a(1) (“The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance.”); see also Horowitz v. Berger, 377 S.W.3d 115, 122–23 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (holding that the defendant did not waive special appearance by filing discovery requests with opposing party and filing motion to compel
Now that the Texas Supreme Court has ruled that personal jurisdiction is a necessary predicate to a Rule 202 deposition, lower courts must consider where this proceeding falls should a suit ensue. Rule 120a has been the vehicle through which non-residents assert personal jurisdiction objections at the trial level, but the Trooper court held that Rule 120a protection must be afforded to non-resident defendants before pre-suit discovery may be had. Since the Rule 202 court must possess personal jurisdiction, one might think that Rule 120a is obviated at the trial level in cases preceded by a Rule 202 deposition. The easy situation would involve a non-resident defendant who raises a personal jurisdiction objection to a Rule 202 deposition, thereby preserving her objection. But if the Rule 202 court determines that jurisdiction is proper, a plaintiff might argue that defendant is estopped from re-litigating that issue. Further, if a non-resident defendant submits to a Rule 202 deposition without objection, a plaintiff may then argue that the defendant waived its personal jurisdiction objection by entering a general appearance, i.e., recognizing that the matter is properly pending.

22. In re Doe (Trooper), 444 S.W.3d 603, 688 (Tex. 2013).
23. Another way of stating the issue here is that the court rendered Rule 120a superfluous when suit is preceded by a Rule 202 deposition. Additionally, one might consider the court’s holding to mean that Rule 120a applies to cases not preceded by a Rule 202 hearing.
24. The doctrine of collateral estoppel bars re-litigation of identical issues of law, including the existence of personal jurisdiction over a defendant. See In re Assurances Generales Banque Nationale, 334 S.W.3d 323, 325–26 (Tex. App.—Dallas 2010, no pet.) (holding that the court’s prior determination of jurisdiction over defendant was an identical issue of law that precluded further consideration in a cross claim); Corea v. Bilek, 362 S.W.3d 820, 825–26 (Tex. App.—Amarillo 2012, no pet.) (holding that where personal jurisdiction over a defendant was fully litigated, future litigants were estopped from litigating that issue again).  
25. See supra note 15.
Regardless of whether a non-resident defendant has raised a personal jurisdiction objection in the Rule 202 proceeding, the defendant may always argue that the Rule 202 proceeding was ancillary to the plaintiff’s original action. The defendant might also argue “consent to personal jurisdiction in one case does not provide personal jurisdiction in another.” But these arguments lose their force given that the suit and the preceding Rule 202 deposition generally involve the same controversy, and the personal jurisdiction issue must be adjudicated under Rule 202. A Rule 202 court’s personal jurisdiction judgment must have some binding impact; it cannot be an advisory opinion without impugning the court’s subject matter jurisdiction. Moreover, simply appearing for a Rule 202 deposition may be enough to constitute a general appearance since a special appearance is merely an exception to a general appearance.

Courts could resolve this issue by treating a Rule 202 court’s personal jurisdiction judgment differently than a trial court’s judgment. The Texas Supreme Court left this possibility open when it explicitly declined to address the constitutional issue: whether Rule 202 would violate the Fourteenth Amendment’s Due Process Clause without a personal jurisdiction requirement. Lower courts might treat Rule 202 procedurally and, somehow, divorce it from due process requirements, thereby reserving constitutional concerns for later suit.

Bifurcating the issue this way merely delays the constitutional question, which must eventually be answered. The majority and dissenting opinions in Trooper provide predictive guidance on how future Texas courts and, eventually, the Texas Supreme Court may address this issue.


28. See, e.g., *Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (“The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties.”).

29. See *Dorsaneo*, *supra* note 17, at 762 (discussing judicial provincialism while noting that Rule 120a makes special appearance an exception to Texas’s general appearance provisions).

III. TROOPER THROUGH THE PERSONAL JURISDICTION LOOKING GLASS

Both the majority and dissenting opinions in Trooper analyze the personal jurisdiction issue procedurally, looking to the protection afforded defendants generally under the Texas Rules of Civil Procedure and addressing the constitutional issues inherent in the concept of personal jurisdiction only in passing. Yet, these constitutional musings speak volumes and reveal the Texas Supreme Court’s likely resolution of the questions raised in Trooper.

A. Non-Resident-Oriented Procedural Protection

The majority opinion in Trooper offered two reasons to read a personal jurisdiction requirement into Rule 202—neither (purportedly) tied to due process concerns. First, the court opined that Rule 202, absent a personal jurisdiction requirement, would not afford a defendant protection guaranteed by Texas Rule of Civil Procedure 120a. According to the court, a defendant is entitled to have personal jurisdiction decided prior to the decision of any other matter. The court also stated that Rule 120a limits discovery to facts essential to the jurisdictional question. A plaintiff could simply bypass this limited discovery standard by filing a Rule 202 deposition notice, thereby circumventing Rule 120a protections.

The majority put a curious and subtle spin on Rule 120a by reading the due-order-of-hearing requirement as a defendant protection, rather than as what some, perhaps most, consider a defendant limitation. From a historical perspective, it may be more

31. Trooper, 444 S.W.3d at 608.
32. Id.
33. See id. (“Under Rule 120a, a defendant who files a special appearance in a suit is entitled to have the issue of personal jurisdiction heard and decided before any other matter.”).
34. Id. (citing In re Stern, 321 S.W.3d 828, 838–40 (Tex. App.—Houston [1st Dist.] 2010).
35. Id. at 608–09.
36. See Dorsaneo, supra note 17, at 761–62 (noting that judicial provincialism historically asserted jurisdiction over non-residents who made
appropriate to consider due-order-of-pleading and hearing requirements as limitations to a defendant’s special appearance since failure to abide by this process constitutes a general appearance.\(^{37}\) If, as the court opined, a defendant who files a special appearance “is entitled to have the issue of personal jurisdiction heard and decided before any other matter,”\(^{38}\) then why should a court determine that a defendant has waived its personal jurisdiction objection by having another matter filed or heard first? If the defendant is “entitled” to this hearing at all, why can a defendant not simply decide to have another matter heard first without waiving personal jurisdiction?

The court also appears to narrow Rule 120a.\(^{39}\) The court cites to In re Stern to support the notion that discovery under Rule 120a is limited to jurisdictional facts.\(^{40}\) In In re Stern, the Houston appellate court held that Rule 120a(3) limits discovery prior to a personal jurisdiction ruling to jurisdictional facts.\(^{41}\) But this limitation may run counter to Rule 120a(1), which explicitly states, without limitation, that “[t]he issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance.”\(^{42}\) Further, the Texas Supreme Court has ruled that the due-order-of-pleading rule applies to a plea, pleading, or motion, not something like a Rule 11 agreement, which is not a plea, pleading, or motion.\(^{43}\) In the same manner, interrogatories, requests

\(^{37}\) See Dorsaneo, supra note 17 at 761–63 (arguing that strict due-order-of-pleading and hearing rules complicate special appearance practice—since special appearance is an exception to general appearance, failure to follow the rules constitutes a failure to specially appear and results in a general appearance).

\(^{38}\) Trooper, 444 S.W.3d at 608.

\(^{39}\) Id. at 608–09.

\(^{40}\) Id. at 608 (citing In re Stern, 321 S.W.3d at 838–40).


\(^{42}\) Tex. R. Civ. P. 120a(1).

