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Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts

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INTRODUCTION

For the first time in human history, the international community is creating an integrated global economic order.[1] The world economy is undergoing a transformation similar to that experienced in the United States around the turn of the century, when national economic integration began in earnest.[2] Just as the effective regulation of the newly national economy necessitated the refinement of the doctrine of federalism,[3] the rise of the global economy has created a need to identify

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1. Several interesting works chronicling the current transformation have been published in recent years. *See* ROBERT B. REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST CENTURY CAPITALISM (1990) (asserting that national boundaries have become increasingly irrelevant to multinational enterprise and that U.S. policy should therefore promote American workers, not "American" corporations); WALTER B. WRISTON, THE TWILIGHT OF SOVEREIGNTY (1992) (arguing that the primary economic commodity in the global economy is information, which, because of its intangible nature, renders states unable to maintain sovereign control over their economies); and RICHARD J. BARNET & JOHN CAVANAGH, GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER (1994) (recounting how several large corporations in a number of industries have become globalized and emphasizing the political, social, and economic implications of this transformation process). *See also* KENICHI OHMAE, THE BORDERLESS WORLD: POWER AND STRATEGY IN THE INTERLINKED ECONOMY (1990); ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS (1987).

2. *See generally* BETTY G. FISHMAN ET AL., THE AMERICAN ECONOMY (1962); DOUGLAS F. DOWD, MODERN ECONOMIC PROBLEMS IN HISTORICAL PERSPECTIVE (1962); EDWIN ROBERT ANDERSON SELIGMAN, THE ECONOMIC INTERPRETATION OF HISTORY (rev. 2d ed. 1961). *Cf.* NATIONAL ASSOCIATION OF MANUFACTURERS (U.S.) ECONOMIC PRINCIPLES COMMISSION, THE AMERICAN INDIVIDUAL ENTERPRISE SYSTEM, ITS NATURE, EVOLUTION, AND FUTURE (1946); SUMNER H. SLICHTER, MODERN ECONOMIC SOCIETY (1931).

3. American federalism theories have developed to allow the political power of the federal government, relative to that of the states, to expand dramatically in this century. *See generally*

and clarify a model that coherently delineates the international allocation of sovereign authority.

In this Article, I seek to develop a model that describes the role of international law in governing a state's assertion of jurisdiction in civil cases[4] involving foreign[5] defendants[6] or plaintiffs.[7] In particular, I

Edwin S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950); Joseph Lesser, *The Course of Federalism in America—An Historical Overview*, *in* FEDERALISM: THE SHIFTING BALANCE 1, 6–8 (Janice C. Griffith ed., 1989); John Minor Wisdom, *Foreword: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063 (1984).

There has been, however, a counter-trend in the area of judicial jurisdiction. *See* Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism"*, 27 GA. L. REV. 697, 698–99, 710–12 (1993).

The issue of federalism relative to personal jurisdiction in the United States is almost exclusively discussed in horizontal terms focusing on the need (or lack of need) to protect the relative jurisdictional powers of the several states vis-a-vis each other. *See generally* Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987); Janice Toran, *Federalism, Personal Jurisdiction, and Aliens*, 58 TUL. L. REV. 758 (1984); Terry Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257 (1990). The "federalism" concerns that will be explored in this Article are vertical in nature. I attempt to demonstrate that international law, rather than the internal law of states, appropriately circumscribes the personal jurisdiction of states in cases involving foreign litigants. The analogous federalist argument within the American system would be that federal law (i.e., the Constitution) appropriately governs the allocation of personal jurisdiction between the states within the United States. This is a wholly uncontroversial proposition within the United States today.

4. For an analysis of whether international law should be applied by domestic courts to determine the extent of state jurisdiction in international criminal cases, *see* Andrew Strauss, *A Global Paradigm Shattered: The Jurisdictional Nihilism of the Supreme Court's Abduction Decision in* Alvarez-Machain, 67 TEMP. L. REV. 1209 (1994). The article specifically deals with the question of whether U.S. courts should accept jurisdiction over criminal suspects abducted from foreign countries in violation of international law.

5. The term "foreign" in this Article means not a citizen of the state whose courts are hearing a particular lawsuit. This is different from the way the term is commonly used in personal jurisdiction cases in the United States, where "foreign" signifies that a defendant is a citizen of another state within the United States and the term "alien" is used to refer to a defendant who is a citizen of another country. For a discussion of this distinction, see VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS 1–52 (1989).

6. The involvement of at least one foreign litigant in a dispute should be the circumstance triggering the question of whether international standards should be applied. Such involvement is the best indicator of the existence of issues that are the appropriate concern of the international order. I realize that such involvement does not cover all situations arguably affecting international interests. For example, the assertion of jurisdiction by a country over its own national while she was domiciled in a foreign country could be said to affect the interests of the foreign country. In contrast, it could be argued that reliance on the nationality of litigants could cause consideration of the applicability of international law in some situations in which international interests might arguably not be affected. For example, whether a state asserts jurisdiction over a foreign national domiciled in its own country is arguably not to be a matter of international concern. In light of the tremendous importance still given to national identifications today, however, foreign nationality seems to be the best indicator that jurisdictional interests might exist beyond those of the state asserting jurisdiction and those of its citizens. In addition, when there is arguably a lack of international interest, as in the second example, determining that the international order should prescribe jurisdictional rules is not tantamount to saying that international law should deny the state the right to exercise jurisdiction. Presumably, international law would allow a state to exercise jurisdiction over a foreign national domiciled in its territory.

7. It might be unusual in the United States to think of the nationality of the plaintiff as relevant to the question of which jurisdictional law should be applied since U.S. contacts analysis

examine and challenge the current assumption that the domestic law of jurisdiction should be applied by domestic courts when asserting personal jurisdiction in cases involving foreign litigants.[8] International law's application requires a well-developed, readily applicable body of legal rules. Correspondingly, I also suggest the need to give clarity and definition to the currently amorphous body of international jurisdictional law.[9]

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tends to emphasize the interests of the defendant. *See discussion infra* part I.A. Plaintiffs obviously have an interest in ensuring that some forum is available to hear their disputes, (see *infra* notes 143 and 152 and accompanying text), and often have a strong interest in one forum over another (see *infra* note 144 and accompanying text).

8. The model I develop in this Article has substantial implications for the status in domestic courts of the international law that limits the jurisdiction of states to prescribe laws, as well as the status in domestic courts of internationally recognized conflict of law principles. I leave for another day the task of exploring these implications.

9. As I will explain, see discussion *infra* parts I.A–.C, since countries in the modern contacts era apply their own jurisdictional laws and seldom feel constrained by international jurisdictional law, some commentators have concluded that the customary international law of jurisdiction is now devoid of content. *See, e.g.*, John H. Wigmore, *The Execution of Foreign Judgments: A Study in the International Assimilation of Private Law,* 21 ILL. L. REV. 1, 9 (1926) ("There is no international rule as to the jurisdiction of courts. Each system has developed, and naturally clings to, those rules for the jurisdiction of its own courts which are considered to be in the interest of the population normally dealt with by them . . . ."). *See also* Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 170 (1972–73).

While the content of international jurisdictional law is perhaps unclear, most authorities agree that this category of international law exists. As the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT (THIRD)] explains:

> The exercise of jurisdiction by courts of one state that affects interests of other states is now generally considered as coming within the domain of customary international law and international agreement. States have long maintained the right to refuse to give effect to judgments of other states that are based on assertions of jurisdiction that are considered extravagant; increasingly, they object to the improper exercise of jurisdiction as itself a violation of international principles.

Id. at 34. *See also* 1 LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW §§ 136–137, at 456 (9th ed. 1992) ("[I]nternational law . . . determines the permissible limits of a state's jurisdiction . . . .").

Those who have attempted to derive the content of this law from international custom have found an existing body of law in what is sometimes called "jurisdiction in the international sense." This is the law that some states look to instead of their own jurisdictional or foreign law when deciding whether a foreign court has properly asserted jurisdiction in a case. If they determine that it has, they will satisfy the foreign court's judgment. *See, e.g.*, Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 15–16 (1988) ("Recognizing the problems of measuring jurisdiction, for recognition purposes, by recourse to domestic or rendition state rules, the English courts have long taken the position that the efficacy of a foreign judgment ought not to depend on the internal law of either. Instead, they seek to ascertain whether the foreign court had 'jurisdiction in the international sense' . . . .").

Commentators attempting to derive the content of the international law of jurisdiction also look to various treaties on satisfaction of judgments that place acceptable limits on jurisdiction (see *infra* notes 11–13 and accompanying text), domestic jurisdictional rules (see discussion *infra* parts I.A–.C), and state protests of assertions of jurisdiction by other states. Scholars who have canvassed explicit state protests or claims of exorbitant jurisdiction include Kurt H. Nadelmann, *Jurisdictionally Improper Fora*, *in* TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW—LEGAL ESSAYS IN HONOR OF HESSEL W. YNTEMA 321 (1961); Joseph Halpern, *"Exorbitant Jurisdiction" and the Brussels Convention: Toward a Theory of Restraint*, 9 YALE J. WORLD PUB. ORD. 369 (1983);

Presently the Hague Conference on Private International Law[10] is considering sponsoring the development of a multilateral convention that would, for the first time outside of a bilateral[11] or regional[12]

Thomas E. Carbonneau, *The French Exequatur Proceeding: The Exorbitant Jurisdictional Rules of Articles 14 and 15 (Code Civil) as Obstacles to the Enforcement of Foreign Judgments in France*, 2 HASTINGS INT'L & COMP. L. REV. 307 (1979); Louis I. De Winter, *Excessive Jurisdiction in Private International Law*, 17 INT'L & COMP. L. Q. 706 (1968); Arthur T. von Mehren, *Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States*, 81 COLUM. L. REV. 1044 (1981).

For a discussion of the likely content of the international law of jurisdiction, see *infra* note 17.

10. The Hague Conference on Private International Law was first convened at the instigation of the Dutch government in 1893. There are now 38 members of the conference, including most of the Western industrial nations and countries from almost every geographical region of the world. Its purpose is to provide a multilateral forum for the development of treaties that prescribe, in various civil and commercial areas, the laws that should be applied within domestic legal systems. Some conventions provide rules for choosing between different countries' domestic laws (choice of law); other conventions themselves establish the applicable substantive law to be applied. The Hague Conference's conventions are very influential in establishing customary norms that are even applied by states that do not formally accede to them. *See generally* Peter Pfund, *The Hague Conference Celebrates Its 100th Anniversary*, 28 TEX. INT'L L.J. 531 (1993); Willis Reese, *The Hague Conference on Private International Law: Some Observations*, 19 INT'L LAW. 881 (1985). Pursuant to congressional authority, the United States became a participatory member in 1965. S. Exec. Doc. A, at V; Pub. L. No. 88-244, 77 Stat. 775 (1963).

11. The United States has not entered into any bilateral treaties that comprehensively allocate the authority to exercise personal jurisdiction in international civil cases, but it has entered into a number of "friendship, commerce, and navigation treaties" that have jurisdictional implications. These treaties contain clauses requiring each country guarantee court access to nationals of the other country. *See, e.g.*, Treaty of Friendship, Commerce, and Navigation, Apr. 2, 1953, U.S.-Japan, art. VI, 4 U.S.T. 2063 (entered into force Oct. 30, 1953). *See also* Allan Jay Stevenson, *Forum Non Conveniens And Equal Access Under Friendship, Commerce, And Navigation Treaties: A Foreign Plaintiff's Rights*, 13 HASTINGS INT'L & COMP. L. REV. 267, 282 (1990) (documenting the many Friendship, Commerce, and Navigation Treaties that the United States has signed guaranteeing access to courts). The United States is also party to a number of bilateral investment treaties that, though limited to the protection of foreign investors, contain similar provisions. *See, e.g.*, The United States Department of State, Model Bilateral Investment Treaty, art. II, 6, (revised Feb. 24, 1984), *in* 1 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 655 (S. Zamora & R. Brand eds. 1990). ("Each party shall provide effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties.").

The United States has also entered into jurisdictional treaties that allocate personal jurisdiction between the United States and foreign countries over U.S. military personnel and their families stationed overseas and that affect its troop deployments throughout the NATO countries in Europe. For example, Law No. 46 of the Office of the United States High Commissioner for Germany, enacted on April 28, 1955, provides the United States and its courts original jurisdiction over criminal and civil cases pursuant to legislation in effect in the U.S. sector of Berlin. For a reprint of this agreement, see United States v. Tiede, 86 F.R.D. 227, 237 (1979). *See also* Maryellen Fullerton, *Hijacking Trials Overseas: The Need for an Article III Court*, 28 WM. & MARY L. REV. 8, n.20 (1986).

12. The United States is not a party to any multilateral conventions that have as their general purpose the definition of international jurisdictional standards, but it is a party to some specific subject area treaties that have jurisdictional provisions. *See, e.g.*, Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, art. 28, 137 L.N.T.S. 13 (entered into force Feb. 13, 1933) (more commonly known as the Warsaw Convention, this treaty provides that liability actions against airlines under the terms of the Convention are restricted to the following fora: (1) the carrier's domicile; (2) the carrier's principal place of business; (3) the place where the ticket was purchased; or (4) the passenger's place of destination).

framework, precisely define an international law of jurisdiction.[13] This Article is also a call for the negotiation and adoption of such a conven-

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The most important regional agreements with implications for personal jurisdiction have been those to secure the recognition and satisfaction of foreign judgments among European countries. *See* the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229 (1969), as amended by the Accession Convention of Denmark, the Republic of Ireland, and the United Kingdom of 9 October 1978, O. J. L 304/77, *reprinted in* 18 I.L.M. 20 (1979) [hereinafter Brussels Convention] (entered into force between the original six Member States and Denmark on Nov. 1, 1986, between these countries and the United Kingdom on Nov. 1, 1987, and between these countries and Ireland on June 1, 1988). The Convention has since been amended to include new members of the European Union and to extend substantially similar provisions to the combined market countries of the European Free Trade Association (EFTA). Convention on the Accession of the Kingdom of Spain and the Portuguese Republic to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1989 O.J. (L 285) 1, *reprinted in* 29 I.L.M. 1413 (1990). *See also* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 Sept. 1988, 1988 O.J. (L 319) 9, *reprinted in* 28 I.L.M. 620 (1989) [hereinafter Lugano Convention] (entered into force among ratifying countries Jan. 1, 1992) (The Lugano Convention extended the principles of the Brussels Convention to relations between the Member States of the European Union and the EFTA, which include Finland, Norway, Iceland, Austria, Switzerland and Sweden. All members of the European Union and the EFTA, with the exception of Spain, are signatories to the Lugano Convention, but only 11 of these countries, France, Finland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Sweden, Switzerland, and the United Kingdom, have ratified that convention). For an excellent review of the major provisions in the Brussels and Lugano conventions, and of the relationship between the two, see Elizabeth M. McCaffrey, *The Lugano and San Sebastion Conventions: General Effects*, 11 CIV. JUST. Q. 12 (1992).

The main purpose of the Brussels Convention and related agreements was to provide for the effective recognition and satisfaction of judgements. States often refused, however, to enforce foreign judgments rendered without what they considered to be adequate jurisdiction. Therefore, the Brussels Convention and related agreements established mandatory rules governing the assertion of personal jurisdiction between signatory states with the goal of providing that judgments will be routinely satisfied.

See also Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, P.A.U.T.S. 51, 18 I.L.M. 1224 (entered into force June 14, 1980) (establishing conditions under which judgments and arbitral awards rendered in civil, commercial, or labor proceedings shall be given validity in the territory of other parties); Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, May 24, 1984 (not in force) (setting out the circumstances where courts and tribunals are to be regarded as "competent in the international sphere" (within the meaning of Art. 2(d) of the Montevideo Convention) to deal with particular legal issues, and establishing certain circumstances where foreign judgments shall not have extraterritorial validity).

13. A Special Commission of the Hague Conference has recently recommended that the Conference should undertake to sponsor the conclusion of such a treaty. If the Conference follows the recommendation of the Commission, negotiations over this treaty would commence in October 1996.

In 1925 the Hague Conference drafted a model bilateral agreement on satisfaction of judgments that left specific jurisdictional provisions up to future agreements between treaty parties. There is already an existing Hague Convention on the recognition and enforcement of judgments. *See* Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and Supplemental Protocol, Feb. 1, 1971 (entered into force Aug. 20, 1979). To date, however, only three countries, Cyprus, the Netherlands, and Portugal, have acceded to this Convention. The United States signed the Convention but never ratified it. The Convention left the difficult issue of establishing international jurisdictional rules to bilateral supplemental agreements that under the terms of the Convention had to be concluded between individual signatories before the Convention could enter into force between them. The Convention is

tion.[14] In cases where litigants are from states that do not accede to the convention, or in the event that the convention is not adopted, the Article additionally suggests that courts begin to apply the customary international law of jurisdiction[15] with the hope that they engage in an international judicial dialogue[16] that will have the practical effect of developing and refining this law.[17]

In this Article, my methodological approach is to focus primarily on the laws and jurisdictional doctrine of the United States. Where relevant, I employ foreign doctrine to indicate the broader scope of my conclusions. My claim is that the international law of personal juris-

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generally considered a failure. At the time it was being negotiated, the European Union countries decided to proceed with the Brussels Convention, *see supra* note 12, which effectively diverted all attention away from the Hague Convention.