\(^{43}\) See Exito Elecs. Co. v. Trejo, 142 S.W.3d 302, 305 (Tex. 2004) (per curiam) (“[T]he plain language of Rule 120a requires only that a special appearance be filed before any other ‘plea, pleading or motion.’”)
for admissions, and deposition notices do not constitute a plea, pleading, or motion.44

Second, the court opines that absent a personal jurisdiction requirement, Rule 202 “unreasonably expands the rule.”45 Texas courts would hold power to compel testimony from “anyone in the world.”46 A Rule 202 court would only be limited by venue and subject matter requirements and the court’s own discretion to decide whether the deposition “may prevent a failure or delay of justice in an anticipated suit,”47 or the benefit to petitioner outweighs the “burden or expense of the procedure.”48 The court refused to make “Texas the world’s inspector general.”49

The majority paid tribute to due process concerns in passing. The court cites to Walden v. Fiore,50 the United States Supreme Court’s most recent personal jurisdiction due process decision, as well as Hanson v. Denckla.51 These cases articulate personal jurisdiction’s central concern that a non-resident defendant be subjected only to lawful power—that is, a non-resident’s minimum contacts with a state must be a prerequisite to that state’s exercise of authority over the defendant.52 In its second line of reasoning, the Texas Supreme Court voiced its concern that applying Rule 202 without a personal jurisdiction requirement would vest Texas courts with nearly unlimited power to exercise authority over

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44. Horowitz v. Berger, 377 S.W.3d 115, 122–23 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (holding that the defendant did not waive special appearance by filing discovery requests with opposing party and filing motion to compel because that motion was not heard before the trial court ruled on special appearance).
45. Trooper, 444 S.W.3d at 610.
46. Id.
47. TEX. R. CIV. P. 202.4(a)(1).
49. Trooper, 444 S.W.3d at 611.
50. Id. at 610 (citing Walden v. Fiore, 134 S. Ct. 1115, 1123 (2014)).
51. Id. at 609–10 (citing Hanson v. Deckla, 357 U.S. 235, 250–51 (1958)).
52. Walden, 134 S.Ct. at 1121–23; Hanson, 357 U.S. at 251 (“[M]inimal contacts with that State . . . . are a prerequisite to its exercise of power over [a party].” (internal quotation marks omitted)).
non-residents. There is an obvious due process element to this concern.

B. Plaintiff-Oriented Procedure with Non-Resident Safeguards

Like the majority, the dissent focused its analysis on how personal jurisdiction relates to Texas procedural rules. The dissent argued personal jurisdiction was not required because Rule 202 made no reference to personal jurisdiction. According to the dissent, personal jurisdiction is concerned with court processes that may lead to a binding judgment. Pre-suit discovery does not pose that risk. One would be hard-pressed to find a United States Supreme Court case that explicitly supports the dissent’s hunch. In fact, as will be discussed below, the dissent’s position falls woefully short of due process concerns.

According to the dissent, applying a personal jurisdiction requirement to Rule 202 would also undermine the plaintiff-oriented protection afforded by the Rule. The dissent focused on the concrete claim before the Rule 202 court in Trooper, where petitioners wished to depose Google to uncover a blogger’s

53. Trooper, 444 S.W.3d at 610.
54. Id. at 612 (Lehrmann, J., dissenting).
55. Id. at 613.
56. See id. at 612–13 (“I question whether personal jurisdiction over an anticipated defendant is ever a prerequisite to obtaining pre-suit discover. . . . From its very inception, the doctrine of personal jurisdiction has considered the due process implications of imposing binding judgment on a nonresident defendant. . . . Before a Defendant is put in that degree of peril, the question of personal jurisdiction has no place.”).
57. See id. at 613 (“Put another way, the Fourteenth Amendment requires a plaintiff to litigate the difficult and complex question of personal jurisdiction—and protects a defendant from the burdens of litigating in a distant forum—only when the defendant may be subject to a final judgment. Before a defendant is put in that degree of peril, the question of personal jurisdiction has no place.”).
58. See id. at 611–16 (“[M]odern technology has made the ability to seek redress for injury due to defamation that much more important, and that much more difficult. In the face of these modern-day realities, today the Court further cripples that ability, effectively extinguishing the claims of those who have the misfortune of being defamed by one who conceals his identity.”).
identity, alleging that the blogger defamed them. Google did not oppose petitioners’ petition, but the blogger did. The dissent contended that Rule 202 could not include a personal jurisdiction requirement when Rule 202 served to identify the person to sue. According to the dissent, a Rule 202 court in this situation would have no way to conduct the personal jurisdiction analysis.

The dissent then turned to the costs and burdens that may affect a plaintiff now that Rule 202 requires a court to possess personal jurisdiction over a non-resident. Without knowing the defendant’s actual identity, a plaintiff would find it impossible to meet the burden to show personal jurisdiction over the defendant, and should the plaintiff file a lawsuit generically against “John Doe” and “subpoena the nonparty Internet service provider to uncover the tortfeasor’s identity,” a plaintiff would incur too great a cost for a possibly fruitless venture. When the issue concerns an anonymous party, the dissent considers personal jurisdiction a premature issue.

Of course, the dissent ignores or omits that Rule 120a’s processes can now be utilized by the Rule 202 court. A petitioner faced with an anonymous potential defendant does not shoulder a cumbersome burden if the petitioner can articulate the factual contacts that involve the anonymous party and the state. Once the petitioner articulates the personal jurisdiction predicates, the

59. Trooper, 444 S.W.3d at 605 (majority opinion).
60. See id. (noting that the blogger’s posts were “critical of Brockman’s character and business management, calling him an idiot, a lunatic, and a crook, and comparing him to Bernie Madoff, Satan, and Bobo the Clown” (internal quotation marks omitted)).
61. Id.
62. Id. at 613 (Lehrmann, J., dissenting).
63. Id.
64. Id. at 611, 613, 614.
65. Trooper, 444 S.W.3d at 613 (Lehrmann, J., dissenting).
66. Id. at 614.
67. TEX. R. CIV. P. 120a(2) (“Any motion to challenge the jurisdiction provided for herein shall be heard and determined before . . . any other plea or pleading may be heard.”).
68. TEX. R. CIV. P. 120a(3) (“The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony.”).
potential defendant bears the burden to negate them.\textsuperscript{69} One way to negate those predicates would be for the anonymous party to simply state, “That was not me.” A non-resident defendant’s First Amendment anonymity concern can easily be addressed by an ex parte hearing, whereby the defendant admits or denies to the judge that it is the party identified by the petitioner. This would allow the court to resolve both the First Amendment claim and personal jurisdiction objection without first requiring the non-resident defendant to disclose who he or she is to the petitioner. When a potential defendant is identified, a petitioner can possibly avoid a timely, and perhaps costly, personal jurisdiction process in Texas by filing a Rule 202 petition and a letter rogatory directed to the potential defendant’s home state.\textsuperscript{70}

The dissent rejected the majority’s “world’s inspector general” concern.\textsuperscript{71} To the dissent, Rule 202 affords potential defendants enough protection.\textsuperscript{72} The court must, after all, first decide whether the deposition is necessary to avoid a failure or delay of justice or whether the deposition’s benefit would outweigh its burden and expense.\textsuperscript{73} In other words, Rule 202’s purpose to promote justice and convenience provides adequate guiding principles to direct a trial court’s discretion without a personal jurisdiction requirement.

Throughout its opinion, the dissent views personal jurisdiction solely in litigation contexts.\textsuperscript{74} In the dissent’s view, Texas pre-suit discovery procedural rules afford enough protection to non-residents. Notice provides due process to a non-resident in pre-suit discovery, without regard to whether that non-resident ever had any contacts with Texas. For reasons discussed below, the dissent’s analysis will not likely pass constitutional muster.

\textsuperscript{69} See CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996) (“In Texas, a nonresident defendant must negate all bases of personal jurisdiction to prevail in a special appearance.”).
\textsuperscript{70} See TEX. R. CIV. P. 201.1(c) (providing for deposition of a party via letter rogatory).
\textsuperscript{71} Trooper, 444 S.W.3d at 614 (Lehrmann, J., dissenting).
\textsuperscript{72} Id. at 614–15.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 611.
IV. DUE PROCESS PERSONAL JURISDICTION’S COMITY AND LIBERTY PRINCIPLES

To resolve the due process question left unresolved by *Trooper*, lower courts must determine whether the pre-suit discovery device differs in a constitutionally significant way from litigation by looking to the United States Supreme Court’s personal jurisdiction jurisprudence. Personal jurisdiction principles have undergone dramatic changes over the years as the doctrine has evolved from one based on a territoriality rule, to a “reciprocal fairness” analysis, and finally to a doctrine designed to protect individual liberty. However, two overarching concerns, the comity principle and the liberty principle, are fundamental to personal jurisdiction inquiries.

A. The Rule of Territoriality: Personal Jurisdiction’s Origin

Personal jurisdiction traditionally spoke to the public law principle that a nation’s sovereignty did not extend past its borders. This principle, known as the territoriality rule, applied, likewise, to the separate sovereign states in the United States. For example, North Carolina could not exercise power over a New York citizen unless that citizen voluntarily consented to New York’s jurisdiction. North Carolina, however, could exercise jurisdiction over its own citizens no matter where they were located by directly serving them.

Prior to the ratification of the Fourteenth Amendment, the U.S. Supreme Court relied on public law principles to hold that a judgment by a court without jurisdiction over a non-resident defendant was not entitled to recognition in the defendant’s home

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75. See infra notes 78–90 and accompanying text (discussing territoriality’s due process jurisdictional beginning).
76. See infra notes 91–110, and accompanying text (discussing the concept of “reciprocal fairness”).
77. See infra notes 123–130 and accompanying text (discussing the evolution of concepts of individual liberty as related to personal jurisdiction).
state under the Full Faith and Credit Clause.\textsuperscript{79} The Court made clear that the territoriality rule existed when the Constitution was ratified.\textsuperscript{80} The Court held that neither the Constitution nor any congressional act intended to “displace that principle of natural justice.”\textsuperscript{81} The issue arose again in \textit{Pennoyer v. Neff}\textsuperscript{82} after the ratification of the Fourteenth Amendment.\textsuperscript{83}

According to \textit{Pennoyer}, individual states enjoyed independent sovereignty under two applicable principles of public law.\textsuperscript{84} The first is that “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.”\textsuperscript{85} The second follows from the first: “[N]o State can exercise direct jurisdiction and authority over persons or property without its territory.”\textsuperscript{86}

While the \textit{Pennoyer} Court applied the “rule of territoriality” rather than the Due Process Clause because both the events that led to litigation and the lower courts’ decisions occurred before the ratification of the Fourteenth Amendment,\textsuperscript{87} the Court reasoned, in dicta, that the Fourteenth Amendment’s Due Process Clause would invalidate judgments entered without personal jurisdiction over a non-resident defendant.\textsuperscript{88} In so doing, the Court incorporated public law principles into the Fourteenth Amendment’s Due Process Clause.\textsuperscript{89} The Court has since struggled to answer how principles

\begin{footnotes}
\item[79.] \textit{D’Arcy}, 52 U.S. at 165.
\item[80.] \textit{Id.}
\item[82.] 95 U.S. at 722.
\item[83.] \textit{Id.} at 733; \textit{see also} U.S. CONST. amend. XIV (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).
\item[84.] \textit{Pennoyer}, 95 U.S. at 722.
\item[85.] \textit{Id.}
\item[86.] \textit{Id.}
\item[87.] \textit{Id.} at 719–20.
\item[88.] \textit{Id.} at 733.
\item[89.] \textit{See id.} (holding that the adoption of the Fourteenth Amendment forces states to comply with principles of public law, specifically, that states cannot impose their authority outside of their jurisdictions); \textit{see also} A. Benjamin Spencer, \textit{Jurisdiction to Adjudicate: A Revised Analysis}, 73 U. CHI. L. REV. 616,
that speak to state sovereignty could comfortably comport with due process principles that concern individual rights owed to individuals by the state.90

B. “Reciprocal Fairness” Replaces Territoriality

Pennoyer tied personal jurisdiction to sovereign power over persons and things within a state’s territory.91 A defendant served with process within a sovereign’s jurisdictional borders, even if the defendant’s presence was only fleeting, empowered the forum to assert personal jurisdiction over the defendant.92 This “presence” rule stretched the territorial rule to its limits; it is one thing to assert sovereign power over citizens and residents within a state’s territory and another to assert sovereign power over a person just passing through.

Nevertheless, long-standing practice among the states adhered to the principle that a citizen resided wherever the citizen was found.93 Once process was served on a person within the jurisdiction, the sovereign exerted power over that person sufficient to give rise to personal jurisdiction.94 Early courts located the foundation of jurisdiction in “physical power.”95

Serving process upon a defendant achieved two purposes: to provide notice to the defendant and to provide a basis for the


90. See, e.g., Alden v. Me., 527 U.S. 706, 740 (1999) (discussing the tension between limitations on personal jurisdiction necessary to uphold states’ sovereignty with due process rights of plaintiffs to obtain remedies promised by state law).

91. Pennoyer, 95 U.S. at 722.

92. See Burnham v. Superior Court, 495 U.S. 604, 608, 619 (1990) (affirming the traditional rule that personal jurisdiction is always conferred by presence and holding that a California court had personal jurisdiction over a defendant who was served in California during a business trip, even though the defendant had no other contacts with California besides the single visit to the state).

93. Id.

94. Id. at 610–11.

95. McDonald v. Mabee, 243 U.S. 90, 91 (1917).
sovereign to exercise power over the defendant.\textsuperscript{96} Personal service in the jurisdiction was necessary if the non-resident defendant did not consent to jurisdiction.\textsuperscript{97} A state could not exercise personal jurisdiction over a non-resident defendant simply by publishing notice in a newspaper.\textsuperscript{98} Justice Holmes considered notice by publication too fictitious an analogy to physical power.\textsuperscript{99} Therefore, two important questions arose: When can an out-of-state corporation be deemed “present” in a state, and how can a plaintiff physically serve an out-of-state corporation?

\textit{International Shoe Co. v. Washington} answered these two questions by making due process principles, rather than territoriality, the primary concern in the personal jurisdiction inquiry.\textsuperscript{100} The Court noted that service of process personally on the person in the state no longer determined personal jurisdiction.\textsuperscript{101} A state could always effectuate service by other means, such as through mail or upon an agent.\textsuperscript{102} Due process required that the non-resident defendant “have certain minimum contacts with [the state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”\textsuperscript{103} The Court stated:

\begin{quote}
But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.\textsuperscript{104}
\end{quote}

\begin{flushleft}
\textsuperscript{96} McDonald, 243 U.S. at 91.
\textsuperscript{97} Id. at 92.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 91.
\textsuperscript{100} 326 U.S. 310, 316 (1945).
\textsuperscript{101} Id.
\textsuperscript{102} Id. at 320.
\textsuperscript{103} Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
\textsuperscript{104} Id. at 319.
\end{flushleft}
Here, the Court articulated a “reciprocal fairness” principle to guide personal jurisdiction inquiries.\footnote{105. \textit{Int’l Shoe}, 326 U.S. at 320. Justice Sotomayor uses the term “reciprocal fairness” in \textit{Daimler AG v. Bauman}, 134 S. Ct. 746, 768 (2014), to describe personal jurisdiction’s guiding principle as articulated in \textit{International Shoe}.}

The “minimum contacts” test flipped territoriality on its head. Rather than focus on the state’s actions, the Court shifted its focus to the defendant’s actions. Reasonableness and fairness appeared to replace territoriality. A state could now extraterritorially extend its power into another state by serving binding notice on non-resident defendants in their home states.\footnote{106. \textit{See Int’l Shoe}, 326 U.S. at 320 (finding \textit{International Shoe}’s contacts with the forum state sufficient for an exercise of personal jurisdiction because it would be “reasonable and just according to our traditional conception of fair play and substantial justice”).} To the extent the forum court considered it reasonable for the non-resident corporation to defend itself in the jurisdiction based on its activities in the state, a non-resident corporation could not complain that the court’s exercise of jurisdiction was unfair.

State sovereignty had not changed, but the Court recognized that technological advances revolutionized the national economy.\footnote{107. \textit{McGee v. Int’l Life Ins. Co.}, 355 U.S. 220, 222–23 (1957).} Commercial transactions were conducted through mail or other transportation methods that involved parties “separated by the full continent.”\footnote{108. \textit{Id.} at 223.} Modern transportation also made it “much less burdensome for a party sued to defend himself in a State where he engages in economic activity.”\footnote{109. \textit{Id.}} The Court had embarked on a seemingly irreversible trend “toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents.”\footnote{110. \textit{Id.} at 222.}

\textbf{C. A Brief Return to Territoriality}
Lower courts embraced *International Shoe’s* expansive personal jurisdiction view.\(^{111}\) Reasonableness, as a guiding principle, enabled courts to assert personal jurisdiction over non-resident defendants based on whether the court considered a plaintiff’s resulting injury foreseeable.\(^{112}\) The U.S. Supreme Court decided at that point to rein in personal jurisdiction by returning to familiar state power principles.