14. This Article is limited to making a case for *an* international law of jurisdiction. It therefore does not appraise the relative merits of any of the alternative proposals that are being discussed for inclusion in a possible Hague Convention.

15. *See supra* note 9 (discussing the existence of this law); *see also infra* note 17 (discussing the likely content of this law).

Customary international law usually is defined as the general practices of states that are accepted as law. *See* 1 OPPENHEIM, *supra* note 9, § 10. Along with treaties, such as the proposed Hague Convention, custom is today generally regarded as one of the two major positivist sources of international law. For a discussion of natural law as a source of international law, see *infra* notes 123–124.

16. This term generally is used to refer to the dialogue that takes place between members of the same court when they speak to each other through multiple opinions. I use it to refer to the discussion that could take place between members of different courts and even different judiciaries. For a discussion of the ways that judicial dialogue develops and refines legal principles, see Frank I. Michelman, *The Supreme Court 1985 Term*, 100 HARV. L. REV. 4, 33–36 (1986).

17. Although the content of the international law of jurisdiction is somewhat unclear, and significant disagreements between states as to the acceptable basis for exercising adjudicative jurisdiction continue (see *infra* notes 146–147 and accompanying text), consensus exists around certain broad parameters. *See* RESTATEMENT (THIRD), *supra* note 9, pt. IV, § 421, reporters' note 1. ("The modern concepts of jurisdiction to adjudicate under international law are similar to those developed under the due process clause of the United States Constitution . . . . The standards here set forth are comparable also to the criteria set out in Order 11 of the Rules of the Supreme Court of the United Kingdom (1983) and to the standards applicable among EEC domiciliaries set forth in the 1968 European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended in 1978."); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 298, 306–07 (4th ed. 1990) (discussing the requirement of a sufficiently close connection between the subject matter and the state to justify a state's assertion of jurisdiction); LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 224–49 (1989) (taking a policy-oriented perspective to examine the allocation of international adjudicatory jurisdiction and explaining the principles of jurisdictional judicial authority); F.A. Mann, *The Doctrine of International Jurisdiction Revisited After Twenty Years,* 186 R.C.A.D.I. 9 (1984); Arthur T. von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated,* 63 B.U. L. REV. 279 (1983). Significant areas of disagreement nonetheless remain. *See* Henry DeVries & Andreas F. Lowenfeld, *Jurisdiction in Personal Actions—A Comparison of Civil Law Views*, 44 IOWA L. REV. 306, 344 (1959) ("A uniform concept of personal jurisdiction of civil-law courts in international relations cannot be presumed . . . . Whether 'traditional notions of fair play and substantial justice' can be reconciled in the international area of law will emerge as a vital problem in the growth of an increasingly unified Atlantic Community."). For a discussion of specific differences in concepts of jurisdiction, see *infra* notes 108–117 and accompanying text.

diction should be applied by domestic courts not only in the United States, but in all countries.

I use the two dominant modes of analytical inquiry, positivism and normativism, to arrive at my conclusion that the international law of jurisdiction should be applied in domestic courts. The positivist rationale, as described in Part II.A, provides essentially that if legal doctrine is to reinforce rather than weaken the existing international system, it must be consistent with the paradigm upon which that system is based. The relevant sovereignty paradigm, as I call it, provides that domestic law regulates private actors who are within the jurisdictional realms of the various states and that international law regulates relations between states. The majority of this Article is committed to resolving the unique conceptual problems that arise when applying the paradigm to determine whether state courts should apply a domestic or international law of jurisdiction in cases involving foreign litigants.

I begin in Part II.B.1 with an historical review of the application of the sovereignty paradigm to personal jurisdiction. What I call the "era of territorial jurisdiction" was defined by a belief that the state's jurisdictional powers were static and that such powers gave each state exclusive domain within the realm of its own territory. Protecting the territorial integrity of states from encroachments by other states was the manifest jurisdictional concern in the territorial era. Because this concern involved the governance of relations between sovereigns, jurisdiction was at that time easily understood to fit comfortably within the realm of international law. Part II.B.2 explains that the new contacts era emphasis on the consent of the defendant was an attempt to establish a basis for state assertions of personal jurisdiction that was independent of the state's own limited territorial powers. This emphasis, however, led doctrine-makers to believe that jurisdiction was concerned with the state's regulation of private actors and was, therefore, under the paradigm, properly the subject of domestic rather than international law. In Part II.B.3, I explain that state jurisdictional powers are not static, and that the shift to contacts jurisdiction represented a dynamic alteration in the power of states to assert jurisdiction that was independent of the defendant's consent. Understood now as a question of how independent state powers are defined, I demonstrate that because this definition necessarily affects the division of jurisdictional responsibility of all states, the paradigm requires prescription by the international order.

Having established that the international order should properly circumscribe state assertions of jurisdiction, Part II.C asks whether what is called the doctrine of dualism might nevertheless prevent the application of international jurisdictional law in domestic courts. Un-

der the dualist interpretation of the sovereignty paradigm, states are thought to have the power to direct their courts not to apply international law. I demonstrate, however, that the unique nature of jurisdiction precludes domestic courts from invoking the dualism concept as a means to avoid applying the international law of jurisdiction.

Finally, Part III of the Article makes the normative case for the domestic application of international jurisdiction law. Specifically, I explain that the creation of a coherent international jurisdictional system demands that the international law of jurisdiction be fully developed and domestically applied.

To put my thesis in context, I will first describe in Part I the various domestic doctrines related to jurisdiction and demonstrate that these domestic doctrines are applied in national courts regardless of the citizenship of the parties to a dispute. I define "doctrine related to jurisdiction" as the body of doctrine that determines which forum ultimately hears a dispute. This contrasts with the understanding in the United States of jurisdiction as limited to constraints that emanate from the United States Constitution. A discussion of doctrine related to jurisdiction is an important starting point for the Article because it specifies the entire body of law that should be supplanted by an international law of jurisdiction in cases involving foreign parties.

I. DOMESTIC DOCTRINE RELATED TO JURISDICTION IN THE UNITED STATES AND ABROAD, AND THE ASSUMPTION OF UNIVERSAL APPLICATION

A. The Contemporary American System of Personal Jurisdiction: Minimum Contacts and Related Doctrines

Every first-year law student in the United States learns in civil procedure class that the ability of a federal or state forum to assert personal jurisdiction over a civil defendant is determined by the United States Constitution. The forum may not exercise jurisdiction if doing so would violate the defendant's rights under the Constitution's applicable Due Process Clause.[18]

The nature of these rights in the modern or "contacts" era was originally laid out in the 1945 case of *International Shoe Co. v. Washington*.[19] In that case the Supreme Court explicitly endorsed what came to be identified as the minimum contacts test:

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18. When the jurisdiction of state courts is in question, the Due Process Clause of the 14th Amendment applies. U.S. CONST. amend. XIV. § I. When the jurisdiction of the federal courts is in question, see *infra* notes 49–50 and accompanying text, the Due Process Clause of the Fifth Amendment is applicable. U.S. CONST. amend. V.

19. 326 U.S. 310 (1945).

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[20]

Precisely defining the nature of the contacts[21] necessary for a court in the United States to assert jurisdiction properly, however, has been the continual subject of litigation, with many cases decided by the Supreme Court itself.[22] Moreover, perhaps no other area of law in the United States has been the subject of more academic commentary.[23] What constitutes sufficient contacts varies depending upon the underlying factual situation. Often, the contacts necessary for jurisdiction arise out of the conduct or activity that gave rise to the litigation itself, thus creating "specific jurisdiction."[24] Under this doctrine, for example, a court in a breach of contract action can assert jurisdiction over a

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20. *Id.* at 316.

21. The minimum contacts test is only the most common application in the United States of what I call contacts analysis. "Contacts analysis" here refers to the jurisdiction-establishing method that emphasizes the contacts between the sovereign or the geographic area where the court sits and the defendant or dispute, rather than emphasizing the protection of the state's territorial sovereignty, see *infra* text accompanying note 76. Contacts analysis in this sense is applied in numerous countries. *See infra* note 103 and notes 53–55 and accompanying text.

Domicile, nationality or citizenship, and service while present in the forum—all ways of establishing jurisdiction in the United States—are sometimes considered doctrinally distinct from the minimum contacts test. *See* Miliken v. Meyer, 311 U.S. 457 (1940) (holding that an individual is subject to personal jurisdiction in the state where he or she is domiciled); Blackmer v. United States, 284 U.S. 421 (1932) (holding that nationality or citizenship provides a basis for the exercise of personal jurisdiction); Burnham v. Superior Court, 495 U.S. 604 (1990) (holding that service of process while present within the forum is a sufficient basis for establishing jurisdiction). I include these in my definition of contacts analysis, however, because the rationale used to support them today emphasizes contacts rather than the protection of territorial sovereignty.

As will be discussed in part II.B.3, contacts could be with a territorially defined sovereign, a nationally defined sovereign, or simply with the area where a particular court sits.

22. Since *International Shoe*, 326 U.S. 310 (1945), the Supreme Court of the United States has revisited the issue of personal jurisdiction on 13 occasions. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958); Shaffer v. Heitner, 433 U.S. 186 (1977); Kulko v. Superior Court, 436 U.S. 84 (1978); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Burnham v. Superior Court, 495 U.S. 604 (1990).

23. *See, e.g.*, 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1064–1081 (1987) (citing numerous scholarly legal sources in the area and canvassing relevant case law); JACK H. FRIEDENTHAL, MARY K. KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 95–190 (1985) (explaining personal jurisdiction and citing authoritative support and commentary).

24. For further explanation, see Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 661–62 (1988).

party—regardless of the party's residence—based on the contract's having been negotiated, signed, or performed in the forum state. In contrast, "general jurisdiction" exists when the defendant's overall contacts with the forum state are so significant that the court can assert jurisdiction over her regardless of the connections between the underlying controversy and the state. For example, a court can assert general jurisdiction over all people domiciled within it.[25] In a minority of cases, the jurisdictional question focuses on whether a forum can exercise jurisdiction over the property that is the subject of the dispute, rather than over an individual. The general rule is that a forum may assert jurisdiction over a dispute involving property that is located within the forum.[26]

Under the multifaceted scheme that has developed in the United States, if the constitutional threshold of minimum contacts is met, other doctrines can be employed to help direct civil cases to the appropriate forum.[27] Most importantly, state and federal forums in the United States have discretion to establish rules and procedures that allow them to decline to exercise their constitutional grant of jurisdiction.[28] All states utilize "long arm" statutes, which limit the cases that their courts may hear. In fact, most states do not allow their courts to exercise jurisdiction to the full extent permitted by the Constitution.[29] Federal district courts use the long arm statutes of the states in which they sit in all diversity cases and in federal question cases where there are no applicable federal long arm provisions.[30] In addition, individual

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25. The distinction between specific and general jurisdiction was first suggested by Arthur von Mehren and Donald Trautman. Arthur von Mehren & Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136–63 (1966). The Supreme Court adopted it in *Helicopteros*, 466 U.S. 408. *See infra* note 43 and accompanying text.

26. For further explanation, see ROBERT C. CASAD, 2 JURISDICTION IN CIVIL ACTION § 3.05 (1991).

27. These are the doctrines that are not considered determinative of jurisdiction in the United States because unlike the minimum contacts analysis, they are not mandated by the Constitution. As I indicated in the Introduction, however, like the constitutional test, these doctrines are important to this Article because they would yield to international law to the extent that it provides an integrated jurisdictional scheme.

28. *See generally* JOSEPH W. GLANNON, CIVIL PROCEDURE 23–24 (2d ed. 1992).

29. Some state legislatures have, however, authorized their courts to exercise personal jurisdiction to the full extent allowed under the Due Process Clause. *See generally id.* at 24.

30. When the personal jurisdiction of a federal court is at issue, Rule 4 of the Federal Rules of Civil Procedure is understood to direct that court to apply the long arm provision of the federal legislation being substantively applied, assuming such a provision exists. FED. R. CIV. P. 4. Such provisions have generally been interpreted to provide that contacts with the United States as a whole (national contacts) rather than with any particular U.S. state, is sufficient to establish the personal jurisdiction of the federal forum. *See, e.g.*, Sherman Act, 15 U.S.C. § 5 (1994); Clayton Act, 15 U.S.C. § 22 (1994); Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1994) (providing for national contacts as a basis of jurisdiction). If no such provision exists, or in a diversity case where state law is being applied, Rule 4 directs the federal court to apply the long arm statute of the state in which the court sits. The rule was recently amended, however, to provide that in

states and the federal government have rules of venue that direct cases to those courts within the forum that are geographically most convenient. Finally, the federal system[31] and many state systems[32] have adopted the Scottish common law doctrine of *forum non conveniens*. This doctrine gives judges the discretion to dismiss a case or transfer it to another court within the forum when it would be significantly more convenient for it to be heard elsewhere.[33]

B. The Application of United States Doctrine Related to Jurisdiction to Cases Involving Foreign Litigants

Civil procedure students in the United States are taught that domestic jurisdiction doctrines apply universally, to cases involving a foreign party as well as those involving only domestic litigants. When one of the parties is foreign, United States courts have assumed it appropriate to overlook international jurisdiction law and apply solely United States constitutional, statutory, and common law doctrines related to jurisdiction.

The four United States Supreme Court cases that have dealt with personal jurisdiction over foreign civil defendants in the minimum contacts era exemplify this failure to consider whether international law should be applied. The first of the four cases is *Perkins v. Benguet Consolidated Mining Company*, decided in 1952.[34] In that case, the plaintiff filed suit in Ohio against a Philippine corporation. The Court found that although the underlying cause of action did not arise in Ohio, an assertion of jurisdiction was valid under the Due Process Clause of the United States Constitution. The decision was based on the fact that during the Japanese occupation of the Philippines, the corporation had conducted "continuous and systematic"[35] business ac-

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federal question cases, where there is no applicable long arm statute, if the foreign defendant does not have contacts with any individual state sufficient for the exercise of jurisdiction under the state's own long arm statute, but does have the requisite national contacts under the Due Process Clause of the Fifth Amendment, any federal court can assert personal jurisdiction. FED. R. CIV. P. 4(k)(2).

31. The federal system has adopted the doctrine of *forum non conveniens* by statute. *See* 28 U.S.C. § 1404(a) (1988). *See also* 28 U.S.C. § 1441 (1988) (setting forth grounds for removal of cases from state court to federal court).

32. Some states recognize the doctrine of *forum non conveniens* by statute, some recognize it by common law, and some do not recognize the doctrine at all. *See generally* 15 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3846 (1986).

33. "Convenience" factors include the private interests of the litigants, ease of access to sources of proof, ease and expense of compelling reluctant witnesses to attend proceedings, expense of transporting willing witnesses, and the enforceability of judgment once it is obtained. This list is not exhaustive, and every situation presents different legal obstacles. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–09 (1947). *See also* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

34. 342 U.S. 437 (1952).

35. During the war, the president of the corporation conducted some business activities on

tivities in Ohio.[36] As the first Supreme Court personal jurisdiction case involving a foreign defendant, *Perkins* provided the Court the opportunity to address the fundamental question of whether United States or international jurisdiction law should be applied. Instead of confronting this issue, the Court simply assumed that the relevant jurisdictional law emanated from the United States.[37]

The Court was not faced with another personal jurisdiction case involving foreign parties until 1982, when it decided *Insurance Corporation of Ireland, Ltd., v. Compagnie Des Bauxites De Guinee.*[38] In that case, Compagnie Des Bauxites De Guinee ("Bauxites"), filed suit in the Federal District Court for the Western District of Pennsylvania against a number of insurance companies.[39] Bauxites alleged that the companies had refused to indemnify it for losses that were covered under its policies. Half of the claimed coverage was provided by a United States insurance company, and the other half was provided by a group of twenty-one foreign insurance companies. Fourteen of these companies challenged the exercise of personal jurisdiction by the United States forum. These fourteen defendants refused to comply with the court's repeated orders for production of documents containing information relevant to a determination of whether they had minimum contacts with the forum. The court ultimately sanctioned them by ruling that minimum contacts had been established and that the defendants were foreclosed from disputing jurisdiction.[40] In upholding the U.S. District Court's assertion of jurisdiction, the Supreme Court looked only to the United States Constitution and the Federal Rules of Civil Procedure.[41] Even though foreign defendants were involved,

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behalf of the corporation from Ohio. For example, he had an office, employed several secretaries, drew salary checks on behalf of the corporation, and held several directors meetings in that state. *Id.* at 447–48.

36. This is an example of general jurisdiction. *See supra* note 25 and accompanying text.

37. "The answer to the question whether the state courts of Ohio are open to a proceeding *in personam* against an amply notified foreign corporation to enforce a cause of action not arising in Ohio and not related to the business or activities of the corporation in that State, rests entirely upon the law of Ohio, unless the *due process clause of the Fourteenth Amendment* compels a decision either way." *Perkins*, 342 U.S. at 440 (emphasis added).

38. 456 U.S. 694 (1981).

39. Compagnie Des Bauxites De Guinee v. Ins. Co. of N. Am., 554 F. Supp. 1080 (W.D. Pa. 1983).

40. The sanction was arguably permitted by FED. R. CIV. P. 37(b)(2)(A), which provides: "[If a party fails to obey an order to provide or permit discovery, the court may make an] order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order . . . ." *Id.*

41. The Court first looks to the Constitution to find the applicable source of law. *Ins. Corp. of Ireland*, 456 U.S. at 702 ("The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause."). It then uses the Constitution to conclude that, "[a]s a general proposition, the Rule 37 sanction applied to a finding of personal jurisdiction creates no more of a due process problem than the Rule 12 waiver." *Id.* at 705.

the Court never considered the possibility that international law should play a role in this determination.

Two years later, the Supreme Court handed down its next case involving a foreign defendant, *Helicopteros Nacionales de Colombia, S.A. v. Hall*.[42] This case addressed whether a Texas court could assert jurisdiction over a Colombian corporate defendant in a wrongful death action. The defendant's helicopter crashed in Peru, killing four Americans. The sales contract for the helicopter that crashed was negotiated by the defendant in Texas, and the defendant had purchased other helicopters in Texas. The defendant's pilots and management were trained in Texas, and the checks paying for the defendant's transportation services were drawn on a Texas bank and paid into a New York account. While this case was important to the development of the domestic law of personal jurisdiction,[43] the Court again assumed that the scope of jurisdiction over a foreign defendant is delineated solely by the Due Process Clause of the Fourteenth Amendment.[44]

Finally, in the 1987 Supreme Court case of *Asahi Metal Industry Co. v. Superior Court*,[45] neither the plaintiff[46] nor the defendant corporations were United States citizens. In this case, the original plaintiff was

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42. 466 U.S. 408 (1984).

43. The issue before the Supreme Court was whether purchases made on a regular basis, but unrelated to the cause of action, are sufficient to subject a foreign defendant to personal jurisdiction. Unequivocally distinguishing specific jurisdiction from general personal jurisdiction for the first time, the Court pointed out that the jurisdiction over *Helicopteros* would be of a general nature. *Helicopteros*, 466 U.S. at 414, nn.8–9. *See supra* note 25 and accompanying text. Characterizing money transfer as of "negligible significance," and minimizing the importance of the chief executive officer's travel to Texas to negotiate the contract, the Court concluded that the purchases, although regular, did not constitute "continuous and systematic" activity, and thus were not sufficient for the exercise of general *in personam* jurisdiction. *Helicopteros*, 466 U.S. at 416–18 (relying upon its decision in Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923)).

44. "The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant." *Helicopteros*, 466 U.S. at 413–14 (emphasis added).

45. 480 U.S. 102 (1987).

46. This is the only Supreme Court personal jurisdiction case in the contacts era in which the plaintiff was not an American citizen. In lower court cases involving foreign plaintiffs, the courts always assume that U.S. jurisdiction law applies. It would be very surprising if this was not the case given that international law is not applied to cases involving foreign defendants despite the prevailing belief in the United States that the law of jurisdiction is about protecting the rights of defendants. For a discussion of the jurisdictional interests of plaintiffs, see *supra* note 7 and *infra* notes 143, 144, and 152 and accompanying text.

In Ins. Corp. of Ireland v. Compagnie Des Bauxites De Guinee, 456 U.S. 694 (1982), the plaintiff-respondent, Compagnie des Bauxites de Guinee, was a U.S. corporation incorporated in Delaware. It was 49% owned by the Republic of Guinea, however, and its principal place of business was in the Republic of Guinea. This raises important questions about what it means to call a corporate plaintiff a "U.S. corporation." This Article assumes, in accordance with the accepted international rule, that the only factor relevant to a corporation's citizenship is its place of incorporation. *See, e.g.*, Barcelona Traction, Light and Power Co. (Belgium v. Spain), 1970 I.C.J. 3 (Feb. 5). This is becoming an increasingly meaningless way to identify a corporation's actual

injured when he lost control of his motorcycle due to a faulty motorcycle valve. He sued the manufacturer of the motorcycle tire, Cheng Shin (a Taiwanese manufacturer) in California court. Cheng Shin, in turn, filed a cross-complaint seeking indemnification from Asahi, the Japanese supplier of the tire tube's valve. The original plaintiff ultimately settled with Cheng Shin, leaving only the action for indemnification between the two foreign parties to be decided by the California court. Asahi challenged the jurisdiction of the California court.

Despite the obvious questions raised by the facts of this case about the role of United States law in prescribing the rules of jurisdiction in international cases, the Court again failed to inquire into whether international law should be applied. In a plurality opinion, the Court per Justice O'Connor acknowledged for the first time that unique factors are involved in asserting personal jurisdiction over a foreign defendant.[47] For O'Connor, however, such factors were important only for the purpose of applying the same constitutional minimum contacts test that is routinely applied to domestic defendants.[48] In fact, Justice O'Connor never discussed the relevance of international law to the case.

All four of these cases (except *Insurance Corporation of Ireland*) dealt with the validity of assertions of jurisdiction by state courts in the United States. It is perhaps more likely that the international law of jurisdiction would be applied to assertions of jurisdiction made by *federal* courts. After all, in United States federalism, the national sovereign is not just one of the "several states" among whom judicial authority constitutionally must be allocated. Rather, the federal sovereign has its own international legal personality as the direct representative of the United States to the international community. As such, the federal sovereign is one of the international sovereigns among whom judicial authority arguably should be internationally allocated. This, however, is not the case. All four of these cases used the same touchstone: the Court in each assumed that the United States Consti-

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connections to a particular forum. For a discussion of "The Coming Irrelevance of Corporate Nationality," see generally REICH, *supra* note 1 at Chapter 12.

47. Justice O'Connor specified that the defendant is forced to litigate in a foreign legal system, and that there are potential implications for U.S. foreign policy. *Asahi*, 480 U.S. at 115.

In a case involving the establishment of jurisdiction to freeze a foreign bank account, Justice Harlan had previously, in a dissent, admonished that, "great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

48. "This case presents the question whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum state in the stream of commerce constitutes 'minimum contacts' between the defendant and the forum state . . . ." *Asahi* 480 U.S. at 105.

tution[49]—and not international law—provides the ultimate restraint on jurisdiction.[50]

Similarly, courts assume that the domestic doctrines related to jurisdiction that allow forums to decline to exercise their constitutional grant of jurisdiction are applicable to all cases regardless of the nationality of the litigants.[51]

Like the courts, legal commentators have failed to question whether the international law of jurisdiction should be applied. The articles that discuss cases involving foreign parties assume that the relevant jurisdictional doctrines to be applied by both state and federal courts are the domestic ones.[52]

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49. Regardless of whether a long arm provision is found in federal legislation, a state long arm statute is being applied, or the national contacts standard of Rule 4 is applied, it is always assumed that the U.S. Constitution and not international law provides the ultimate restraint on jurisdiction. For a discussion of domestic long arm provisions applicable to federal courts, see *supra* note 30 and accompanying text.

50. Following is a representative sampling of circuit court cases that assume that domestic, rather than international law, is applicable. *E.g.*, *Insurance Corporation of Ireland*, 651 F.2d 877, *see supra* notes 38–41 and accompanying text (discussing the Supreme Court's review of the case); *In re* Chase & Sanborn Corp. 835 F.2d 1341 (11th Cir. 1988) (holding that the bankruptcy court's exercise of *in personam* jurisdiction over Colombian defendants satisfied due process and statutory requirements); Wells Fargo & Co. v. Wells Fargo Exp. Co., 556 F.2d 406, 416 (9th Cir. 1977) (pointing out that "not only must the requirements of due process be met before a court can properly assert *in personam* jurisdiction, but the exercise of jurisdiction must also be affirmatively authorized by the legislature"); Rebozo v. Washington Post Co., 515 F.2d 1208, 1213 (5th Cir. 1975) (stressing that "having decided that the Florida statute authorized the assertion of jurisdiction in the circumstances of this case, we turn to the second aspect of our inquiry: is the assertion of *in personam* jurisdiction over the company constitutionally permissible?"); *see also* Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406, 1415 (9th Cir. 1989); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1545 (11th Cir. 1993); Command-Aire Corp. v. Ontario Mechanical Sales and Serv. Inc., 963 F.2d 90, 93–94 (5th Cir. 1992); Koteen v. Bermuda Cablevision, Ltd., 913 F.2d 973, 975 (D.C. Cir. 1990).

51. *See, e.g.*, Jim Fox Enterprises, Inc. v. Air France, 664 F.2d 63 (5th Cir. 1981) (subjecting foreign defendants to Texas long arm statute); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (applying U.S. version of *forum non conveniens* and U.S. case law on forum selection clauses to overturn finding of jurisdiction over foreign defendant).

These domestic doctrines, particularly *forum non conveniens*, are sometimes applied differently to foreign litigants. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). *See also* Molly M. White, *Home Field Advantage: The Exploitation of Federal Forum Non Conveniens by United States Corporations and its Effects on International Environmental Litigation*, 26 LOY. L.A. L. REV. 491 (1993); Allan Jay Stevenson, *Forum Non Conveniens and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff's Rights*, 13 HASTINGS INT'L & COMP. L. REV. 267 (1990).

52. *See, e.g.*, Louise Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913 (1985); R. Lawrence Dessem, *Personal Jurisdiction After* Asahi*: The Other (International) Shoe Drops*, 55 TENN. L. REV. 41 (1987); William VanDercreek, *Jurisdiction Over the Person—The Progeny of* Pennoyer *and the Future of* Asahi, 13 NOVA L. REV. 1287 (1987); Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. LITIG. 239 (1988); David Seidelson, *A Supreme Court Conclusion and Two Rationales that Defy Comprehension:* Asahi Metal Indus. Co., LTD. v. Superior Court of California, 53 BROOK. L. REV. 563 (1987).

Several commentators have argued that in cases involving foreign defendants or federal asser-

C. The Domestic Law of Adjudicatory Jurisdiction in Civil Law Countries and its Application to Cases Involving Foreign Litigants

Like the United States, other countries are provincial in their approaches to asserting jurisdiction in cases involving foreign litigants. For example, law students in France[53] learn that article 42 of the French Code de Procedure Civile provides that defendants may always be sued at their place of domicile.[54] Alternative forums are provided by the place where a tort is committed or where a contract is performed.[55] In France, law students learn additionally that articles 14 and 15 of the French Code Civile[56] (unlike United States law) include special substantive provisions for foreign litigants. Far from requiring the application of international standards, however, these articles permit French courts to assert exclusive jurisdiction[57] whenever[58] a French national is either a plaintiff or a defendant in a suit.[59]

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tions of jurisdiction, the United States generally, rather than a particular state, should be considered the relevant entity with which a defendant must have minimum contacts. These commentators premise this argument on an analysis of the U.S. Constitution rather than on international law. *See, e.g.*, Graham Lilly, *Jurisdiction Over Domestic and Alien Defendants,* 69 VA. L. REV. 85 (1983); Gary Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1 (1987); Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1 (1984); Robert Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign,* 33 VILL. L. REV. 1 (1988); Brian Frasch, *National Contacts as a Basis for In Personam Jurisdiction Over Aliens in Federal Questions Suits,* 70 CAL. L. REV. 686 (1982).

53. I reference France because it is the home of the civil law tradition and its basic approach to jurisdiction has been adopted throughout the civil law world. Despite this, most countries have not adopted anything similar to articles 14 and 15 of the French Civil Code. See *infra* notes 56–59 and accompanying text. The U.S. approach is broadly representative of the other major legal tradition, the common law tradition, which started in England.

54. CODE DE PROCEDURE CIVILE [C. PROC. CIV.] art. 42 (Fr.).

55. C. PROC. CIV. art. 46 (Fr.).

56. Articles 14 and 15 read as follows:

> An alien, though not residing in France, can be cited before the French courts, for the performance of obligations contracted by him in France with a Frenchman; he can be brought before French courts for obligations contracted by him in a foreign country toward Frenchmen.

C. CIV. art. 14 (Fr.)

> A Frenchman can be brought before a court of France for obligations contracted by him in a foreign country even with an alien.

C. CIV. art. 15 (Fr.).

57. Articles 14 and 15 were interpreted to establish the exclusive jurisdiction of French courts by the French Cour de cassation in Judgment of Mar. 17, 1830 (Challier v. Ovel), Cass. req., 1830 Recueil Sirey [S. Jur. I] 95, at 97 (Fr.).

58. Because the term "obligations" has been construed to apply to both contracts and torts, these provisions are generally applied. *See* Judgment of Dec. 13, 1842 (Comp. du Britannia v. Comp. du Phenix), Cass. req., 1843 [S. Jur. I] 14 (Fr.).

59. The Brussels Convention supercedes and invalidates articles 14 and 15 as to treaty signatories. *See* Brussels Convention, *supra* note 12, art. 3. For a discussion of the discriminatory implications of this, see *infra* notes 154–160 and accompanying text.

D. The General Applicability of International Law in Domestic Courts

When international law exists in a certain area—as it does in the area of personal jurisdiction in cases involving foreign litigants[60]—nations adhere to various doctrines that hold, with certain qualifications that will be discussed in Part II.C, that the international law should be applied. The classic United States statement of this doctrine was articulated in the turn-of-the-century Supreme Court decision of *The Paquete Habana*: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[61] Pursuant to this doctrine, international law is periodically applied by courts within the United States.[62]

Why then are civil procedure students in the United States never taught in accordance with *The Paquete Habana* to consider that the international law of jurisdiction is in theory—if not in practice—applicable in the United States, and why are students in France similarly never taught to consider the possibility that the international law of jurisdiction may be applicable in French courts?[63] To understand why this view that international law is not applicable in jurisdictional cases involving foreign parties prevails, and to see why this belief is inconsistent with the underlying social order upon which the international system is based, this Article will now turn to the positivist analysis.

II. THE POSITIVIST ANALYSIS

A. Legal Positivism and the Sovereignty Paradigm

Law is a human invention to help order social behavior. To accomplish this task, when legal doctrines are not being employed to create new (or to reform) social institutions, such doctrines must reinforce existing social institutions. The craft of developing these legal doctrines requires that judges, legislators, commentators, and other "doc-

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60. *See supra* note 9, suggesting that there is an international law of jurisdiction. *See supra* note 17, suggesting the likely content of that law.

61. The Paquete Habana, 175 U.S. 677, 700 (1900). The *Paquete Habana* court applied customary international law. For early authority upholding the validity of international agreements in U.S. courts, *see* Head Money Cases, 112 U.S. 580 (1884); Whitney v. Robertson, 124 U.S. 190 (1888). *See also* RESTATEMENT (THIRD), *supra* note 9, § 111(1) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States.").

62. *See* RESTATEMENT (THIRD), *supra* note 9, § 111, cmt. C, intro. to pt. I, ch. 1 (noting that, "In appropriate cases [American courts] apply international law or agreements . . . .").

63. *See* Luzius Wildhaber & Stephan Breitenmoser, *The Relationship Between Customary International Law and Municipal Law in Western European Countries*, 48 ZEITSCHRIFT FÜR [A]USLÄNDISCHES ÖFFENTLICHES RECHT & VÖLKERRECHT § 3.1.5, (1988) (supporting the idea that French tribunals have regarded the rules of customary international law as directly applicable).

trine-makers" derive such doctrines from an underlying paradigm[64] that describes the relevant social institution.[65] Doctrine-makers fail in their craft when their legal doctrines do not accurately reflect the underlying paradigm.[66] Law then acts to weaken rather than strengthen the institutional structure and ceases to perform its fundamental mis-

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As it is impossible to overlook major treaties, French law students are taught, as are American law students (*see supra* note 61), that the jurisdictional provisions of applicable self-executing treaties such as the Brussels Convention (*see supra* note 12), apply in their domestic courts. *See, e.g.*, LA CONSTITUTION art. 55 (Fr.) (providing that properly ratified and approved treaties have priority over French municipal law). My colleagues in Paris assure me that, while it is assumed that jurisdictional provisions of treaties apply, the courts never consider applying the customary international law of jurisdiction.

64. My definition of "paradigm" has been highly influenced by Thomas Kuhn, who used the word to connote a conceptual framework generally held by the scientific community that describes or explains natural phenomena. THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). The word has gained currency among social scientists in the last two decades as a means of describing a generally held conceptual framework that explains human institutions. A paradigm becomes generally accepted because it appears to explain underlying phenomena. The key to understanding Kuhn's concept of the paradigm is to realize that a paradigm is not "true" in an objective or absolute sense. Rather it functions only to explain phenomena for analytically useful purposes for a certain period of time. Because of a successful paradigm's apparent ability to explain such phenomena, however, it comes to be generally accepted by the scientific community as "true." As the paradigm is applied to new and different problems, its explanatory limits become apparent, and the resultant "anomalies" prompt the emergence of a new paradigm to explain the phenomena. According to Kuhn, while the scientific community is skeptical at first, it slowly accepts the "superior" explanatory power of the new paradigm and a "scientific revolution" is accomplished. *Id.*

The paradigm concept does not perfectly apply when used to connote a generally accepted framework for explaining our own social institutions, rather than phenomena relatively independent of them. Such institutions—unlike the phenomena of the "natural world"—are themselves directly influenced by the acceptance of the paradigm. These institutions are also highly unstable relative to the natural world, so paradigms may have to be abandoned due to fundamental alterations in the underlying institutions they are meant to explain. *See infra* note 66.