In *World-Wide Volkswagen Corp. v. Woodson*\(^{113}\) the Court rejected the notion that foreseeability alone establishes personal jurisdiction.\(^{114}\) Rather, foreseeability as a benchmark would render companies amenable to suit wherever their products traveled: “Every seller of chattels would in effect appoint the chattel his agent for service of process.”\(^{115}\) The Court made clear that minimum contacts cannot be predicated simply on the fact that a defendant’s product made its way into the state. Rather, the minimum contacts test ties jurisdiction to the defendant’s willful acts directed at the state.\(^{116}\)

The majority opinion centered its personal jurisdiction inquiry on state sovereignty, stating that the Court had never “accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could [the Court do so], and remain faithful to the principles of interstate federalism embodied in the Constitution.”\(^{117}\) Viewed this way, the minimum contacts test worked both to protect a non-resident defendant from inconvenient litigation and to prevent states from encroaching on the sovereignty of other states.\(^{118}\)

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112. *Id.* at 806 (finding that personal jurisdiction was proper where defendant “purposefully conducted business activities in Georgia so that maintenance of suit there is fair and reasonable”).
114. *Id.* at 295.
115. *Id.* at 296.
116. See *id.* at 297 (“Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”).
117. *Id.* at 293.
118. *Id.* at 291–92.
In his dissenting opinion, Justice Brennan disagreed with the majority’s interpretation of *International Shoe*, and argued instead that the *International Shoe* standards were obsolete, and that “[t]he clear focus in *International Shoe* was on fairness and reasonableness.”119 To the extent state sovereignty bore on the personal jurisdiction inquiry, Justice Brennan centered it on the “forum State’s interest in the case.”120

According to Justice Brennan, *International Shoe* served its purpose at the time it was decided but had become outdated: “Business people, no matter how local their businesses, cannot assume that goods remain in the business’ locality. Customers and goods can be anywhere else in the country usually in a matter of hours. . . .”121 Due process in the personal jurisdiction context requires fairness, and fairness “no longer require[s] the extreme concern for defendants that was once necessary.”122

**D. Liberty’s Role in Personal Jurisdiction Analyses**

By reintroducing state sovereignty into the personal jurisdiction analysis, *World-Wide Volkswagen* created what some courts deemed a quandary: if the minimum contacts test serves, in part, to prevent states from impairing sister states’ sovereignty, then a non-resident defendant could not waive its personal jurisdiction objection without also impairing the sovereignty of the state where jurisdiction is proper.123 Justice White, who wrote the majority opinion in *World-Wide Volkswagen*,124 attempted to reconcile this seeming disjunction in *Insurance Corp. of Ireland*: “The personal jurisdiction requirement recognizes and protects an individual liberty

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120. *Id.* at 299.
121. *Id.* at 309.
122. *Id.*
123. See, e.g., *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (“The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.”).
interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”\textsuperscript{125}

\textit{Insurance Corp. of Ireland} marks the first time the Court centered the personal jurisdiction due process inquiry on individual liberty. Of course, the Court really had no choice, since the Due Process Clause on its face protects life, liberty, and property.\textsuperscript{126} Even so, Justice White’s opinion in \textit{Insurance Corp. of Ireland} seemed to conflict with his opinion in \textit{World-Wide Volkswagen}. Justice White addressed this seeming contradiction in a footnote:

The restriction on state sovereign power described in \cite{World-Wide Volkswagen} . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.\textsuperscript{127}

One would think the Court finally settled on a guiding principle to the personal jurisdiction due process analysis, but this was not the case. The Court continued to split, primarily in stream-of-commerce cases, on whether “fairness” concerns about the forum and the plaintiff’s interests inform minimum contact analyses.\textsuperscript{128} The Court explicitly stated that reasonableness and fairness play a role in the personal jurisdictional analysis after a court establishes minimum contacts.\textsuperscript{129} But that is the second jurisdictional prong, where the burden falls on the defendant to

\begin{footnotes}
\footnotetext{125. \textit{Ins. Corp. of Ir.}, 456 U.S. at 702.}
\footnotetext{126. \textit{See} U.S. CONST. amend. XIV, § 1 (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law.”).}
\footnotetext{127. \textit{Ins. Corp. of Ir.}, 456 U.S. at 703 n.10.}
\footnotetext{128. \textit{See}, e.g., \textit{Asahi Metal Indus. Co. v. Super. Ct.}, 480 U.S. 102, 105 (1987) (producing a four-Justice plurality and two separate concurrences with two justices joining in each); \textit{J. McIntyre Mach., Ltd. v. Nicastro}, 131 S. Ct. 2780, 2785 (2011) (producing a four-vote plurality, a two-vote concurrence, and a three-vote dissent).}
\footnotetext{129. \textit{See Asahi}, 480 U.S. at 113 (“The strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction . . . under circumstances that would offend “traditional notions of fair play and substantive justice.”“).}
\end{footnotes}
demonstrate that exertion of personal jurisdiction in the state would be unreasonable, notwithstanding the defendant’s voluntary contacts with the state.130

E. Personal Jurisdiction Principles in Flux

Justice White’s majority opinion and Justice Brennan’s dissent in *World-Wide Volkswagen* came to a head in *Asahi Metal Industry Co. v. Superior Court of California*.131 Despite the fact that *World-Wide Volkswagen* made clear that something more than merely injecting a product into the stream of commerce is needed to establish minimum contacts, Justice Brennan, joined by three other justices, reiterated his opinion that the stream-of-commerce metaphor refers to “the regular and anticipated flow of products from manufacture to distribution to retail sale.”132 If a participant in the chain is merely aware that the product is being marketed in the forum, it is on notice that it may be required to litigate in the state.133

Justice O’Connor, joined by three justices, took the majority opinion in *World-Wide Volkswagen* seriously when it held that it is not enough that the nonresident corporation simply place an item in the stream of commerce. The nonresident defendant must take additional action directed at the forum, such as advertising in the state, soliciting business there, or designing the product specific to the forum.134 “[A] defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does

130. The second personal jurisdiction prong requires a court to consider several factors, including:

[T]he burden on the defendant, the interests of the forum State, and the plaintiff’s interest in obtaining relief. It must also weigh in its determination “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.”


131. *Id.* at 102.

132. *Id.* at 117 (Brennan, J., concurring in part and dissenting in part).

133. *Id.*

134. *Id.* at 112 (plurality opinion).
not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.”

The Supreme Court tried one more time to bring clarity to the stream-of-commerce test in *J. McIntyre Machinery, Ltd. v. Nicastro.* Justice Kennedy’s plurality opinion—joined by Chief Justice Roberts, and Justices Scalia and Thomas—adopted the “stream plus one” theory articulated by Justice O’Connor in *Asahi.* The plurality made a startling concession that the lower court’s error, which the U.S. Supreme Court reversed, was made possible, “in part,” by the U.S. Supreme Court’s inability to articulate a clear test in *Asahi.* And though the plurality viewed the case as an opportunity to clarify what personal jurisdiction requires in stream-of-commerce theory cases, the Court split, again.

The Court did garner consensus on two important points. The two concurring Justices, Alito and Breyer, agreed with the plurality opinion that mere awareness cannot constitute a predicate for a state to assert personal jurisdiction over a non-resident. “[S]omething more” is required than simply placing a product into the stream-of-commerce, “such as special state-related design, advertising, advice, marketing, or anything else.” One should note that the concurrence also adopts the “stream-plus” theory by this statement. However, the plurality and concurrence do not agree on what “something more” may entail. For the plurality, “something more” must “manifest an intention to submit to the power of a sovereign.” For the concurrence, “something more” must be a flexible standard to meet changing commercial demands; the focus must be “defendant-focused fairness.”

Justice Breyer was not willing to consider the extent, if any, to which the Court must clarify its jurisdictional standards. Since the concurrence centered due process on what fairness requires, Justice

135. *Asahi,* 480 U.S. at 112 (plurality opinion).
137. *Id.* at 2786.
138. *Id.* at 2793 (Breyer, J., concurring).
139. *Id.* at 2792.
140. *Id.* at 2788 (plurality opinion).
141. *Id.* at 2793 (Breyer, J., concurring).
Breyer considered premature any “automatic rule” for or against jurisdiction in all cases:

What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii). I know too little about the range of these or in-between possibilities to abandon in favor of the more absolute rule what has previously been this Court’s less absolute approach.142

Of course, Justice Breyer’s reluctance is baffling. He fails to articulate why the defendant’s stature should dictate the personal jurisdiction rule that applies. Fairness cannot alone be the reason. “Fairness” begs the question why a constitutional clause that protects nonresidents’ liberty would provide a pass to some entities who inject their products into the stream of commerce based on the size of their operations. Essentially, Justice Breyer’s position is that the Court can constitutionally treat commercial actors unequally based on nothing more than their success in the market.