65. Because doctrine-makers do not see themselves as formally engaging in this process does not mean that it is not occurring. Judges implicitly derive doctrines from paradigms describing social institutions, for example, when they attempt to "find" the common law. If they are attempting to determine whether to allow divorces or homosexual marriages, and they do not look to change existing family structure, they will identify the paradigm that models the institutions of the family and derive the appropriate doctrine from that paradigm. Doctrine-makers engage in this process when they ask themselves, "What does it mean to call something a family, and is divorce or homosexual marriage consistent with it?"

66. This account of the process, for simplicity's sake, synthetically isolates the creation of the underlying paradigm from the process of doctrine-making. It artificially assumes that doctrine-makers do not have a role in the creation of the paradigm itself. Such a role is particularly obvious during times of rapid social change. To the extent that changing economic, social, or political circumstances force changes in an underlying institutional structure, the existing paradigm will no longer accurately reflect that new structure. Doctrine-makers who find themselves in the position of having to respond to new problems not adequately accounted for in the old paradigm will necessarily be participants in the development of a new paradigm. Robert Lipkin has written on the direct role of a judge—one kind of doctrine-maker—in the creation of new constitutional paradigms. He describes when doctrine-makers must involve themselves in this task:

> Generally, a revolutionary constitutional decision is a response to a perceived constitutional or social crisis . . . . A crisis may occur when there is an intractable problem in constitutional law itself, for example, when there is no paradigm in an area involving much social and political upheaval[, or . . .] when the current paradigm is indeterminate [cite omitted] or radically defective . . . .

sion of helping to order social behavior. In the following section of this Article, I specifically assess the commonly held belief that the domestic rather than the international law of jurisdiction should apply to cases involving foreign litigants. In Section II.C, I attempt to determine whether international jurisdiction law must be followed by domestic courts once it is proven applicable. Both determinations require that we look to the paradigm that defines the relative spheres of authority between the domestic and international orders.

The traditional sovereignty paradigm defines these spheres of authority.[67] This paradigm views the habitable portion of the planet, with few exceptions,[68] as divided into sovereign states. Under the classic formulation of this paradigm, each state is the ultimate and supreme political entity within its jurisdictional sphere.[69] As such, all private

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> A crisis may also occur when there is a constitutional paradigm which conflicts with the political and moral convictions of some social majority. Such a paradigm no longer solves the general social or moral problem it was designed to solve.

Robert Justin Lipkin, *The Anatomy of Constitutional Revolutions*, 68 NEB. L. REV. 701, 745 (1989). Lipkin has also applied Kuhn's theory of paradigms to judicial decision making. *See* Robert Justin Lipkin, *Conventionalism, Pragmatism, and Constitutional Revolutions* 21 U. C. DAVIS. L. REV. 645 (1988).

We are living in a time of rapid global change, when the state system is undergoing profound transformation. Although the sovereignty paradigm is under considerable stress, I believe that those aspects of it relevant to this Article will, subject to the qualifications I express (see *infra* notes 68–72), remain stable for the foreseeable future.

67. The social institution of the modern sovereign state is generally considered to have fully come into being with the final dissolution of the Holy Roman Empire after the Thirty Years War in the 17th century. What I term the sovereignty paradigm is commonly thought to have been comprehensively described first in 1577 by French political theorist Jean Bodin in the classic *Six Livres de la République*. JEAN BODIN, SIX LIVRES DE LA REPUBLIQUE (Lyon, 1576). He defined sovereignty as "the absolute and perpetual power within a State." JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH (M.J. Tooley trans., 1955).

Many 17th-, 18th-, and 19th-century writers, including Hobbes, Pufendorf, Bentham, and Austin, discussed sovereignty at great length. While there were disagreements about the details of the paradigm, there was considerable consensus as to its basic elements. (For a discussion of the modern history of the concept of sovereignty, *see generally* CHARLES EDWARD MERRIAM, HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU (1900), and PETER N. RIESENBERG, THE INALIENABILITY OF SOVEREIGNTY IN MEDIEVAL POLITICAL THOUGHT (1956). For a discussion of the history of the concept and its relationship to international law, see 1 OPPENHEIM, *supra* note 9, at 124–26.

68. Though arguably habitable, Antarctica is not a state because it lacks a significant permanent population. RESTATEMENT (THIRD), *supra* note 9, § 201(c). For a discussion of the international status of Antarctica, see generally Brenda S. Thornton, *Protecting Antarctica: Suggestions for U.S. Implementation of Three Specific Areas Addressed in the Protocol on Environmental Protection to the Antarctic Treaty*, 11 WIS. INT'L. L. REV. 49, 52 (1992).

While of diminishing relevance today, the extent to which various protectorates and colonies are regarded as states is ambiguous. For the classic work discussing this issue, see 2 D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW (1967). *See also* MALCOLM N. SHAW, INTERNATIONAL LAW 128–29 (2d ed. 1986). Military occupation does not terminate statehood. *See* RESTATEMENT (THIRD), *supra* note 9, § 201 reporters' note 3. For a discussion of the ambiguous legal status of Israeli-occupied territories, see James L. Prince, *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 STAN. J. INT'L. L. 681 (1989).

69. The first generally recognized attempt among jurists to apply the paradigm explicitly to create jurisdictional legal doctrine was done by Ulricus Huber, a Dutch jurist of the 17th century.

In the 19th century Huber's work gained widespread exposure, particularly in the United States, as a result of the writings of Joseph Story. For further explanation see ULRICUS HUBER, DE CONFLICTU LEGUM, *translated and reprinted in* D. J. LLEWELYN DAVIES, THE INFLUENCE OF HUBER'S *DE CONFLICTU LEGUM* ON ENGLISH PRIVATE INTERNATIONAL LAW 49 (1937); Ernest G. Lorenzen, *The Theory of Qualifications and the Conflict of Laws*, 20 COLUM. L. REV. 247, 271 (1920); Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15, 16 n.9, 16–17 (1934). For an explanation of Story's role in shaping the jurisdictional rules specifically, see Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 S. CT. REV. 241, 259–62.

The dominant classical view reflected in Huber and Story's work was that the state's jurisdictional sphere was almost exclusively defined by its territorial boundaries. Justice Marshall, writing in The Schooner Exchange v. M'Faddon, 11 U.S. 116 (1812), articulated what became the classic American description of this understanding:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed upon itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.

Id. at 136.

For more on the American approach to the principle of territorial sovereignty, *see generally,* RESTATEMENT (THIRD), *supra* note 9, § 206(a), cmt. b. For a classic non-American statement of this principle, see 1 OPPENHEIM, *supra* note 9, § 169, at 564 (*citing* The S.S. Lotus, (Fr. v. Turk) 1927 P.C.I.J., (Ser. A) No. 9, at 19 (Sept. 7, 1927) ("Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention."). This understanding of the state is implicit in the generally accepted definition of the state in international law: "An entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) *supra* note 9, § 201 (1987); Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. I, 49 Stat. 3097, 165 L.N.T.S. 19. The notion that a defined territory and a permanent population must be under the control of its own government is, in reality, nothing more than a designation that statehood is the institutionalization of territorial jurisdiction.

Even in the earliest days, however, it was impossible to conform the state's exercise of jurisdiction completely to its territorial boundaries. This is true for different reasons depending upon the type of jurisdiction in question. International jurisdiction can be separated into three analytically distinct categories: prescriptive jurisdiction, referring to the power of a state to legislate or prescribe its substantive laws; enforcement jurisdiction, referring to the power of a state to enforce its laws or perform executive acts; and adjudicative jurisdiction, referring to the power of a state to assert personal jurisdiction over a dispute so as to render a judgment having legal effect. For a better understanding, see the RESTATEMENT (THIRD), *supra* note 9, which is organized according to these distinctions. Absolute adherence to the principle of exclusive territorial jurisdiction in the prescriptive area has always been a practical impossibility. Activities that occur outside of national boundaries often have effects within national boundaries. Acknowledging this, international law is thought to allow states to restrict activities outside national boundaries that have effects within national boundaries. In addition, based upon the somewhat competing idea that sovereignty is primarily nationally rather than territorially defined (for a further discussion of the implications of this distinction see *supra* note 109 and accompanying text), international law has long accepted that states generally may delimit the activities of their own citizens even when in foreign territories. Several other subsidiary principles of jurisdiction allow states to prescribe laws extraterritorially. For a discussion of these, see generally Andreas Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 R.C.A.D.I. 311 (1979).

As much of this Article explains, the international legal right of states to exercise adjudicatory

non-state actors[70] coming within a state's jurisdictional sphere, and the state's own internal organs of administration, are subject to the absolute exercise[71] of that state's domestic authority. All that is left for international law under this paradigm is to govern relations between these sovereign political entities.[72]

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jurisdiction used to be based on the territorial principle. Under the Anglo-American interpretation of this principle the forum could assert jurisdiction if the defendant could be served with process within its territorial sphere. For further explanation, see part II.B.1. As a result of economic, legal, and technological changes, however, territoriality could no longer be used as the basic principle for limiting state assertions of jurisdiction. *See infra* notes 91–95 and accompanying text. To determine whether a dispute falls within a state's jurisdictional sphere, courts instead began to look at the nature of the contacts between the defendant and the forum. *See supra* notes 18–26 and accompanying text. For a discussion of the application of the principle of territoriality to jurisdiction to enforce, see generally Strauss *supra* note 4.

70. Today under the restrictive form of foreign sovereign immunity, state actors that enter the jurisdictional realm of foreign states to engage in activities that are essentially private in character are generally subject to the domestic jurisdiction of local courts. For example, a state-owned steel company that establishes an office in a foreign country and leases office space from a local landlord would not be immune from suit for allegedly breaching the lease. In addition, such courts will often apply local law pursuant to choice of law principles. RESTATEMENT (THIRD), *supra* note 9, ch. 5.

71. Post World War II developments in international human rights law now place some qualifications on such authority. Unfettered state discretion over individuals present within their jurisdictional sphere is limited by many international treaties and customary norms that directly protect individuals from abuses by states. *See, e.g.*, the rights defined in the International Covenant on Civil and Political Rights, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights, 1966, 993 U.N.T.S. 3; Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 U.N.T.S. 277.

In addition, since the principle was established in the Nuremberg and Tokyo War tribunals, individuals acting on behalf of states can, in their own capacity, be held responsible by the international order for their violations of fundamental human rights. *See, e.g.*, Indictment of War Criminals (Germany), U.S. Dept. of State, TRIAL OF WAR CRIMINALS 23 (Dept. of State pub. no. 2420, European ser. no. 10, 1945); Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472; *International Military Tribunal (Nuremberg) Judgment and Sentences*, 41 AM. J. INT'L L. 172 (1947); *Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia*, ABA Task Force (1993); *Crisis in the Balkans, Part II: From Nuremberg to Bosnia—Should the U.N. Prosecute War Criminals?*, 1993 Annual ABA Meeting, Aug. 9, 1993; James O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639 (1993).

72. Given modern developments, this statement must also be partially qualified. International organizations such as the United Nations, the World Bank, and the International Monetary Fund, as well as non- governmental organizations such as the Red Cross and Amnesty International, are generally acknowledged to be participants in the international legal order. It is still possible to maintain a state-centric view that regards international organizations as nothing more than state-created treaty organizations, and non-governmental organizations as merely interlopers in the interstate order. But it is probably more accurate to recognize that actors other than states have become major players in the international system. In addition, multinational corporations, while formally still creatures of domestic legal systems, nevertheless exert a profound influence on the international system. Theorists who have chosen to focus on this broadening of the international order and on how global social interactions often transcend state-state relationships, have begun, following the lead of Philip Jessup, refering to the global order as "transnational" rather than "international." PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956). *See also* LEONARD LAZAR, TRANSNATIONAL ECONOMIC AND MONETARY LAW: TRANSACTIONS & CONTRACTS (Kenneth R. Simmons ed., 1993); HENRY STEINER ET AL., TRANSNATIONAL LEGAL PROBLEMS,

B. Applying the Sovereignty Paradigm to Determine the Applicable Jurisdictional Law in International Cases

1. Jurisdiction Based on the Territorial Principle

During the era of territorial jurisdiction, doctrine-makers applied the sovereignty paradigm to determine that international law circumscribed the limits on state assertions of personal jurisdiction. Pre-dating this century, it was common to think of personal jurisdiction as defined by what is called territoriality, power, or sovereignty. The basic concept was simple. If the defendant could be served with a summons within the territory of the forum, jurisdiction was allowed, if not, it was not.[73] This concept of personal jurisdiction flowed directly from the traditional understanding of the state as a territorially defined sovereign entity whose authority over activity within that territory was exclusive and absolute.[74] This requirement of service within the forum was a legacy of the requirement that jurisdiction over a defendant could only be secured by actually seizing or arresting him within the forum pursuant to a writ of *capias ad respondendum*. Service came to stand for the symbolic seizure of the defendant.[75] Application of the paradigm was, therefore, very simple. The underlying rationale of the

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MATERIALS AND TEXT (1994); TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP (Wolfgang Friedmann et al. eds., 1972); WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964); PERCY E. CORBETT, THE GROWTH OF WORLD LAW 184 (1971).

73. During the Roman and early medieval periods, before the rise of the modern, territorially sovereign state, a court's adjudication of a dispute was premised on the parties' voluntary submission of that dispute to the court. Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 296–97 (1956).

74. For a discussion of this understanding of the state, see *supra* note 69.

75. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (noting that *capias ad respondendum* had given way to personal service but that "historically the jurisdiction of courts to render judgements *in personam* is grounded in their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him."). Before the 16th century, if a defendant in England refused to appear in court, his property could be attached, and continued refusal to appear would result in eventual forfeiture. During the 16th century, the practice developed of arresting the defendant. Keeping even the most defiant defendants in jail to ensure their presence at trial came to be seen as unduly harsh and was replaced by a system of bail, and later by "symbolic" bail. This eventually yielded to the concept of service of process. *See* Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913), stating, in relevant part:

> Ordinary jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power, and attribute the same force to the judgment or decree whether the party remains within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute.

Id. at 353. *See also* 2 CASAD, *supra* note 26, § 2.02(2)(b). *See generally* Nathan Levy Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 59–70 (1968).

territorial doctrine was the protection of the territorial integrity of states against encroachments by other states.[76] For a state to allow a fellow sovereign to "seize" someone,[77] or otherwise exercise judicial process[78] within its territory was a direct threat to that state's sovereign control over its territory, similar in effect to a foreign occupation by force. A jurisdictional law designed to protect the territory of states from encroachments by other states obviously functions to govern relations between sovereigns, and, therefore, fits comfortably within the ambit of international law as defined by the paradigm.[79]

Evidence supports the conclusion that during the territorial era courts within the United States interpreted the sovereignty paradigm to hold that international law prescribed jurisdiction between nation-states. That courts accepted international law as prescribing state jurisdiction is demonstrated by their many references to this fact in resolving jurisdictional problems among the "sovereign" states within

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76. This understanding is reflected in the classic American decision that defined the territorial era, Pennoyer v. Neff, 95 U.S. 714 (1978), which stated:

> The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse.

Id. at 720.

77. RESTATEMENT (THIRD), *supra* note 9, § 432 cmt. b (discussing international law's prohibition on foreign arrests).

78. For a discussion of international law's prohibition on the exercise of judicial process in foreign states, see Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145 (1973), in which the author states:

> An act by one State in the territory of another is forbidden by international law if it is, by its nature, an act which only the officials of the local State are entitled to perform, as opposed to an act which private individuals may perform . . . . For [this reason] the officials of one state may not sit as judges . . . in another state.

Id. at 146. States that are secure in their claim to sovereignty will sometimes consent to allow foreign states to exercise judicial process within their territory. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1956).

79. The protection of states from territorial encroachments by fellow states is one of *the* classic subjects of international law. *See* Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 R.C.A.D.I. 1 (1957):

> International law protects the territorial sphere of each State through the principle of non-intervention, in its different forms and applications. This is indeed one of the fundamental principles of international law—so much so, that, although it would be an exaggeration, and indeed seriously misleading to say so, it would not be without a certain element of plausibility if it were contended that a State can do what it pleases provided only that it avoids intervention in the territory or internal affairs of other States.

Id. at 170–71. *See generally* Frank Vischer, *General Course on Private International Law*, 232 R.C.A.D.I. 201 (1992) ("The delimitation of sovereignties is the very objective of public international law . . . . [The delimitation of jurisdiction] concerns the limits of State sovereignty which is the very subject matter of public international law."). While the protection of territorial sovereignty has always been important, from the formative period of the modern international legal system in 1648 until this century, the resort to war, somewhat anomalously, was generally thought to have been legal. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 14–50 (rev. 1981).

the United States. The most famous such reference is found in the 1874 case of *Pennoyer v. Neff*.[80] Justice Field derived the domestic requirements for personal jurisdiction by analogizing the "well established principles of public law respecting the jurisdiction of an independent [nation-] state over persons and property"[81] to the United States internal system created under the Constitution. He declared:

> The several states of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory.[82]

Pennoyer is only the most well-known of the many cases of the time that, through such analogous reasoning, demonstrated the prevailing belief that the international order prescribed the jurisdiction of nation-states. For example, in 1850 the Supreme Court in *D'Arcy v. Ketchum*[83] held that a state could refuse to give effect to a sister state's judgment on the basis of a claim of lack of jurisdiction, proclaiming: "We deem it to be free from controversy that these adjudications are in conformity to the well-established rules of international law, regulating governments foreign to each other; . . . ."[84] One commentator who recently canvassed the early personal jurisdiction cases concluded that courts prior to *Pennoyer* consistently applied the international territorial principles of personal jurisdiction.[85]

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80. 95 U.S. 714 (1877).

81. *Id.* at 722.

82. *Id.*

83. 52 U.S. (11 How.) 165 (1850).

84. *Id.* at 174. *See also* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 525 (1839) (analogizing American states to nations for jurisdictional purposes); Peckham v. North Parish in Haverhill, 33 Mass. (16 Pick.) 274, 286 (1834); Picquet v. Swan, 19 F. Cas. 609, 611–13 (C.C. Mass. 1828) (No. 11,134); McQueen v. Middletown Mfg. Co., 16 Johns. 5, 7 (N.Y. 1819); Wildenhus's Case, 120 U.S. 1 (1886); Campbell v. Wilson, 6 Tex. 379, 391 (1851); Phelps v. Holker, 1 Dall. 261, 263 (Pa. 1788); Kibbe v. Kibbe, 1 Kirby 119 (Conn. 1786). For more examples of such cases, see those cited in Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775 (1955) (cases addressing territorial limits on judicial power in reference to judgments, *id.* at 782 n.23; cases addressing territorial limits on state power to grant divorces, *id.* at 783 n.28; cases addressing territorial limits on state power to tax, *id.* at 783 n.29; cases addressing state power to legislate, *id.* at 783 n.30, 784 n.31).

85. Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 25 (1990). Another commentator similarly canvassed personal jurisdiction cases prior to *Pennoyer*, and concluded:

While there appear to be no United States cases directly applying the international law of personal jurisdiction to resolve truly international jurisdictional questions during the territorial era, the absence of cases is not surprising. Under the territorial approach, so fundamental and well-established was the assumption that international law prohibited states from either establishing off-shore tribunals in foreign territories or arresting civil defendants overseas, that states simply did not engage in such activities (unless occupying foreign territory in time of war). Jurisdictional issues involving foreign civil defendants thus arose in situations where the territorial integrity of a foreign state was not physically breached by United States authorities.[86] Most cases involved the nature and extent of the jurisdiction a state could exercise based upon the presence of the defendant's person or property within that state's territory.[87] In these cases, anyone or anything found in a state of the United States was also found in the United States as a whole. Therefore, once a court determined that a domestic state forum, such as California, had jurisdiction under the Constitution, the United States as a whole clearly had jurisdiction under international law, and there was no need for courts to consider explicitly the international dimension. While there is some controversy about whether the territorial approach was commonly accepted before *Pennoyer* in the United States,[88]

> Under the principles of international law as understood by these American courts, one country did not have authority over the citizens of another unless they or their property were within the borders of the country. The courts used this concept of governmental territorial authority as the basis for rules of personal jurisdiction.

John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1022 (1983).

86. This was not necessarily the case in actions against criminal defendants. For further discussion, see Strauss, *supra* note 4, at 1249–56.

87. Notable cases among many include: Arndt v. Griggs, 134 U.S. 316 (1890); Freeman v. Alderson, 119 U.S. 185 (1886); Pennoyer v. Neff, 95 U.S. 714 (1877); Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336 (1850); Holker v. Parker 11 U.S. (7 Cranch) 436 (1813); Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813); Dubin v. City of Philadelphia, 34 Pa. D. & C. 61 (C.P. Pa. County Ct. 1938); Fenton v. Garlick, 8 Johns. 194, 197 (N.Y. 1811); Phelps v. Holker, 1 Dall. 261 (Pa. 1788); Kibbe v. Kibbe, 1 Kirby 119 (Conn. 1786). *See also* C. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENT IN THE UNITED STATES 1–2 (6th ed. 1885); Max Rheinstein, *The Constitutional Basis of Jurisdiction,* 22 U. CHI. L. REV. 775, 782–784 nn.23–31 (1955) (citing relevant cases).

88. The extent to which jurisdiction in the 19th century and earlier was actually grounded in territoriality has been questioned. Professor Albert Ehrenzweig has argued that the American doctrine of territorial jurisdiction was not settled law prior to *Pennoyer*. Ehrenzweig, *supra* note 73, at 308. Professor Geoffrey Hazard also maintains that the territorial concept of jurisdiction never worked very well, and was invented by Joseph Story with little basis in case precedent. Hazard, *supra* note 69. Professor James Weinstein has convincingly responded, however, that the territorial approach to jurisdiction was, in fact, historically well accepted. James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U.L.J. 1 (1992). *See also,* Justice Scalia's plurality opinion in Burnham v. Superior Court, 495 U.S. 604 (1990), which supported the assertion of jurisdiction over an individual based solely on presence within a forum by referring to the traditional sovereign rights of states to exercise jurisdiction over everything within their territory.

and whether it was ever accepted in Europe,[89] there is no doubt that, to the extent it was accepted, it was believed that the international law of jurisdiction was applicable.

2. Confusion: The Rise of Contacts Analysis and the Application of Domestic Jurisdictional Law

As a result of the new focus on the rights of defendants that accompanied the development of the contacts approach to jurisdiction,[90] courts began to believe that, under the sovereignty paradigm, the domestic order prescribed all United States assertions of jurisdiction. The contacts doctrine was a response to economic, legal, and technological changes that undermined the ability, both domestically and internationally, to delineate exclusive territorial spheres of jurisdictional competence.

Critical to this doctrinal shift was the increasing prevalence of the corporate form of economic organization,[91] and the corresponding increase in the number of corporations that became defendants in civil cases. Because corporations do not have a physical existence in the same way that real persons do, the presence test could not be applied in an increasing number of cases. It was impossible, for example, to precisely say that a corporation was "in" the territory where it was incorporated or where its subsidiaries were incorporated. The same was true of where its board of directors sat, where its principal place of business was, where its factories were, where it sold its goods, or where its shareholders were. Great liberties were taken with the concept of presence,[92]

While there is clearly some historical ambiguity, a thorough discussion of the extent to which the territorial approach to jurisdiction was accepted is well beyond the scope of this Article. For our purposes, I believe it is safe to conclude that, while perhaps not universally held, territorial concepts of jurisdiction were central to the concept of sovereignty as it was understood at that time. *See supra* note 69.

89. Some commentators have inferred that territorialism never existed in the continental European system. *See, e.g.*, Friedrich Juenger, *Judicial Jurisdiction in the United States and the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1204 n.64 (1984). In most European countries it is more difficult to derive the theoretical underpinnings of jurisdiction because, following the French approach, fundamental principles of jurisdiction are codified and jurisdictional decisions are seldom reported. In addition, unlike the United States, most of the continental countries were not federations of supposedly sovereign states. There was, therefore, no opportunity when deciding cases involving the allocation of jurisdiction between domestic courts to make the kind of international analogies made by U.S. courts. As in the United States, however, the concept of territorial sovereignty was well established, and states simply were not in the habit of exercising judicial process in foreign countries.

90. *See discusion supra* notes 18–26 and accompanying text.

91. For a discussion of the rise of the modern for-profit corporation, *see* ROBERT CLARK, CORPORATE LAW 1 (1986).

92. One court, for example, interpreted corporate presence broadly, arguing that a corporation has:

> existence, vitality, efficiency, beyond the jurisdiction of the sovereign which created it,

until finally the territorial doctrine evolved into the conceptually different doctrine of contacts that emphasized connections to the forum rather than literal presence.

The rationale behind the presence approach was further undermined by the evolving use of default judgments. Courts began to proceed with civil cases even if the defendant's physical presence before the court could not be secured.[93] Obviously, proceeding with a case when the defendant was in another territory did not directly offend a foreign sovereign in the same way that either establishing a foreign judicial presence or engaging in a foreign abduction[94] of the defendant would have.[95]

The development of the contacts basis for the exercise of jurisdiction was, therefore, an innovative response to the fact that it was no longer possible in the case of corporations or necessary in the face of default judgments to maintain the strict territorial approach to jurisdiction. Doctrine-makers, however, believing that the state's territorial jurisdictional character was immutable,[96] rationalized contacts jurisdiction with the notion of consent. If an offshore defendant agreed to accept the state's jurisdiction, then the state had a basis that was independent of its own limited territorial powers for asserting extraterritorial jurisdiction.

Applying the sovereignty paradigm to this new rationalization, doctrine-makers began to conclude that domestic rather than interna-

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> provided it be voluntarily exercised. If it be said that all these acts are performed by its agents, as they may be in the case of a private individual, and that the corporation itself is not present, the answer is, that a corporation acts nowhere, except by its officers and agents. It has no tangible existence, except through its officers. For all practical purposes, its existence is as real, as vital, and efficient elsewhere as within the jurisdiction that created it.

Moulin v. Trenton Mut. Life & Fire Ins. Co., 25 N.J.L. 57, 60–61 (N.J. 1885).

93. In England this procedure began in the 18th century. *See* Hazard, *supra* note 69, at 249.

94. For a discussion of the legality of an extraterritorial abduction in the criminal context, see generally Strauss, *supra* note 4.

95. Commentators often note that the prevalence of the automobile was also responsible for the demise of the territorial approach to jurisdiction in the United States. By the time a victim of an automobile accident allegedly caused by an out of state driver was able to arrange for the defendant driver to be served with process, the defendant was no longer (thanks to her car) within the territory of the state. To circumvent this problem, courts developed the fiction that the out-of-state driver had tacitly consented to suit in the state and had appointed the secretary of state as her agent for service of process. *See* Hess v. Pawlowski, 274 U.S. 352 (1927). *See also* St. Clair v. Cox, 106 U.S. 350, 356 (1882).

Automobiles, however, did not challenge the fundamental basis of territoriality in the way that corporations or default judgements did. While it may have been difficult to get jurisdiction over out-of-state drivers, obtaining such jurisdiction was not conceptually incompatible with the concept of territorial jurisdiction.

96. This was at least in part a legacy of the classical belief that the state, like man, was divinely created. *See* CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 9–16 (P.E. Corbett trans., rev'd ed. 1968). *See also* J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY (1992) (expounding on the reasons for this belief).

tional law circumscribed assertions of jurisdiction by the United States. Because the contacts doctrine was justified by looking to the defendant's consent, doctrine-makers came to view personal jurisdiction as essentially about protecting defendants from the unfairness of being subject to assertions of power by forums to whose jurisdiction they did not in some way submit. In addition, because presence within a state's territory was no longer the *sine qua non* of jurisdiction, and contacts analysis had correspondingly developed to allow potentially more than one state to exercise jurisdiction over the same matter, the exercise of personal jurisdiction over an offshore defendant no longer affected the nonforum state's physical control over its own territory. Because the concerns behind jurisdictional law, therefore, now focused on the relationship between sovereigns and private actors,[97] rather than the protection of the sovereign interests of the state,[98] doctrine-makers came to assume that personal jurisdiction was, under the paradigm, exclusively a question of domestic law. This was, however, a misapplication of the paradigm based upon a failure to acknowledge the fundamental change in the character of the state's jurisdictional powers that was actually occurring. It is to resolving this confusion that I will now turn.

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97. In fact, while deemphasized in U.S. case law, jurisdiction continues to impact upon considerations that transcend the concerns of private actors. See part II.B.3 for the explanation of why jurisdiction is, even during the contacts era, inherently a matter of international concern. See *infra* note 143 for an explantion of how U.S. minimum contacts cases deal with these broader considerations within the U.S. domestic system. As part III of the Article, which presents the normative case for the application of the international law of jurisdiction, makes clear, state approaches to the exercise of jurisdiction in cases involving foreign litigants have a significant effect on the overall effective functioning of the international judicial system.

98. One illustration of the transition from the state-concerned territorial approach to jurisdiction to the defendant-concerned contacts approach was the change in the rationale underlying the requirement of service. Recall that, during the territorial era, service within the territory of a sovereign was the symbolic legacy of the requirement that jurisdiction over a defendant could only be secured by literally seizing him within the forum. *See supra* note 75 and accompanying text. Originally, the concept of sovereignty dictated, as I have discussed, that states could only arrest someone within their own territory. Service of process as a symbolic arrest continued under the territorial theory of jurisdiction to be territorially limited under the same rationale. Originally, one can imagine that notice to the defendant of a pending law suit was only a rather fortuitous incidental benefit of his arrest. The concern was not primarily the interest of the defendant. *See* Gerald Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 533 (noting that judicial emphasis on fairness to defendants in jurisdictional matters did not come to the fore until *International Shoe*). *Pennoyer* introduced the idea that service performed the function, under the newly established 14th Amendment to the U.S. Constitution, of giving the defendant notice of the suit against him. *See* Hazard, *supra* note 69 at 262–72 (1965). With the demise of the territorial approach to jurisdiction, service became more about notice and less about symbolic arrest.

3. Clarifying the Confusion: Why Jurisdiction Is Unique

As I have explained, faced with new, non-territorial assertions of jurisdiction that were outside the state's traditional independent powers, doctrine-makers came to base such jurisdiction on the defendant's own consent to accede to the state's powers. This emphasis on the consent of the defendant led doctrine-makers to believe that, under the paradigm, jurisdiction was now solely a question of domestic law. As I will demonstrate, however, because the consent rationale was not based on the defendant's actual submission to a forum that otherwise would not have the independent power to assume jurisdiction, the emergence of this new doctrine necessarily constituted a fundamental alteration in the state's jurisdictional power. Because defining the state's basic jurisdictional power is a matter of interstate relations, I will conclude that the international order must, under the paradigm, prescribe the laws that define state jurisdiction.

When parties to a dispute consent to the jurisdiction of a state that otherwise would not have the power to exercise jurisdiction, the state's own independent powers to exercise jurisdiction need not be expanded for it to provide a forum for the dispute. When consent, however, becomes constructive, that is, as a matter of law construed to exist when the defendant engages in certain extraterritorial activities, then the jurisdiction of the state is being fundamentally altered to cover those activities. While particular defendants might, in certain respects, choose whether to engage in such activities and thereby to enter the newly defined jurisdictional realm of the state, anyone who does engage in such activity will be brought within the state's domain.

Because doctrine-makers used this notion of constructive consent to rationalize modern contacts jurisdiction, the rise of this new form of jurisdiction constituted an alteration of independent state powers. In the early days of the development of contacts analysis, doctine-makers attempted to constructively infer from the actions of defendants their consent to submit to state jurisdiction. For example, as a result of the difficulty in applying the territorial approach to jurisdiction to corporations,[99] state assertions of jurisdiction over corporations were, for a time, premised on the fiction that corporations had impliedly consented to the jurisdiction of every state where they conducted business. In addition, jurisdiction over out-of-state motorists was justified on the theory that driving an automobile within a state constituted implied consent to be sued within that state.[100] This was, of course, a complete manipulation of the concept. Most likely, only the rarest of corpora-

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99. *See supra* notes 91–92 and accompanying text.
100. *See supra* note 95.

tions or motorists truly intended by their actions to consent to such jurisdiction.[101] As the problem of justifying state jurisdiction with a legal fiction became too obvious to ignore, doctrine-makers began to develop an alternative constructive consensual rationale that allowed the state to exercise extraterritorial jurisdiction despite its limited territorial powers. If the defendant's contacts with the forum were sufficient to lead to the inference that she "purposefully availed herself of the privileges and benefits of the forum's laws," doctrine-makers opined that she need not have actually consented to the forum's jurisdiction.[102] The perceived basis for extraterritorial jurisdiction became a bargain: if the defendant takes advantage of the state's laws, then in exchange, it is fair for the state to extend its jurisdiction over her.

While this new extension of jurisdiction might be justifiable as a reasonable or fair extension of state power, it nevertheless was not based on the defendant's actual submission to a forum that would otherwise not have had the independent power to assume jurisdiction. It therefore necessarily constituted a fundamental alteration of state powers. "Fairness"[103] became a way of justifying an expansion of state power based upon the belief that certain categories of defendants[104] and/or activities[105] are intrinsically related to the independent nature of state power. The understanding of the state that justifies the state's authority to exercise personal jurisdiction within a particular realm is, therefore,

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101. This notion of consent is close to what Professor Ronald Dworkin criticizes as counterfactual consent. *See generally,* Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 1980 HOFSTRA L. REV. 563 (arguing that "the proposition that I would have consented had I been asked is not consent at all").

102. *See, e.g.*, Hanson v. Denckla 253 U.S. 235, 357 (1958) (noting that a corporate defendant has clear notice that it is subject to the personal jurisdiction of the forum court if it "purposefully avails itself of the privilege of conducting activities within the forum state"); World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 295 (1980) (holding that personal jurisdiction was not properly asserted over defendants who had "avail[ed] themselves of none of the privileges and benefits of Oklahoma [the forum's] law"). Many other cases have relied on this language and analysis.