For the second point, the Court unanimously agreed that personal jurisdiction due process primarily protects the non-resident defendant’s liberty.143 The plurality opinion and dissenting opinion, however, were completely at odds when it came to how federalism concerns inform personal jurisdiction. The plurality articulated a clear place for federalism concerns in the personal jurisdiction inquiry:

If the defendant is a domestic domiciliary, the courts of its home State are available and can exercise

142. Nicastro, 131 S. Ct. at 2793 (Breyer, J., concurring).
143. Id. at 2789, 2798.
general jurisdiction. And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.144

The dissent expressly disclaimed any room for federalism principles in the personal jurisdiction context.145 Justice Ginsberg’s dissent—joined by Justices Sotomayor and Kagan—adopted the “pure stream” theory. For the dissent, much like Justice Brennan’s dissent in Woodson and concurrence and dissent in Asahi, reasonableness and fairness controlled the jurisdictional analysis. When a company, like J. McIntyre, engages another company to promote, sell, and distribute the manufacturer’s product, the dissent considered it fair to require the manufacturer to defend itself in the State where the injury occurred.146 “Do not litigational convenience and choice-of-law considerations point in that direction?”147 Notably, by conflating the reasonableness prong (the second personal jurisdiction prong) to stand for minimum contacts (the first personal jurisdiction prong), Justice Ginsberg makes the same error she accuses Justice Sotomayor of making in Daimler AG v. Bauman.148

Personal jurisdiction is derived from stable political principles centered on comity. Since the Court incorporated personal jurisdiction in the Fourteenth Amendment Due Process Clause, personal jurisdiction principles have been in flux. If due process requires anything, at minimum it requires stable rules and principles so commercial actors may predict how their actions may subject them to a foreign sovereign’s laws. “Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, 

144. Nicastro, 131 S. Ct. at 2789 (plurality opinion).
145. Id. at 2798 (Ginsberg, J., dissenting).
146. Id. at 2798–2800.
147. Id. at 2800 (footnote omitted).
148. See Daimler AG v. Bauman, 134 S. Ct. 746, 758 n.10, 762 n.20 (2014) (criticizing Justice Sotomayor for favoring “a resolution fit for this day and case only” by looking to the reasonableness prong as a substitute for a contacts test in general jurisdiction cases).
not the merits of their claim, but which court is the right court to
decline those claims. . . . Simple jurisdictional rules . . . promote
greater predictability.”149 As the next subsection argues, the Court’s
recent personal jurisdiction cases may have provided the simplicity
that due process requires.

F. Defendant-Oriented Principles: Comity and Liberty

Only recently has the U.S. Supreme Court reached consensus
on two highly relevant personal jurisdictional principles: reciprocal
fairness and comity. In Daimler AG v. Bauman, the Court, in an 8–1
opinion, expressly rejected reciprocal fairness as a guiding principle
of personal jurisdiction due process when the issue concerns general
(all-purpose) jurisdiction.150 The Court held that when a defendant’s
conduct or contact in the state does not give rise or relate to the
litigation, a state may exercise all-purpose jurisdiction over the
defendant if the forum is one in which the defendant is “‘fairly
regarded as at home.’”151 Only in rare occasions is a defendant
corporation likely to be regarded as at home outside its place of
incorporation or principal place of business.152

The Court emphasized the importance comity plays in
personal jurisdiction due process inquiries in a general jurisdiction
context.153 The Ninth Circuit’s decision, which the U.S. Supreme
Court reversed, envisioned an expansive role for personal
jurisdiction that other nations do not share.154 The Ninth Circuit
adopted an agency theory for personal jurisdiction that would impute
a subsidiary’s forum contacts to a manufacturer if a manufacturer
would have performed the same services in the forum absent the
subsidary.155 If the Court were to sustain such an expansive view, it
could “impede[] negotiations of international agreements on the

150. Daimler AG, 134 S. Ct. at 757 n.10 .
151. Id. at 760 (quoting Goodyear Dunlop Tires Operation, S.A. v. Brown,
131 S. Ct. 2846, 2854 (2011)).
152. Id.
153. See id. at 763 (explaining the importance of the principle of
international comity).
154. Id.
155. Id. at 759–60.
reciprocal recognition and enforcement of judgments.”\textsuperscript{156} Rapport between countries, the Court explained, plays a role in the due process inquiry.\textsuperscript{157}

By a parity of reason, interstate comity must play a role in personal jurisdiction due process inquiries, and the Court’s opinion suggests as much.\textsuperscript{158} The Court made clear that specific jurisdiction inquiries have been cut loose from the state sovereignty-centered focus in \textit{Pennoyer}.\textsuperscript{159} However, the Court has consistently “declined to stretch general jurisdiction beyond limits traditionally recognized” in \textit{Pennoyer}, including interstate comity, which played a central role in the Court’s reasoning in \textit{Pennoyer}.\textsuperscript{160}

\textit{Daimler AG} indicates that state sovereignty plays an important role in the personal jurisdiction due process inquiry. Comity’s role in personal jurisdiction analysis has gone from conclusively determinative under the territoriality rule, to irrelevant after \textit{International Shoe}, to persuasive according to \textit{World-Wide Volkswagen}, to uncertain after \textit{Insurance Corp. of Ireland}, and to a central concern that personal jurisdiction must address according to \textit{Daimler AG}.

Comity must inform the personal jurisdiction analysis all the way down. Though the Court in \textit{Nicastro} could not agree on how federalism concerns, which derived from comity principles, inform the jurisdictional analysis, the Court in near unanimity articulated a role for comity in \textit{Daimler AG}. The Court has not articulated a clear distinction as to why interstate comity informs general jurisdiction, but not specific jurisdiction. Dual sovereignty between the federal government and state governments is a constitutional fact. Organic documents of the United States are imbued with this fact.

\textsuperscript{156} \textit{Daimler AG}, 134 S. Ct. at 753.
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} See \textit{id.} at 763 (“Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the ‘fair play and substantial justice’ due process demands.” (quoting Int’l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945))).
\textsuperscript{159} \textit{Id.} at 755.
\textsuperscript{160} \textit{Id.} at 757–58.
The dissent in *Nicastro* was correct to point out that federalism is not mentioned in the Due Process Clause. But neither were the public law principles that were incorporated in that Clause by the Court in *Pennoyer* that inform the general jurisdiction inquiry according to the Court in *Daimler AG*. “Federalism” is not expressly stated in many if not most constitutional clauses. It does not follow, therefore, that federalism does not inform our understanding of those clauses.

Equally important to the Court’s opinion in *Daimler AG* was its adamant objection to Justice Sotomayor’s belief that “reciprocal fairness” guides the personal jurisdiction inquiry. For Justice Sotomayor, personal jurisdiction principles are generally applicable, whether the issue involves general or specific jurisdiction. One has little reason to dispute that personal jurisdiction principles are generally applicable.

Justice Ginsburg appears to have tried to mark a difference between the principles that inform general jurisdiction and those that inform specific jurisdiction: “Justice Sotomayor identifies ‘the concept of reciprocal fairness’ as the ‘touchstone principle of due process in this field.’” She overlooks, however, that in the very passage of *International Shoe* on which she relies, the Court left no doubt that it was addressing specific—not general—jurisdiction. Justice Ginsberg’s criticism assumes without support that *International Shoe* intended to articulate a space for different principles to attend to two types of personal jurisdiction. Her assumption wanes in persuasion when one considers that the terms “general jurisdiction” and “specific jurisdiction” were articulated not
by the Court, but by legal scholars trying to make sense of the Court’s jurisprudence in this area.\textsuperscript{164}

Justice Ginsburg also unjustifiably dismisses that Justice Sotomayor did not mean by “this field” general over specific jurisdiction. Rather, it is clear that Justice Sotomayor meant by “this field” personal jurisdiction due process generally.\textsuperscript{165} Justice Ginsburg may be correct to note that there may be more than a single principle that informs personal jurisdiction, but she articulates no basis upon which to completely disregard one principle over another depending on whether the issue is general or specific jurisdiction. The only difference between general and specific jurisdiction is a matter of relatedness: is jurisdiction predicated on the defendant’s conduct in the state and does that conduct gives rise or relate to the litigation?

Justice Sotomayor viewed the majority’s state-power-oriented opinion as a retreat from \textit{International Shoe}, giving new life to \textit{Pennoyer}’s territoriality rule.\textsuperscript{166} But comity has always informed the jurisdictional analysis. Personal jurisdiction, after all, was born out of the territoriality rule, itself derived from comity principles.

\textit{Daimler AG} articulated that personal jurisdiction should not unduly strain rapport among independent sovereigns, looking to \textit{Pennoyer} for authority. \textit{Pennoyer} rested its jurisdictional analysis on each state’s “exclusive jurisdiction and sovereignty over persons and property within its territory.”\textsuperscript{167} \textit{World-Wide Volkswagen} realized that federalism concerns are relevant to the jurisdictional analysis. State sovereign power over persons is limited to each person’s voluntary actions by which he or she submits to the sovereign’s authority, as \textit{Insurance Corp. of Ireland} reasoned. And the \textit{Nicastro} plurality reiterated what precedent established, and which \textit{Daimler AG} affirmed: personal jurisdiction assertions must comport with the

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\begin{itemize}
\item \textsuperscript{165} \textit{Daimler AG}, 134 S. Ct. at 768 (Sotomayor, J., concurring).
\item \textsuperscript{166} \textit{Id.} at 768–72, 773 n.12.
\item \textsuperscript{167} \textit{Pennoyer v. Neff}, 95 U.S. 714, 722 (1877).
\end{itemize}
federal balance, “which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States” in protecting its citizens under laws of its choosing.  A single principle may be derived from this precedent: the comity principle, which encompasses each state’s right as a co-equal sovereign to develop its own laws and to protect its residents and their property within its jurisdiction under its laws. Each state must afford non-resident defendants due process in part to foster rapport amongst the states.

One month after Daimler AG, the U.S. Supreme Court unanimously decided Walden v. Fiore—a case that concerned specific jurisdiction. There, the Court reversed the Ninth Circuit’s holding that an action by a non-resident defendant that occurred in Georgia could constitute minimum contacts in the forum state (Nevada) if the non-resident knew his action would affect plaintiffs with substantial connections to the forum. The Court placed great weight on the fundamental principles that underlie Fourteenth Amendment personal jurisdiction due process analysis: “The Due Process Clause of the Fourteenth Amendment constrains a State’s authority to bind a nonresident defendant to a judgment of its courts.”

The minimum contacts test to establish specific jurisdiction “focuses on the relationship among the defendant, the forum, and the litigation.” The focus is not on any contacts the defendant makes with people who reside in or have affiliations with the forum state. “Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the ‘random, fortuitous, or attenuated’ contacts he makes by interacting with other persons affiliated with the State.” The Due Process Clause in this context “principally protects” the non-resident

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168. Nicastro, 131 S. Ct. at 2789 (plurality opinion).
170. Id. at 1120, 1124.
171. Id. at 1121.
173. Walden, 134 S. Ct. at 1122.
174. Id. at 1123 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).
defendant’s liberty, “not the interests of the plaintiff.” 175 Walden reiterates the personal jurisdiction liberty principle: due process protects a non-resident defendant’s right to be subject only to lawful power. 176

No one would argue that the liberty principle does not apply in general jurisdiction cases because liberty is among the interests explicitly protected by the Due Process Clause. 177 Nor could one seriously dispute that the comity principle applies in specific jurisdiction cases because personal jurisdiction, after all, was born out of the territoriality rule, which was itself derived from comity principles.

V. THE LIBERTY AND COMITY PRINCIPLES IN PLAY

The best way to understand how the liberty and comity principles relate to personal jurisdiction analyses is as follows: In specific jurisdiction contexts, the liberty principle means that a defendant, by his or her own voluntary action, is subjected to a foreign state’s power over matters that relate to the defendant’s conduct in, with, or directed toward that state, or from which an action arises out of his or her conduct in, with, or directed toward that state. The non-resident’s willful and voluntary action in, with, or directed toward a state he or she does not call home corresponds

175. Walden, 134 S. Ct. at 1121–22, 1125 n.9.
176. See id. at 1125 n.9 (“[T]he ‘minimum contacts’ inquiry principally protects the liberty of the nonresident defendant . . . .”); J. McIntyre, Ltd. v. Nicastro, 131 S. Ct. 2780, 2783 (2011) (providing the best articulation of the liberty principle: “The principal inquiry in cases of this sort is whether the defendant’s activities manifest an intention to submit to the power of a sovereign.”) (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958)); see also Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702, 702 n.10 (1982) (holding that the personal jurisdiction requirement comes from the Due Process Clause, restricts judicial power based on a liberty interest, and is not a matter of state sovereignty).
177. See Robert L. Theriot, Specific and General Jurisdiction—The Reshuffling of Minimum Contacts Analysis, 59 Tul. L. Rev. 826, 842 (1985) (“[L]imitations implicit in the concepts of specific and general jurisdiction ultimately act to secure ‘the individual liberty interest preserved by the Due Process Clause.’”).
to the comity principle. The forum does not encroach on another state’s separate sovereign authority to protect its own citizens under the laws of its choosing, because the non-resident invoked the benefit and protection of the forum state’s laws by the defendant’s own action, or, in certain instances, when the defendant obstructs the forum state’s laws by his or her action,\textsuperscript{178} which the forum has a right to remEDIATE.

In general jurisdiction contexts, the liberty principle generally means that a foreign state can exert no power over a non-resident who has had no voluntary contact in, with, or directed toward that state, or whose conduct in no way relates to a matter before a court in that state.

When a non-resident defendant engages in voluntary conduct in, with, or directed toward a state the defendant does not call home, but the defendant’s conduct in no way relates to the matter before the forum court, the forum must satisfy the comity principle before asserting personal jurisdiction. The forum must make sure its personal jurisdiction assertion over another state’s citizen does not encroach upon the sister state’s separate sovereign authority to protect its residents and their property within its jurisdiction. The non-resident’s voluntary actions in, with, or directed toward the state (actions by which liberty is accounted for) must be so “continuous and systematic” as to render \[the non-resident\] essentially at home in the forum State.”\textsuperscript{179} In other words, the non-resident’s actions in the forum state must be so pervasive that the forum state could consider the defendant “essentially” a resident who subjects itself to the forum’s general authority.\textsuperscript{180}

\textsuperscript{178} See Nicastro, 131 S. Ct. at 2787 (plurality opinion) (“As a general rule, the sovereign’s exercise of power requires some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws . . . though in some cases, as with an intentional tort, the defendant might well fall within the State’s authority by reason of his attempt to obstruct its laws.” (citation omitted) (internal quotation marks omitted)).


\textsuperscript{180} See id. (“A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to
VI. RULE 202’S FUTURE IN TEXAS COURTS

The majority and dissenting opinions in *Trooper* appear to believe that some state court processes may be immune to due process concerns.\(^{181}\) The question this Article asks, and that the court left open, is whether Rule 202 is one of those processes.\(^{182}\) United States Supreme Court precedent leans heavily toward a negative answer. Between the majority and dissent’s constitutional musings, the majority opinion tracks the liberty principle closer, while the dissent omits the comity principle.\(^{183}\)

A. Rule 202 and the Liberty Principle

The personal jurisdiction liberty principle holds that due process protects a non-resident defendant’s right to be subjected only to lawful power.\(^{184}\) No U.S. Supreme Court opinion has ever render them essentially at home in the forum State.” (internal quotation marks omitted)).

\(^{181}\) The majority cryptically opines that “the liberty interest protected by the Fourteenth Amendment . . . does not prohibit all state court proceedings.” *In re Doe* (Trooper), 444 S.W.3d 603, 609 (Tex. 2014) (emphasis added). The majority refuses to consider whether due process requires a Rule 202 court to possess personal jurisdiction over a nonresident defendant. *Id.* at 609–10. One might conclude that at least some of the Justices joining the majority consider pre-suit discovery a state court proceeding free from due process personal jurisdiction constraints. Likewise, the dissent opines that due process personal jurisdiction concerns only arise when a defendant faces a final judgment. *Id.* at 613 (Lehrmann, J., dissenting). Personal jurisdiction concerns, for the dissent, do not arise when a would-be plaintiff initiates pre-suit discovery because there is no threat of a final judgment. *Id.* at 612–13.

\(^{182}\) *Id.* at 610.

\(^{183}\) See *infra* Part VI(A) (discussing the liberty principle in the *Trooper* majority and dissent); *infra* Part VI(B) (discussing the comity principle).