103. While their formulation of the concept might be slightly different, Europeans also place some reliance on fairness to legitimize personal jurisdiction. *See generally* Peter Hay, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 3 U. ILL. L. REV. 593 (1990):

> Europeans deal with a person's relationship to the forum for jurisdictional purposes ranging from domicile (in our strict and technical sense), to habitual residence, to residence, and to nationality. The last of these is regarded as the closest connection in some legal systems, although to Anglo-American countries and perhaps generally in practice, it may be a rather attenuated relationship when people have emigrated many years ago. The point is that European jurisdictional law, just like its counterpart, seeks to identify the kind of connection between a defendant and the forum that makes it fair ("natural justice" in English terms, "due process" in American terms, or "rechtstaatlich" in German terms) to subject him or her to local judicial jurisdiction. All this is common legal heritage and modern experience.

Id. at 599–600.

104. *See supra* note 25 and accompanying text discussing general jurisdiction.

105. *See supra* note 24 and accompanying text discussing specific jurisdiction.

really no different than the understanding of the state that justifies its authority to prescribe[106] or enforce[107] laws governing human activity within a particular realm. All are ultimately dependent upon a certain view of statehood that dictates within what parameters state assertions of authority are legitimate.

For example, it is still possible, and indeed common, to accept the state as most legitimately a territorially defined sovereign entity.[108] Alternatively, it is possible to accept the state as most legitimately a nationally defined sovereign entity.[109] Finally, it is possible to accept the state as legitimately neither territorially nor nationally "sovereign" but simply a convenient unit for localizing administration.[110]

Keeping in mind that the concept of sovereignty denotes supreme and absolute political power,[111] if one accepts the state as primarily a territorially defined *sovereign* entity, then by definition this entity may legitimately assert jurisdiction over any defendant that actually comes within its territory for however brief a period of time.[112] During the

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106. For an explanation of prescriptive jurisdiction, see *supra* note 69.

107. For an explanation of enforcement jurisdiction, see *supra* note 69.

108. *See generally supra* note 69.

109. Many of the prominent 18th- and 19th-century continental philosophers emphasized this understanding of the state. For example, Vattel saw the state as primarily an act of association or social contract. EMER DE VATTEL, THE LAW OF NATIONS OR PRINCIPLES OF NATURAL LAW 13–14 (C. Fenwick trans. & ed., 1916) (1758). Jean-Jacques Rousseau, in his exploration of the philosophical basis of legitimate government in *Le Contrat Social*, makes clear that for him, sovereignty resides in the almost metaphysical organism of the people who make up the state. JEAN-JACQUES ROUSSEAU, LE CONTRAT SOCIAL (1762), *translated in* ROUSSEAU: POLITICAL WRITINGS OF JEAN-JACQUES ROUSSEAU (F. Watkins ed. & trans., 1962). For Hegel, the all important human spirit did not reside solely in the individual, but in the body politic as nationally—not territorially—defined. G.W.F. HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS (1821), *translated in* PHILOSOPHY OF RIGHT (T.M. Knox trans., 1942).

110. Many modern legal theorists are increasingly coming to this view of the state as solely an administative unit. They emphasize that the primary value of planetary governance should be the growth of human dignity and development, not the preservation and adulation of the artificial entity known as the state. They see the concept of sovereignty as a convenient way to justify the violation of fundamental human rights, an impediment to coherent planetary governance, and as a cause of war. This has been a major theme of discussion in international law. While there are far to many works to list, for an interesting sampling, see generally JAMES BRIERLY, THE LAW OF NATIONS 54 (6th ed. 1963); RICHARD FALK, REVITALIZING INTERNATIONAL LAW (1989); EUNOMIA ALLOTT, NEW WORLD ORDER FOR A NEW WORLD 416–19 (1990); ALEXANDRE C. KISS & DINAH SHELTON, *Systems Analysis of International Law: A Methodological Inquiry*, 17 NETH. Y.B. INT'L L. 45 (1986).

111. Black's Law Dictionary defines sovereignty as follows:

> The Supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the rights and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent . . . .

BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

112. It is a direct appeal to this definition that justifies the exercise of jurisdiction in Justice Scalia's opinion in Burnham v. Superior Court, 495 U.S. 604 (1990):

territorial era the state's power to exercise jurisdiction within its territory was based precisely upon this understanding of the state.[113] If we believe that it is reasonable or fair for such a territorial definition to be expanded to include the ability to assert jurisdiction over any defendant whose actions have certain effects within that territory, then by definition the forum can assert jurisdiction over an offshore defendant who, for example, sells products that cause harm within the territory.[114] This is essentially the fundamental jurisdictional principle that underlies the minimum contacts test.

If one sees the state as legitimately a nationally defined sovereign entity, then depending upon how we define national sovereignty, it can be regarded as "fair" for this entity to assert jurisdiction over all matters concerning its nationals. We could define national sovereignty as only including the ability for the sovereign to exercise jurisdiction over its own nationals. If we believe that it is reasonable or fair, however, for such a national definition to be expanded to include what is called passive nationality, then by merely interacting with a national, one could by definition enter the sovereign's jurisdictional ambit.[115]

Finally, if one only accepts the state as legitimately an administrative unit, then the focus of fairness changes from the relationship between the defendant and this sovereign political entity to what

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> The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of "traditional notions of fair play and substantial justice."

Id. at 619. The territorial principle of jurisdiction has traditionally been applied in U.S. personal jurisdiction cases. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235 (1958):

> [Restrictions on the personal jurisdiction of state courts] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

Id. at 251. The most extreme use of the territorial principle is found in Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (holding that an individual could be served with papers while on an airplane over the jurisdiction). *But see* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").

113. *See supra* note 69 and text accompanying notes 73–78.

114. The effects doctrine is an expansion of the territorial approach to jurisdiction that is traditionally used to justify prescribing laws covering offshore activities that cause effects within the territory. The doctrine, however, can be applied to personal jurisdiction and, as I indicate above, is essentially the fundamental jurisdictional principle that underlies the minimum contacts test.

115. The passive nationality principle is an expansion of the national approach to jurisdiction that is traditionally used to justify prescribing laws prohibiting foreign nationals from causing harm to a sovereign's nationals. Like the effects doctrine, however, this doctrine can also be applied to personal jurisdiction. In fact, this is exactly what the French have done with articles 14 and 15 of the French Civil Code. *See supra* notes 56–59 and accompanying text. For further explanation of the principles of passive nationality, see generally 1 OPPENHEIM *supra* note 9, at 138.

becomes exclusively a balancing of different factors of convenience. Because there is no longer a "sovereign" territorial entity to be "entered" the concept of presence as an absolute basis for jurisdiction becomes meaningless. Likewise, if there is no nationally "sovereign" organism, nationality or passive nationality can no longer define its jurisdiction. Jurisdiction can no longer be based on the relationship between the defendant and the nonexistent "sovereign."[116] Rather, determining whether the exercise of jurisdiction by particular courts is legitimate must now be done with reference to such questions as whether the defendant has to travel further than the plaintiff, or whether localized adjudication most effectively allows for those judicial officers most familiar with applicable law to officiate.[117]

If determining the personal jurisdictional realm of states is, once freed of the confusion about consent, conceptually synonomous with defining the state and its corresponding powers, the question then becomes whether the sovereignty paradigm provides that the law that defines the state and its powers should come from the international order. Because of the unique character of jurisdiction, the prescription of state jurisdictional limits differs from other subjects of international regulation. This is because jurisdiction, understood as a question of fundamentally defining the state and its powers, involves both the internal problem of delimiting a state's "domestic" realm of authority over private actors, as well as the external problem of delimiting lines of authority between states. Under the terms of the paradigm, however, the international order properly prescribes the law that defines state jurisdiction. This is because individual states are fundamentally incapable of unilaterally generating the law that governs interstate jurisdiction for exactly the same reasons that they are incapable of prescribing other laws that we classically think of as regulating relations between states. The subject matter to be regulated is intrinsically a matter of interstate relations requiring collective prescription by states working together in the international arena. When states unilaterally

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116. Currently, when factors of convenience are taken into account, for example to the extent they are in the U.S. minimum contacts test, see *infra* note 143, it does not mean that the sovereign has ceased to exist. The sovereign itself is still the entity that asserts jurisdiction and defines the forum.

117. The concept of statehood is in flux, and it would be wrong to conclude that any particular state is expecially committed to any one of the three conceptions of statehood. Interestingly, however, the United States, one of the most nationally heterogenous countries in the world, but one that enjoys a strong sense of territorial sovereignty, continues over international objections to adhere to the principle of jurisdiction based on transient territorial presence (*see supra* note 112). In contrast, France, a country known for its sense of national identity, provides in articles 14 and 15 of its civil code for French courts to assert jurisdiction over any case where there is a French plaintiff, also over international objections. *See supra* notes 56–59 and 115, and *infra* notes 154–159 and accompanying text.

attempt to prescribe the law that defines their own jurisdiction, they inherently participate in a broader transnational process of state definition. Because the state is the basic unit of political separation into which the global community divides itself, any attempt to proclaim a certain jurisdictional division of responsibilities is necessarily an act impacting upon the division of responsibility of all members of the community. As a corollary to staking out claims to their own jurisdiction, states act to expand or restrict the jurisdictional space open to other states, thereby implicitly participating in the definition of other states' jurisdiction.[118] Despite the fact, therefore, that personal jurisdictional is no longer, for the most part, concerned with the international issue of protecting territorial sovereignty, it continues to be about the larger international question of defining state power. Thus, while the regulation of private actors within a state's jurisdictional sphere is, under the sovereignty paradigm, the subject of domestic law, the determination of the ambit of that sphere itself is inherently the subject of international law.

Practically speaking, because of this intrinsically international character of state jurisdiction, only the international order can authoritatively create the law that prescribes the jurisdiction of states. Because a state's international jurisdictional claim is subject to other states' own understanding of the state, there is no way for states operating solely within the separate confines of their individual domestic orders to determine whose understanding should prevail. Even under the present system of jurisdictional self-prescription states wishing to resolve conflicts find themselves with little choice but to resort ultimately to the international order. When a state's unilaterally prescribed assertion of jurisdiction offends other states' views of statehood, those states operating in accordance with institutionalized international processes will formally or informally object. To the extent that the "offending" state wishes the other states to cooperate with it on jurisdiction or other matters, it will take their concerns into consideration. Once, either before or as a result of such diplomatic procedures, a state's novel jurisdictional claim is accepted by other states, those states will be encouraged to make similar claims and new international jurisdictional norms will emerge. Presently this is how the international law of jurisdiction is being created.[119]

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118. This is true even to the extent that states today tend to view their personal jurisdictional realms as overlapping and nonexclusive. To claim a specific, nonexclusive jurisdictional realm is nevertheless to endorse a certain view of state authority, and to limit the space open to the *exclusive* jurisdiction of other states.

119. For an explanation of custom and treaty as the two primary sources of international law, see *supra* note 15.

The fact that the process of defining the personal jurisdictional powers of the state is, even under the present system, inherently international, does not lessen the extent to which doctrine-makers are confused in believing that states can self-prescribe their jurisdiction. In fact, it is precisely because jurisdiction is intrinsically international that the paradigm requires it to be prescribed by the international order, and that domestic courts should apply such international law as authoritative in cases involving foreign plaintiffs or defendants. There is no reason why this should be any less the case when it comes to jurisdiction than when it comes to any other area of law appropriately prescribed by the international order. For instance, doctrine-makers clearly accept that the law governing the use force by one state against another state is intrinsically a question of interstate relations that, under the paradigm, can only be prescribed by the international order.[120] A United States congresswoman whose world view was informed by the sovereignty paradigm, for example, would be very unlikely to consider proposing legislation prescribing the international legality of uses of force by the United States against foreign nations.[121] If, however, states did begin to self-prescribe legislative schemes to govern this intrinsically international concern, as is the case with jurisdiction, they would ultimately be forced to compensate for their actions by circuitously establishing international standards. Just as it is clear that such a convoluted approach would be inconsistent with the straight-forward division of regulatory responsibility provided by

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120. The United Nations Charter is today the primary *international* instrument governing the circumstances under which states can use military force against other states. *See generally* art. 2(4) (prescribing that, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.") and art. 51 (providing that, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."). For some well known works discussing these as well as other subsidiary instruments prescribing when states can resort to military force see generally LORI DAMROSCH & DAVID SCHEFFER, LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, (1991); LOUIS HENKIN, RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE, (1990); YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENSE, (1994); RICHARD FALK, LEGAL ORDER IN A VIOLENT WORLD, (1968); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, (1981); DEREK BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW, (1958); Oscar Schacter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986).

121. This should not be confused with whether or not national legislatures have the ability under the paradigm to prescribe legislation directing the state to violate international law. Generally, as would be true in directing the state to use force, such legislative action would not be inconsistent with a well accepted interpretation of the powers that states have under the sovereignty paradigm called "dualism". For a full discussion of why the doctrine of dualism cannot under the paradigm be extended to allow states to break international jurisdictional law, see part II.C.

the sovereignty paradigm, domestic prescription of the law that governs interstate jurisdiction is equally inconsistent with the paradigm.

As an alternative to focusing on the inherently transnational nature of state jurisdiction, independent corroboration that states cannot under the paradigm self-prescribe their jurisdiction is provided by an analysis of the basic meaning of the concept of jurisdiction itself. For an entity not to have jurisdiction means that it is precluded from exercising authority in a particular area. This necessarily entails externally defined objective limits. Without external limits, an entity may still decide, legislatively or otherwise, not to exercise authority in a particular area. Because such a decision is subject to the entity's own discretion and could be changed by it at any time, however, the entity could not be said to be truly precluded from acting or, therefore, truly lacking in jurisdiction. This means that the law that circumscribes the state's jurisdiction must originate from outside of the state itself.[122] Thus, as between the two orders provided by the sovereignty paradigm, only the international order can prescribe the law of jurisdiction.

Following the erroneous analytical path that conceives of jurisdiction as primarily about fairness, doctrine-makers have conceptually bypassed this contradiction between the nature of jurisdiction and state jurisdictional self-prescription. Jurisdiction understood as based upon the absolute ideal of fairness conceives of the external limits inherent in jurisdiction as coming from an independent, objectively established natural law standard of justice that absolutely allows or disallows jurisdiction.[123] This natural law, however, becomes domestic rather

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122. To avoid confusion, it is important to clearly identify the relevant jurisdictional entity. While the state is not external to itself and, therefore, cannot define the extent of its own jurisdiction, it is external to and, therefore, can define the jurisdiction of its own internal organs, including its courts. Personal jurisdiction, however, is about the jurisdiction of the state and not the court. Unlike subject matter jurisdiction that, in the American system, allocates authority between different courts, personal jurisdiction is about the forum state's authority to exercise regulatory control over the defendant. While the discourse surrounding personal jurisdiction has developed to sometimes interchangeably refer to "the jurisdiction of the court," and "the jurisdiction of the forum," it is only about the jurisdiction of the court in the sense that the court is the particular institution of the forum state called upon to act on the state's behalf. The *Restatement of Judgments* draws the distinction as follows:

> Although a State has jurisdiction over the person of the defendant, it may not have given to a particular court or it may not have given to any of its courts power to entertain the action. In such a case the court has no "competency" to render a valid judgment.

RESTATEMENT OF THE LAW OF JUDGMENTS § 7 cmt. a at 41 (1942).

123. The idea that there exists a "natural" body of law whose claim to legitimacy, unlike man-made positive law, is that it is ultimately true has classical roots. Aristotle was one of the first Western thinkers to recognize a pre-ordained distinction between the written law of man and a universal natural law that is "permanent and changeless, impartial as to the human condition." H. MCCOUBREY, THE DEVELOPMENT OF NATURALIST LEGAL THEORY 28–30, 37 (1987) (quoting ARISTOTLE, ETHICS (J.A.K. Thomson trans., rev'd by Tredennick, Penguin Classics). Reflecting the medieval mind, Thomas Aquinas maintained that natural law (*jus naturale*) had its foundation in the divine and was given to man so that he might reasonably

than international law because, despite its sublime origins, it is currently transformed into positive law through the institutional processes of the domestic order.[124]

Not surprisingly, when the jurisdictional question is freed from the confusion about fairness and approached as a pure question of defining state powers, doctrine-makers following the sovereignty paradigm accept that the definition of the state comes from international law.[125] For example, there is general agreement that, for an entity to legitimately exercise the powers of statehood, it must either meet the globally agreed upon criteria for statehood[126] or be recognized by the international community as meeting these criteria.[127] Only when it comes to the law of jurisdiction, which has been erroneously disconnected from the concept of independent state powers, do states incongruously attempt to self-define their own international powers.

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govern society and see to it that the nations within this society come to some agreeable common ground. *Id.* at 46–54, 60 (citing ST. THOMAS AQUINAS, SUMMA THEOLOGIAE 1a 2ae, 92:1). In the 17th century, the English philosopher John Locke agreed with the premise that natural law comes from a supreme being. Locke's major contribution, however, was his strong emphasis on human reason as the prime tool for deriving such law. 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT ch. II, § 6 (Peter Laslett rev'd ed., 1963).

124. Existentially speaking, natural law cannot be confined to either the domestic or international realms. Its claim to legitimacy is not that it is the properly derived product of either institutional order, but that it is ultimately "true." In a practical sense, however, the current institutional division between the international and domestic system requires that natural law be realized and then accepted as law within the context of one or the other. While clearly subordinate to positive law, natural law continues to be accepted as a source of international law.

125. *See, e.g.*, RESTATEMENT (THIRD), *supra* note 9, § 201 (referring to the state as defined under international law). In addition, signatory states presumed to internationally define the powers of statehood when they established the definition of the state pursuant to a multilateral treaty. *See* Montevideo Convention on the Rights and Duties of States, *supra* note 69. The *Restatement (Third)* also specifically identifies only international law as the source of the state's jurisdictional powers referred to as, "Capacities, Rights and Duties of States". Not surprisingly, these powers first and foremost include the basic territorial and national jurisdictional character of the state. RESTATEMENT (THIRD), *supra* note 9, § 206 ("Capacities, Rights and Duties of States. Under international law, a state has: (a) sovereignty over its territory and general authority over its nationals . . . .").

126. The declaratory theory regarding international law requirements for statehood maintains that a political entity is a state if it meets the criteria of statehood. *See* J.D. van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 13–15 (1991) (explaining the declaratory theory of statehood and quoting Alan James for the theory's basic premise: "Recognition presupposes a state's existence; it does not create it.") (citation omitted).

127. The constitutive theory regarding international law requirements for statehood asserts that a political entity is a state if it is recognized as such by existing states. *See id.* at 16–20 (explaining the constitutive theory of statehood and quoting L. Oppenheim for the theory's basic premise: "A state is, and becomes, an International Person through recognition only and exclusively.") (citation omitted). As J.D. van der Vyver explains:

> Statehood, in a word, is the key for political entities of the kind under consideration to gain entry into the domain that is governed by public international law . . . . A political community only constitutes a state for purposes of international law inasmuch as other states, through recognition and by entering into international relations with that political community, permit it to participate in the areas governed by international law.

Id. at 11.

Of what consequence is this failure by doctrine-makers to correctly derive jurisdictional doctrine from the sovereighty paradigm? As whenever doctrine-makers fail to adequately perform their positivist mission of accurately ascertaining legal doctrine from underlying paradigms, the cost is a weakening of social institutions. In this case, it is a weakening of the coherent division of responsibility between the domestic and international orders that the sovereignty paradigm supports.

C. The Dualist Interpretation of the Sovereignty Paradigm: Can States Disregard the International Law of Jurisdiction?

1. The Nature of Dualism

Having established that international law, rather than domestic law, appropriately governs state assertions of jurisdiction in cases involving foreign litigants does not necessarily mean that state courts must apply this law. Many countries, including the United States, ascribe to a dualist conception of the relationship between domestic and international law. This conception allows that states may direct their courts not to apply international law. As we have seen, the sovereignty paradigm holds that domestic law is created by states to regulate private actors operating within their jurisdictional realm, and international law is created by the international order to regulate sovereigns in their relationship with each other. The dualist model of the relationship between domestic and international law interprets the sovereignty paradigm to mean that these two types of law are produced by legal systems that are totally separate and distinct.[128] Because, under this view, the domestic system is totally self-contained, it is charged with creating its own comprehensive body of law, and, most importantly, domestic courts are limited to applying this domestic law.

In reality, the domestic and international systems do not function completely independently of each other. At times, laws that govern interstate relations impact upon the rights or obligations of private actors. As this Article has demonstrated, personal jurisdiction in cases involving foreign litigants is a good example of a situation where the

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128. Commentators that support dualism point to the fact that each order has its own separate body of law, and each has its own distinct law applying institutions. International law is created by states through procedures that manifest their consent either explicitly through treaties or implicitly through customary practice. In contrast, domestic law comes exclusively from the domestic system. In the United States, legislatures, administrative agencies, and tribunals, to name a few, are all law-making institutions. International legal problems are thought to be largely resolved through international dispute resolution mechanisms, such as diplomacy, international arbitration, or the International Court of Justice, while domestic legal problems are thought to be largely resolved in national legal institutions, most notably domestic courts.

international order should be thought of as prescribing laws that impact upon private actors. Other legal norms that are well accepted as international law but that impact upon private actors, and are therefore applied in domestic courts, include the protection of diplomats,[129] the punishment of piracy[130] and terrorism,[131] the extradition

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129. The customary international law of diplomacy was first codified in the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force June 24, 1964; for the U.S. December 13, 1972). The customary international law of consular immunity was later codified in the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. For representative domestic case law applying the laws of diplomatic and consular immunity, see RESTATEMENT (THIRD), *supra* note 9, §§ 464–466 and reporters' notes. *See also* E. DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS (1976); Ernest L. Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 AM. J. INT'L L. 88 (1962).

130. Piracy has long been considered criminal under international law. United States v. Smith, 18 U.S. (5 Wheat.) 153, 161–62 (1820). *See also* D.H.N. Johnson, *Piracy in Modern International Law*, 43 TRANSACTIONS OF THE GROTIUS SOCIETY 63 (1957). The customary international law of piracy was first internationally codified by the Declaration of Paris of 1856. *See* 2 A COLLECTION OF NEUTRALITY LAWS, REGULATIONS, AND TREATIES OF VARIOUS COUNTRIES (Frances Deak & Philip C. Jessup eds., 1939), for the text of the Declaration. It was subsequently codified at articles 14–22 of the Convention of the High Seas of 1958. Convention of the High Seas, Apr. 29, 1958, arts. 14–22, 13 U.S.T. 2312, 450 U.N.T.S. 82 (entered into force in U.S. Sept. 30, 1962). In 1982 these provisions were superseded by articles 100–110 of the United Nations Convention of the Law of the Sea, *opened for signiture* Dec. 10, 1982, arts. 100–110, UN Doc. A/Conf. 62/122 *reprinted in* 21 I.L.M. 1261 (1982).

Nineteenth-century U.S. courts addressing cases of piracy directly applied the customary international law of piracy. *E.g.*, United States v. Chapels, Fed. Cas. No. 14,782 (C.C. Va. 1819); *Smith*, 18 U.S. (5 Wheat.) at 153 (addressing piracy charge and applying international law); Marianna Flora, 24 U.S. (11 Wheat.) 1, 40–41 (1825); United States v. The Cargo of the Brig Malek Adhel, 43 U.S. (2 How.) 210, 232 (1844); The Ambrose Light, 25 F. Supp. 408, 423–28 (S.D.N.Y. 1885). Today, U.S. courts instead largely apply treaty or domestic statutes that are substantively the same as the customary international law of piracy. *See* 18 U.S.C. §§ 1651–1661 (1988) (incorporating by reference customary international law of piracy). *See generally* ALFRED RUBIN, THE LAW OF PIRACY 122–200 (1988) (for an historical treatment of American municipal law on the subject).

For representative foreign cases applying the international law of piracy, see Kid Dawson's Trial, 13 How St. Tr. 451 (1696); Kidd's Trial, 14 How St. Tr. 123 (1701); Bonnet's Trial, 15 How. St. Tr. 1231 (1718); The Republic of Bolivia v. The Indemnity Mutual Marine Assurance Company [1909] K. B. 785; In re Piracy Jure Gentium, [1934] AC 586; 7 ILR 213. *See also* 1 OPPENHEIM *supra* note 9 (citing relevant sources); Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334 (1925) (citing relevant sources).

131. Acts of terrorism are illegal under customary international law. *See* ALBERT PARRY, TERRORISM: FROM ROBESPIERRE TO ARAFAT 1–11 (1976); I R. FRIEDLANDER, TERRORISM-DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 71 (1979). *Cf. Recognition of Need of Member States to Cooperate in Combating Terrorism*, G.A. Res. 61, 40 U.N. GAOR, 40th sess., Supp. No. 53, at 301, U.N. Doc. A/40/53 (1985). The vast majority of customary international law addressing acts of terrorism has recently been accepted by seven nations including the United States as an agreement to punish and condemn terrorism. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, (Feb. 2, 1971) 27 U.S.T. 3949; T.I.A.S. 8413.

For a modern case where American courts applied the international law of terrorism, see Ahmad v. Wigen, 726 F. Supp. 389, 402 (E.D.N.Y. 1989), *cert. denied*, 497 U.S. 1054 (1990) (listing evidence of the international law of terrorism). *See* also RESTATEMENT (THIRD) *supra* note 9, § 404, cmt. a, reporters' notes 1 (1987) (citing relevant cases). In the United States today a federal law that is similiar in many respects to customary international law proscribes terrorism. Title X

of criminal suspects,[132] the seizure of fishing and other small commercial vessels in time of war,[133] and the validity in foreign courts of the acts of regimes purporting to be governments.[134] Most countries where the dualist model has been adopted, including the United States, have found the doctrine of incorporation a conceptually tidy way to apply international law within the confines of the model's rigid separation of the domestic and international systems. This doctrine of domestic law provides that international law should, where relevant, be automat-

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of the Foreign Relations Authorization Act for Fiscal Years 1988–1989. Pub. L. 100-204, §§ 1001–1005, 101 Stat. 1331, 1406–07, 22 U.S.C.A. §§ 5201–5203 (West. Supp. 1988).

The courts of some foreign countries also apply the customary international law of terrorism. *E.g.*, Government of Belgium v. Postlethwaite, 2 All E.R. 985 (1987) (Eng.); R v. Chief Metropolitan Magistrate, ex parte Secretary of State for the Home Department, 1 W.L.R 1204 (1988) (Eng.). *Cf.* Director of Public Prosecutions for Northern Ireland v. Maxwell, 3 All E.R. 1140 (1978) (Eng.).

132. International law generally does not require nations to comply with other nations' requests for extradition of criminal suspects. 2 OPPENHEIM *supra* note 9, § 415. Many countries, however, have entered into various bilateral and multilateral treaties that require states to extradite certain categories of fugitives upon request. *Id.* § 416.

The United States has entered into extradition treaties with most of the world's nations, and such extradition treaties are directly applied in U.S. courts. For examples of U.S. cases applying extradition treaties, see those cited at RESTATEMENT (THIRD), *supra* note 9, § 475, reporters' notes 1–6.

Courts of foreign countries also apply extradition treaties. Some of the more well known cases include Re Petalas, 22 I.L.R. 519 (Conseil d' Etat 1955) (Fr.); Re Garcia Setien, 43 I.L.R. 244 (Court of Cassation 1963) (Belg.); Kakias v. Cyprus, 2 All E.R. 634 (1978) (Eng.); Government of Denmark v. Nielson, 2 All E.R. 81; 74 I.L.R. 458 (1984) (Eng.); United States Government v. McCaffery, 2 All E.R. 570 (1984) (Eng.).

On extradition generally, see I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW (1971); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER (1974).

133. When countries are at war, customary international law prohibits them from capturing the coastal fishing boats and small merchant vessels belonging to citizens of opposing countries. The Paquete Habana, 175 U.S. 677, 698 (1900). This customary prohibition was first codified in article III of the Hague Convention XI of 1907. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. III, 36 Stat. 2277.

United States courts have directly applied international law when adjudicating cases of this type, i.e., prize cases. *E.g.*, The Paquete Habana, 175 U.S. 677 (1900); The Schooner Adeline, 13 U.S. (9 Cranch) 244 (1815); Penhallow v. Doane's Admrs., 3 U.S. (3 Dall.) 54 (1795).

There are many instances of foreign courts also applying international law in this area. *See, e.g.*, Schiffart-Treuhand, G.m.b.H., and Others v. H.M. Procurator General, Privy Council, 1953 App. Cas. 232, 1953 All E.R. 364; and, Lever Brothers and Unilever N.V. v. H.M. Procurator General, Re: S.S. Unitas, 1950 App. Cas.536, 1950 All E.R. 219.

134. The actions of a national government arguably must be given deference in foreign courts under international law pursuant to the "Act of State" doctrine. This doctrine holds that:

> [T]he courts of one state do not, as a rule, question the validity or legality of the official acts of another sovereign state . . . insofar as those acts involve the exercise of the latter state's public authority, purport to take effect within the sphere of the latter's own jurisdiction, and are not in themselves contrary to international law.

1 OPPENHEIM, *supra* note 9, at 365–66. Courts within the United States historically directly applied the Act of State Doctrine. *E.g.*, Underhill v. Hernandez, 168 U.S. 250 (1897). Today they give force to the Act of State Doctrine, but claim that it emanates from "constitutional underpinnings" not from international law. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964).

ically incorporated directly into domestic law. Thus, international law is not applied as international law, but as incorporated domestic law. In the United States, international law is seen to be incorporated directly into federal law.[135]

Why not simply apply international law directly where appropriate, rather than first imposing this artificial separation of the domestic and international systems by inventing the doctrine of incorporation? While this question has been a hot subject of theoretical debate for most of this century,[136] practically speaking, states adhere to this conceptual structure because it allows for them to apply international legal norms when they are necessary to resolve a dispute properly, while at the same time uniquely maintaining their ability, free of interference by domestic courts, to disregard international law when they deem it necessary.[137]

Domestic authorities applying the dualist model could come up with any system for directing their courts when to apply international law. In the United States, the most doctrinally accepted way to direct courts not to apply international law is through the passage of federal

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For foreign cases applying the Act of State doctrine as international law, see AM Luther Co. v. Sajor & Co., 3 K.B. 532 (1921) (Eng.); Bank Indonesia v. Senembah Maatschappij and Twentsche Bank, 30 I.L.R. 28 (Neth. Hof. Amsterdam 1959); Pons v. Republic of Cuba, 294 F.2d 925 (D.C. Cir. 1961); Epoux Reynolds v. Ministre des Affaires Etrangères, 47 I.L.R. 53 (Fr. Trib. gr. inst. 1965).

135. *See* RESTATEMENT (THIRD), *supra* note 9, § 111, reporters' notes 2, 3 (addressing the incorporation of treaty law and customary international law, respectively).

136. For an explication of the classic arguments, see J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L. L. 66 (1936); Josef L. Kunz, *The "Vienna School" and International Law*, 11 N.Y.U. L. REV. 370, 399 (1934); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 446–47 (1952).

137. In the United States, doctrines of judicial preclusion also prevent courts from interfering with the state's ability to violate international law. Frequently the doctrine of standing is invoked by courts to prevent a plaintiff from asserting an international legal claim on his own behalf. Since all violations of international law ultimately have some effect on real persons, courts have been faced with having to decide when private actors have a legally cognizable interest in making an international claim. When interpreted narrowly, this doctrine of standing, consistent with the general division between the domestic and international systems, only prevents state courts from becoming involved with disputes that are best characterized as between states. If interpreted expansively, however, this doctrine has the potential to preclude all international law from being applied in domestic courts.

Occasionally, courts within the United States have also declined to decide cases that require the application of international law on the explicit grounds that they do not wish to interfere with what they regard as essentially "political questions." *See, e.g.*, United States v. Berrigan, 283 F. Supp. 336, 342 (D. Md. 1968), *aff'd*, 417 F.2d 1009 (4th Cir. 1969). Such questions, they have held, are best left to the discretion of the political branches of government. For a very interesting discussion and criticism of this doctrine as it is applied by courts within the United States to exclude the use of international law, see THOMAS FRANCK, POLITICAL QUESTIONS, JUDICIAL ANSWERS (1992).

When the application of treaty law specifically is in question, courts look to whether the treaty was substantively intended to be domestically applied. If so, the treaty is referred to as self-executing.

legislation.[138] Since United States domestic law holds that a later-in-time federal law takes precedence over an earlier-in-time federal law, by passing legislation inconsistent with a previous international legal obligation, the United States political branches direct the courts to give effect to the later-in-time domestic law over the earlier-in-time incorporated international law. As an extension of the same theory, because the Constitution is always supreme to other federal law, it is also thought to be supreme to international law and would take precedence over such law in domestic courts.[139]

2. Why Jurisdiction Is Unique Redux: A Jurisdictional Exception to the Dualism Model

Failing to understand why jurisdiction is unique, one could reach the conclusion that the concept of dualism allows states to prescribe laws to direct local courts to disregard international jurisdictional law. In the United States, such a result would be accomplished by direction of the Constitution[140] or federal legislation. The concept of dualism, however, cannot be applied to allow the state to prescribe jurisdictional law in international cases.

The sovereignty paradigm holds that states are the ultimate and supreme political entities within their jurisdictional realms. Dualism interprets this to mean that states are self-contained, autonomous political entities with the capacity to determine which laws their own courts and other administrative institutions will follow. While the

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138. In the United States, questions have also emerged as to whether judicial decisions as well as presidential actions and decrees take precedence over international law in courts within the United States. Authority most often cited for the proposition that they do take precedence is the famous Supreme Court dicta in *The Paquete Habana*, 175 U.S. 677, 700, that "[f]or [the purpose of applying international law as a part of our law] where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." For additional reference, see *supra* text accompanying note 61.

Courts have generally not attempted to issue directives superseding international law based solely on their own authority. On several occasions, however, courts have been presented with the question of whether to give deference to an executive action in violation of international law. Courts have at times found that executive actions or decrees should be given precedence in American courts over international law. *See* Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986). A general executive power to violate international law has been persuasively criticized by several commentators as being inconsistent with our own domestic constitutional order. If the executive cannot constitutionally violate purely domestic law, these commentators question the power of the executive to violate *incorporated* domestic law. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 878–79 (1987); Michael Glennon, Comment, *State-Sponsored Abductions: A Comment on* United States v. Alvarez-Machain, 86 AM. J. INT'L. L. 746 (1992).