\(^{184}\) See *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (“Due process limits on the State’s adjudicatory authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties . . . it is the defendant’s conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him.”); *J. McIntyre, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011) (articulating the principle inquiry of the liberty principle as a question of whether the defendant’s actions “manifest an intention to submit to the power of a sovereign” (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1957))); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694,
explicitly held this due process principle inapplicable outside litigation as the dissent in Trooper suggests. The majority also appears to waver on this point when it suggests that the liberty interest protected by the Due Process Clause “does not prohibit all state court proceedings.” Even so, the majority reaches the right conclusion, imposing a personal jurisdiction requirement on Rule 202 petitions.

The majority opinion in Trooper pays tribute to the liberty principle in passing. The majority opined that if a plaintiff’s suit against an Alaskan resident were dismissed on personal jurisdiction grounds absent a personal jurisdiction requirement, that same plaintiff could still undertake discovery on the same controversy under Rule 202. The court considered such a result to undermine Rule 120a. But the court’s conjecture begs the constitutional question. It assumes that Rule 202 does not violate the Due Process Clause absent a personal jurisdiction requirement. It also assumes that a Rule 202 court possesses power over a non-resident to order that non-resident to submit to deposition in Texas, even though a trial court lacked power to order that same non-resident to do anything, even submit to deposition, once personal jurisdiction was found lacking.

The majority apparently considered its holding as creating a procedural safeguard, rather than a constitutional requirement. If the Texas Rules of Civil Procedure provide a method by which a non-resident raises and preserves a constitutional objection to the

702 n.10 (1982) (“The restriction on state sovereign power described in World-Wide Volkswagen Corp., however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause . . . . [I]f the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.”).

185. Trooper, 444 S.W.3d at 612–13 (Lehrmann, J., dissenting).
186. Id. at 609 (majority opinion).
187. Id. at 610.
188. Id. at 609.
189. Id. at 609–10.
190. Id. at 604–05.
forum’s personal jurisdiction assertion at the trial level, that procedural protection surely must be afforded whenever Texas courts order a non-resident to leave home, traverse the country, and submit to the court’s authority over discovery processes that will be used in future litigation.

The dissent does not consider due process a factor at all. For the dissent, the liberty principle is invoked only when the “defendant may be subject to a final judgment.” According to the dissent, this only occurs in litigation. The majority retorts by arguing that Rule 202 in Trooper had “already been used to adjudicate the Trooper’s First Amendment issue, which may lead to an adjudication of Reynolds’ claims against him.” On balance, the majority has the constitutional upper hand.

As the dissent posits, most, if not all, U.S. Supreme Court cases considering personal jurisdiction do so in the context of litigation, where a defendant faces a binding judgment. That is just how the cases have come before the Court. It does not follow, therefore, that personal jurisdiction due process concerns begin and end at the litigation stage.

The dissent cannot rely on “this is the way it has always been done” as a valid reason to omit personal jurisdiction due process concerns from Rule 202. The U.S. Supreme Court defers to liberty interests even in the face of what has always been done.

Shaffer v. Heitner is instructive on this point. In Shaffer, the Court absolved the long-recognized constitutional distinction between in personam and in rem proceedings. Historically, state courts could exercise jurisdiction over actions in rem or quasi in rem as part of the state’s exclusive sovereignty over things within its jurisdiction (e.g., property or property interests), without regard to a defendant’s contacts with the state. In contrast, actions in

191. Trooper, 444 S.W.3d at 613 (Lehrmann, J., dissenting).
192. Id. at 612–13.
193. Id. at 609 (majority opinion). The First Amendment issue concerned Trooper’s motion to quash Rule 202 discovery on the ground that he possessed a First Amendment right to speak anonymously. Id. at 605.
194. Id. at 613 (Lehrmann, J., dissenting).
196. Id. at 196–203.
personam (against the person) required a state to conduct personal jurisdiction due process analyses.\(^{197}\)

The Court in *Shaffer* made clear that personal jurisdiction analyses must be conducted without repair to fictions designed to overcome constitutional protections.\(^{198}\) Just as the *International Shoe* Court looked solely at the quality and quantity of corporate activities in the state, instead of the fiction that a corporation could be deemed “present” by conducting activities in the state,\(^{199}\) so too the Court in *Shaffer* rejected *Pennoyer*’s reasoning that a proceeding against a person’s property within the state is not really a proceeding against the owner personally.\(^{200}\) The Court considered this a distinction without any difference. An action against the person’s property affects the person’s rights and interests in that property, thus invoking due process concerns.\(^{201}\) The liberty principle requires the state to determine whether the non-resident defendant’s voluntary conduct in, with, or directed toward the state relates to the action before the court sufficient to render personal jurisdiction proper.\(^{202}\)

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198. *See id.* at 212 (stating that the legal fiction of in rem jurisdiction is “without substantial modern justification” and concluding that all assertions of state-court jurisdiction must be analyzed under *International Shoe*).

199. *See Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316–18 (1945) (stating that fiction of corporate “presence” is used merely to symbolize the corporation’s contacts with the forum state). Earlier courts tried to adhere to *Pennoyer*’s territoriality rule by conflating a corporation’s employees’ actions in the forum state to “presence” in the state or consent to the state’s jurisdiction. *See, e.g.*, Phila. & Reading Ry. Co. v. McKibbin, 243 U.S. 264, 265 (1917) (holding that a non-consenting corporation is subject to personal jurisdiction within a jurisdiction when “it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there”); Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930) (describing the historical problem surrounding fictions created to exert personal jurisdiction over non-resident corporate defendants). The Court in *International Shoe* reasoned that the real concern is over the non-resident defendant’s activities in the state. *Int’l Shoe*, 326 U.S. at 316–19.


201. *Id.*

202. *Id.* at 204. *Shaffer* was decided before *Insurance Corp. of Ireland*, in which the Court first articulated its focus on a non-resident’s liberty interest in the personal jurisdiction context. So, *Shaffer* does not use the term “liberty,” but its
Much like the old in personam and in rem distinction, the Trooper dissent’s distinction between a trial court’s power over a defendant and a Rule 202 court’s power over a defendant is one that hardly demonstrates a constitutional difference, and the dissent fails to articulate any such constitutionally significant difference. Though a non-resident defendant may face a binding judgment on the merits of the claim at the trial level, this judgment is contingent on sufficient evidence being uncovered in discovery.

If it matters constitutionally that a trial court possess personal jurisdiction over a non-resident to order discovery—since due-order-of-hearing requires that a defendant’s personal jurisdiction motion is heard before any other plea, motion, or pleading—at the trial level, why not at the pre-suit discovery stage? After all, this discovery may be used by the plaintiff to prove a prima facie case against the non-resident defendant at trial; that is, it may lead to a binding judgment. Surely, the constitutional distinction cannot lie in the additional step that occurs between a pre-suit discovery petition and filing an action. The liberty principle is concerned with lawful power, which both a trial court and a Rule 202 court purport to possess by exerting power over a non-resident defendant.

B. Rule 202 and the Comity Principle

Rule 202, unencumbered by personal jurisdiction protection, invokes the comity principle, which the dissent does not address in Trooper. The majority obliquely touches on the comity principle when it points out that “no other American jurisdiction allows pre-suit discovery as broadly as Texas does,” and when it voices minimum contacts analysis is part and parcel of what now constitutes the liberty principle.

203. Compare In re Doe (Trooper), 444 S.W.3d 603, 613–14 (Tex. 2014) (Lehrmann, J., dissenting) (distinguishing a trial court and Rule 202 court’s power over a defendant only based on the time in the trial process and the necessary information needed by a trial court to perform a full minimum contacts review), with Shaffer, 433 U.S. at 199 (distinguishing in rem jurisdiction from in personam jurisdiction in that the former only takes control via a defendant’s property and imposes no other obligation on a defendant whereas the latter can impose personal obligations on the defendant).

204. Trooper, 444 S.W.3d at 609 (majority opinion).
concern over making Texas “the world’s inspector general.”\textsuperscript{205} Even though the majority couched its holding in procedural—rather than constitutional—terms, the comity principle is satisfied by the majority’s conclusion that imposes a personal jurisdiction requirement on Rule 202 courts.\textsuperscript{206}

By contrast, the dissent in no way addresses the comity principle. For the dissent, Rule 202 provides a non-resident ample procedural protection by requiring the court to consider whether the burdens imposed by Rule 202 on the non-resident outweigh the benefit.\textsuperscript{207} If reciprocal fairness were the primary personal jurisdiction principle, the dissent would have a stronger argument. But, as discussed above, fairness concerns only arise after a court establishes a non-resident’s minimum contacts with the forum state.

By the dissent’s reasoning, a Rule 202 court could order a non-resident from anywhere in the world to submit to Texas’s jurisdiction to be deposed, so long as the court in its discretion found it fair in terms of burden and cost.\textsuperscript{208} It would not matter whether the non-resident ever had any contacts in, with, or directed toward Texas. Nor would it matter whether the potential action concerned matters that in no way relate to conduct by a non-resident in, with, or directed toward the forum state. Such a view envisions that state power over non-residents is greater than the U.S. Supreme Court recognized in the general jurisdiction context.

The dissent’s view also strains interstate comity. Rule 202 allows Texas to jeopardize resources under a sister state’s protection that would otherwise fund the other state. If a non-resident in no way voluntarily invoked the privileges and benefits of conducting activities in Texas, or voluntarily submitted to Texas’s jurisdiction, or could be viewed as “essentially at home” in Texas, Texas would

\begin{itemize}
\item \textsuperscript{205} Trooper, 444 S.W.3d at 611 (Lehrmann, J., dissenting).
\item \textsuperscript{206} Id. at 610 (majority opinion).
\item \textsuperscript{207} Id. at 614 (Lehrmann, J., dissenting).
\item \textsuperscript{208} Id. at 609–11 (holding that the applicable procedural rules require that personal jurisdiction be exercised over an anticipated defendant before such discovery may be granted).
\end{itemize}
have no interest over matters that could deplete a non-resident’s resources by an eventual judgment.\textsuperscript{209}

Texas would also have no authority over those resources to which it never provided, nor offered, protection. Without extending comity to sister states, Texas’s assertion of power over non-resident’s resources can easily be viewed as a way to divert a sister state’s resources to Texas via Texas’s residents who eventually win judgment in Texas courts. If every state employs a pre-suit discovery rule like Texas, no state could effectively offer its citizens protection. It would be similar to Texas authorities entering California to arrest a California citizen or seizing the citizen’s property without apprising California. Rapport among states would be severely stained.

Perhaps the dissent might consider the above analogy distinguishable. Under the dissent’s reasoning, Rule 202 cannot directly lead to a binding judgment.\textsuperscript{210} So, a more appropriate analogy would be Texas authorities entering California to place a California citizen under house arrest or guarding the defendant’s California property pending the outcome of litigation in Texas. But this still raises an unanswered question: Where does the constitutional difference lie? The dissent’s failure to pay tribute to the comity principle, considering Rule 202’s broad reach over non-residents, is constitutionally fatal to its analysis.

\textbf{C. Rule 202 Constitutionally Requires Personal Jurisdiction}

Texas courts will likely face the constitutional question of whether Rule 202 violates the Fourteenth Amendment Due Process Clause in the waiver or estoppel context at the trial level. Ultimately, the question will be whether the Rule 202 court’s personal jurisdiction judgment was constitutionally binding over the factual predicates before the court. Based on the majority’s reasoning in \textit{Trooper}, the Texas Supreme Court will likely


\textsuperscript{210} \textit{Trooper}, 444 S.W.3d at 612–13 (Lehrmann, J., dissenting).
eventually find that due process requires a personal jurisdiction analysis under Rule 202.

Even so, the Court could easily find that Rule 120a offers an additional constitutional layer of protection to non-residents at the trial level. States can offer greater, but not lesser, protection than that afforded under the United States Constitution.211 However, the Rule 202 court’s personal jurisdiction judgment must have binding effect in order to avoid other constitutional issues that impugn the Rule 202 court’s subject matter jurisdiction because Texas courts do not have power to issue advisory opinions under the state’s constitutional separation of powers.212 Further, courts typically avoid construing statutory provisions or constitutional provisions in a manner that creates other constitutional problems.213

Another way to view this same problem would be to consider whether a default judgment could be entered against a non-resident defendant that does not respond to a plaintiff’s original complaint in a Texas court after a Rule 202 court found personal jurisdiction lacking. If one answers “no,” then admittedly Rule 202 has binding effect on the constitutional issue. Rule 120a, then, would serve little purpose on this issue at the trial level.

If one answers “yes,” then admittedly Rule 202 has no binding effect on the constitutional issue, which raises a separate due process concern. That is, a non-resident defendant should be able to rely on a Texas court’s judgment that the defendant did not have minimum contacts with Texas relating to the matter before the court that are sufficient to empower the Texas courts to order participation in discovery. To allow a state to make inconsistent statements on the same issue, under the same facts, that threaten to deprive a non-resident of her life, liberty, or property is antithetical to the very concept of due process.

212. See, e.g., Tex. Ass’n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443–46 (Tex. 1993) (“Thus we have construed our separation of powers article to prohibit courts from issuing advisory opinions because such is the function of the executive rather than the judicial department.”).
213. See, e.g., Satterfield v. Crown Cork & Steel Co., 268 S.W.3d 190, 202 (holding that a court may not allow a statutory provision to override a state constitutional provision or allow the constitutional provision to become surplusage).
Rule 120a is designed to provide a non-resident defendant a first line of protection to assert a constitutional objection to the forum state’s personal jurisdiction assertion. Since the defendant was afforded this protection at the pre-suit discovery stage, what purpose would a second look by a trial court serve if the predicate jurisdictional facts are the same? Rule 120a is not designed to ensure that a prior Texas court got the jurisdictional question right. Taking a second look when the jurisdictional predicate facts are the same would just waste judicial resources and litigants’ time.

Moreover, the legitimacy of the procedural protections afforded non-residents under Texas law would be impugned should the Rule 202 court and the trial court differ in their jurisdictional judgments on the same predicate facts. A non-resident who submits to a Rule 202 deposition based on the court’s representation that Texas courts have power over the defendant on the matter before the court would be poorly served if the trial court reaches the opposite conclusion. In effect, the trial court would state that it could not order the defendant to submit to a deposition that could be used against the defendant in future litigation. But the defendant has already submitted to a deposition by order of a court that may never really have had authority over the defendant to begin with. In other words, the very protection the majority in Trooper aimed to afford non-residents could easily be undone.

The rule most consonant with due process protection requires a Rule 202 court’s personal jurisdiction judgment to have a constitutionally binding effect at the trial level when the predicate jurisdictional facts are the same. When the predicate jurisdictional facts are not the same, a separate question arises: Whether due process requires additional safeguards, such as another hearing on

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214. See, e.g., Kelly v. Gen. Interior Constr., Inc., 301 S.W.3d 653, 658 n.3 (Tex. 2010) (stating that the Supreme Court of Texas promulgated Rule 120a to allow defendants to contest personal jurisdiction in a special appearance rather than choose between waiving personal jurisdiction by making a general appearance or defaulting and arguing the issue in another forum).

215. See Trooper, 444 S.W.3d at 608 (majority opinion) (“[T]o allow discovery of a potential claim against a defendant over which the court would not have personal jurisdiction denies him the protection Texas procedure would otherwise afford.”).
the personal jurisdiction question. This question may require an article of its own.

However, nothing should prevent a court from concluding that an additional hearing is necessary at the trial level because the stakes are higher than at the pre-suit-discovery level. Unlike at the trial level, a non-resident does not face a default judgment for failing to respond to a Rule 202 order. This argument does not lend support to the constitutional distinction the Trooper dissent hopes to establish between a Rule 202 order and a trial court order. The Trooper dissent offered no personal jurisdiction due process protection for the former. Here, the issue is not between no personal jurisdiction due process protection and some personal jurisdiction due process protection. Rather, it is between one level of personal jurisdiction due process protection and another. A state can always offer more protection than the U.S. Constitution offers, but never less. Here, the question is whether an additional layer of protection is necessary when the predicate jurisdictional facts as they existed when adjudicated at the trial level have changed since the Rule 202 court ruled on the same issue. In that case, such protection may well be necessary.

VII. Conclusion

Personal jurisdiction due process principles should apply to Texas Rule of Civil Procedure 202. The Texas Supreme Court’s opinion in Trooper will eventually lead to a case that raises this question and will at the same time provide an answer. The Trooper majority’s opinion, viewed in light of U.S. Supreme Court precedent, pays tribute to the comity and liberty principles that guide personal jurisdiction due process analyses. Once a Rule 202 court adjudicates the personal jurisdiction issue, that issue should bind the parties at the trial court level when the predicate jurisdictional facts are the same. Therefore, non-resident defendants would do well to raise the jurisdictional issue at the Rule 202 level.

216. Trooper, 444 S.W.3d at 613–14 (Lehrmann, J., dissenting).
217. Id.