139. *See* RESTATEMENT (THIRD), *supra* note 9, § 111 cmt. a.

140. *See infra* note 142 (discussing the role or, perhaps better stated, lack of the role of the U.S. Constitution in proscribing the jurisdiction of the United States in cases involving foreign parties).

sovereignty paradigm gives the state the ability to control its own internal organs of administration, this control cannot extend to directing these organs to define the state's jurisdictional power itself. The state cannot grant its courts powers that it itself does not already have. Because, under the sovereignty paradigm, the definition of the state and its corresponding powers to exercise jurisdiction come from international law, under this paradigm these jurisdictional powers cannot be interpreted to provide that the state itself has the power to define their scope.

The state's attempt to give domestic precedence to its own jurisdictional law over international jurisdictional law is, therefore, fundamentally different from its attempt to give precedence to its own substantive law over substantive international law. By directing its courts through the vehicle of domestic law to disregard international law, the state is usually making no claim to exercise authority within the international realm. Consistent with its sovereign powers, it is only directing its courts as to whether to apply international law. Here, however, by attempting to prescribe jurisdiction itself, the state is no longer able to subordinate international law to domestic law within the confines of the internationally defined walls of sovereignty. Rather, by attempting to define these very walls, they disappear, and the state is left attempting to legislate within the international realm.

Normally, for example, United States courts could, under the paradigm, defer to an act of Congress or an executive order directing the United States armed forces to seize small enemy coastal fishing boats in time of war, a violation of international law.[141] Such a decision would not mean that the United States was usurping the role of international law in attempting to unilaterally define the law of war or the law of the sea. Operating within the internationally defined domestic order, the United States courts simply would be giving deference to domestic over international law. When attempting to define the jurisdictional contours of the state itself, however, the state can no longer be said to be exercising authority within its domestic realm. Instead, the state would actually be attempting to prescribe international law within the international realm. Consistent with the sovereignty paradigm, therefore, the state has the power (though under international law, not the right) to violate substantive international law. The one power it does not have is the power to define its own powers.

Here again, if doctrine-makers are to create doctrine that reinforces rather than weakens the underlying social order reflected by the sov-

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141. *See* cases cited *supra* note 133.

ereignty paradigm, they must create doctrine that recognizes jurisdiction as an exception to dualism and gives deference to the international law of jurisdiction over domestic jurisdictional law, even if that law purports to apply to cases involving foreign litigants.[142]

III. THE NORMATIVE ANALYSIS

A. The Case for Applying the International Law of Jurisdiction

I explained in Part II, the positivist analysis, that law is a human invention to help order social behavior, and that to accomplish this, when it is not being employed to create new or reformed social institutions, its doctrines must reinforce existing social institutions. I further explained that the doctrine that provides that states apply their own law of jurisdiction to cases involving foreign plaintiffs or defendants is inconsistent with the sovereignty paradigm, which is accepted as defining the present international institutional structure. Here, in the normative section, we are no longer analytically bound to support global institutions as they currently exist. Our only question now is whether it is preferable in cases where there is foreign party involvement for states to apply the international law of jurisdiction in place of their own self-prescribed jurisdictional law.

In the most general sense, a well functioning international jurisdictional system should facilitate the effective functioning of the international judicial system as a whole. Specifically, it should promote an effective system of dispute resolution whereby opportunities for forum shopping will be minimized, foreign judgments will be satisfied, and jurisdictional conflicts will be avoided. In addition, because the forum asserting jurisdiction over a case presently determines which state's substantive law applies, the international jurisdictional system should also promote a coherent scheme for applying what are presently diverse and sometimes conflicting national legislative policies. Finally, the system should ensure that all defendants, regardless of nationality, are protected from the inconvenience that would result from overly broad

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142. The U.S. Constitution does not purport to apply to cases involving foreign litigants. The Constitution's framers, operating under the sovereignty paradigm, never presumed to self-define the United States' fundamental international powers. This is reflected in the fact that the document is contextually limited to establishing the *internal* mechanisms of U.S. governance (i.e., separation of internal powers, state-federal relations, etc.).

The Constitution's contextually implicit acceptance of the sovereignty paradigm was made explicit in the Declaration of Independence.

> [These Free and Independent States] have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States *may of right do.*

THE DECLARATION OF INDEPENDENCE (U.S. 1776) (emphasis added).

assertions of jurisdiction by individual states. The current system in which all states unilaterally circumscribe their own adjudicative jurisdictional laws is not well suited to accomplishing any of these objectives.[143]

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143. These types of concerns have been obscured within the U.S. domestic jurisdictional system by the contacts era emphasis on "fairness" to the defendant. They are, however, generally referred to as relevant to the jurisdictional determination in World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286 (1980). They are articulated as follows:

> the forum State's interest in adjudicating the dispute . . . ; the plaintiff's interest in obtaining convenient and effective relief . . . at least when that interest is not adequately protected by the plaintiff's power to chose the forum . . . ; 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 . . . .

Id. at 292 (citations omitted). That these concerns are relevant to jurisdictional law has been repeated in several subsequent cases by the Court. *E.g.*, Asahi Metal Indus. Co. v. Superior Ct. of Ca., Solano County, 480 U.S. 102, 104–05 (1987).

Exactly how these types of concerns fit into the minimum contacts analysis has been the subject of a great deal of confusion. The Supreme Court has interpreted *International Shoe's* statement that the defendant must have "minimum contacts" with a forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice," as establishing two separate tests: a minimum contacts test and a fair play and substantial justice test. For example, the court in *World-Wide Volkswagen* states:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum state is the most convenient location for litigation, the Due Process Clause, acting as an instrument of federalism may sometimes act to divest the State of its power to render a valid judgment.

444 U.S. at 294. *See also* Hanson v. Denckla, 357 U.S. 235, 251 ("However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimum contacts' with that State that are a prerequisite to its exercise of power over him."). The minimum contacts test in these cases maintains the exclusively defendant-centric concern with protecting individuals from jurisdictional overreach by forums with whom they have constitutionally insufficient contacts. The fair play and substantial justice test or fairness test as it has come to be called provides for balancing the other relevant concerns with the interests of the defendant.

The Court, because of lack of internal consensus, has been unable to state definitively the relationship between these two tests. There is language in some cases suggesting that the Constitution requires that the defendant's requisite contacts with the forum under the minimum contacts test must first be independently established without regard to various other interests. Only then does the Constitution allow or, for some, require that the other interests defined in *World-Wide Volkswagen* be taken into account. *See, e.g.*, *Asahi*, 480 U.S. at 114 (opinion announced by O'Connor J.) ("When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant."). Other cases have suggested that the considerations of the fairness prong, "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *E.g.*, Burger King v. Rudzewicz, 471 U.S. 462, 477 (1985); *Asahi*, 480 U.S. at 121 (Stevens, J., concurring in part and concurring in the judgment) ("An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional."). These pronouncements have led some lower courts to conclude that the constitutional test determining personal jurisdiction in the United States has actually collapsed into one large balancing test of the competing jurisdictional interests. *E.g.*, Sybaritic, Inc. v. Interport Int'l., Inc., 957 F.2d 522, 524 (8th Cir. 1992); Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1270 (9th Cir. 1981). Finally some courts seem to reject the broader consideration of the fairness prong altogether. *See, e.g.*, companion cases, Keeton v. Hustler, 465 U.S. 770, 778 (1984), and Calder v. Jones 465 U.S. 783, 790–91 (1984).

The present multiplicity of nationally defined and overlapping jurisdictional forums allows plaintiffs to shop for the forum that will apply the most pro-plaintiff substantive law. To the extent that nations do not apply uniform choice of law rules, the outcome of cases in the present system very often depends on the idiosyncratic jurisdictional rules of individual forums.[144] Thus, parties in their dealings with foreigners are unable to know with certainty what laws will be applied to their transactions in the event of litigation. This is inconsistent with an effectively functioning dispute resolution system. In addition to undermining the legal predictability necessary for social and commercial actors to plan future international activities, a system that fails to give parties advance notice of the laws with which they must comply is also unfair. Furthermore, the present system, in which each state's uncoordinated jurisdictional laws can be manipulated to determine applicable substantive law, impedes the development of a globally coherent or even consistent approach to coordinating the application of diverse national legal regimes. An organized system of international jurisdictional rules, while unlikely to completely eliminate the potential for forum shopping, would provide that it only occur to the extent that it is not inconsistent with the intended functioning of an ordered international jurisdictional system.[145]

In addition to creating opportunities for plaintiffs to take advantage of incongruities, the present system of nationally self-prescribed jurisdictional law also clearly impairs the effective functioning of the international dispute resolution system by actually undermining the likelihood that countries will cooperate with each other in satisfying

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For a helpful explanation of the development of the two step analysis, see Gregory Gelfand, *A Dissenting View of* Asahi Metal Industry Co., LTD v. Superior Court, 39 S.C. L. REV. 873, 886–91 (1988).

144. *See generally* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553 (1989) (explaining that international forum shopping is common and is frequently outcome determinative).

145. For example, the U.S. system allows for forum shopping. In contrast to the international system, however, this is the intended result of a coordinated approach to jurisdiction that, if appropriately designed, should not undermine the goals of the larger judicial system. The outcomes of cases in the United States are, in fact, not significantly affected by the fact that plaintiffs often have the ability to choose between internal forums within the United States. This is because the substantive laws in the various states, as well as the choice of law rules that determine which forum's laws will ultimately be applied, are far more uniform than they are internationally. Hazard states:

> [T]he premise that the jurisdictional problem is a territorial one may appear to beg a central question in the conflict of laws . . . . The homogeneity of the federal union, as distinguished from the heterogeneity of the international community, makes choice of forum among United States courts rather a technical, legal problem than one of major political dimensions.

Hazard, *supra* note 69, at 245. All of the major domestic jurisdictional systems currently allow forum shopping in certain circumstances, but usually to a far more limited extent than in the United States. *See generally* Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH L. REV. 1195 (1984).

foreign judgments. Under almost any jurisdictional scheme, the forum or fora that have jurisdiction over disputes will be limited at times to those where defendants do not have assets. In these cases, effective judicial redress depends upon the willingness of courts to execute the judgments of foreign courts.[146] Courts will, however, typically refuse to execute such foreign judgments if they consider the foreign court to have exhorbitantly asserted jurisdiction in the underlying case.[147] Because under the present system state jurisdictional parameters are self-circumscribed, disagreements over what is appropriate result in countries refusing to satisfy each other's judgments. Far more foreign judgments, therefore, would be satisfied if states accepted a generally agreed upon international law of jurisdiction as domestically applicable.[148]

An even more egregious breakdown of judicial cooperation occurs when the present system of uncoordinated, self-circumscribed, overlapping jurisdictional forums leads to more than one state competing for jurisdiction over the same case. For parties to a dispute subject to differing judgments, the result of such conflicts of jurisdiction is unnecessary expense, confusion, and unfairness. Another result for states whose courts are involved is increased diplomatic friction. These conflicts,

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146. Friedrich Juenger describes the consequences that flow from the failure of states to recognize foreign judgments:

> To retry cases that have been authoritatively decided violates fundamental tenets of judicial economy . . . . Such duplication is not only wasteful; it punishes private litigants and exacts a toll from international commerce. To protect their interests, parties engaged in multinational transactions must either resort to arbitration or insist on advance payments or guarantees, which increases the transaction costs of doing business abroad.

Juenger, *supra* note 9, at 4.

147. *See* Juenger, *supra* note 9, at 13 (noting that in preparing a general report on judgment recognition for the Twelfth International Congress of Comparative Law, he found that of twenty-one countries from four continents studied, "with the notable exception of the State of South Australia all [the studied] legal systems . . . exercise some form of review of the rendition state's jurisdiction").

Sometimes states will refuse to exercise foreign judgments based on exclusive claims of jurisdiction of their own. As Michael Akehurst explains:

> The French ordinance of 1629 which forbade the execution in France of foreign judgments against French nationals was based on the idea that French courts had exclusive jurisdiction over French nationals; a similar rule exists in France to this day. Swiss courts have exclusive jurisdiction over personal actions against persons domiciled in the canton in question. Hungarian courts claim exclusive jurisdiction in divorce cases if either party is a Hungarian national. A somewhat similar rule exists in Yugoslavia, which also claims exclusive jurisdiction in succession cases over immovables in Yugoslavia and over movables left abroad by Yugoslav nationals. In France a *clause compromissoire* conferring jurisdiction French courts is regarded as ousting the jurisdiction of foreign courts.

Akehurst, *supra* note 9, at 238 (citations ommitted).

148. In fact, reaching agreement on jurisdictional limits has been so integral to the willingness of states to satisfy each other's judgments that the existing bilateral or regional treaties on satisfaction of judgments, of necessity, specify that, assuming other relevant criteria are met, foreign judgments must be satisfied in cases where the original assertion of jurisdiction is not inconsistent with certain defined limits. See *supra* note 12.

even without a centrally coordinated jurisdictional system, are usually averted because courts will generally stay their proceedings if another court has already accepted jurisdiction.[149] Such judicial deference is often not given, however, when a second forum regards the first forum as having "extraterritorially" imposed its substantive laws beyond its legitimate prescriptive powers.[150]

While the underlying conflict is over the nature and extent of a nation's right to prescribe laws rather than to adjudicate cases, such conflicts will be ameliorated to the extent that international law generally evolves to circumscribe effectively the assumption of adjudicative jurisdiction and does so specifically in cases involving prescriptively controversial laws.[151]

The present uncoordinated system of jurisdiction can also result in the opposite situation where no state will assert jurisdiction over a dispute.[152] In the United States, which has a legacy of concern with

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149. United States court cases on concurrent jurisdiction usually address applications for injunctions against a party's pursuing litigation in a foreign country. *See, e.g.*, Robin Cheryl Miller, Annotation, *Propriety of Federal Court Injunction Against Suit in Foreign Country*, 78 A.L.R. FED. 831 (1983 & Supp. 1994). In accordance with principles of comity, U.S. courts generally give deference and mutual respect for concurrent foreign proceedings, provided the foreign court is proceeding to a separate judgment offering full justice and remedies comparable to those under U.S. law. *E.g.*, Kline v. Burke Const. Co., 260 U.S. 226, 233 (1922); Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-A-Mousson, 205 U.S. App. D.C. 172, 636 F.2d 1300 (D.C. Cir. 1980). *Cf* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (discussing British courts acceptance of jurisdiction over case already commenced in the United States).

150. While there are many examples of such conflicts, the most notorious was perhaps the antitrust litigation initiated by the liquidator for Laker Airways in the 1980s. Objecting to what it regarded as the "extraterritorial" application of U.S. antitrust law, the British court in this case issued a series of orders enjoining parties from participating in the U.S. action. Ultimately, the conflict was resolved when the British House of Lords ruled that jurisdiction was properly exercised in the United States. *See* Laker Airways, Ltd. v. Pan Am. World Airways, 559 F. Supp. 1124 (D.D.C. 1983), *aff'd sub nom.*, Laker Airways, Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984). For further discussion, see generally Aryeh Friedman, *Laker Airways: The Dilemma of Concurrent Jurisdiction and Conflicting National Policies*, 11 BROOK. J. INT'L L. 181 (1985).

151. Discussing the link between adjudicatory jurisdiction and the application of substantive law, *see* Arthur von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 323 (1983) ("[W]here a forum has a strong or vital interest in having its law (or perhaps the law of a third state) apply to a matter, this interest may justify the taking of specific jurisdiction where it would otherwise be refused."). The importance or lack of importance of the link between the forum whose substantive law should be applied and the forum that accepts jurisdiction in a given case has been a recurring theme in U.S. Supreme Court decisions. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 225–26 (1977); Hanson v. Deckla, 357 U.S. 235, 254 (1958); Kulko v. Superior Court, 436 U.S. 84 (1978). For further discussion of the relationship between prescriptive conflicts and adjudicatory jurisdiction, see also Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982).

152. Vischer, *supra* note 79, at 204 ("The negative conflict can lead to a 'deni de justice' for the claimant, if he cannot obtain jurisdiction on the grounds that no State considers its courts competent."). Civil law countries sometimes exercise jurisdiction by necessity, "on the independent ground that no other court would be willing to exercise it." Brian Pearce, *The Comity*

jurisdictional overreach dating back to the rationale behind territorial jurisdiction, jurisdictional problems are viewed as emerging when states exceed their jurisdictional grants. Yet avoiding negative conflicts of jurisdiction is also a requirement of an effective dispute resolution system. States at times refuse to provide judicial fora to foreign parties to economize on judicial resources and to protect defendant nationals. A domestically applicable international law of jurisdiction could coordinate jurisdictional responsibilities so that some forum would always be available to hear any legitimate dispute.

Finally, the implementation of a system of universally adopted international limitations on state jurisdiction is the only way for states to effectively ensure that their nationals will be protected from overly broad assertions of jurisdiction by individual states. Currently, there is no effective limit on even the most extreme assertions of jurisdiction by state entities. For example, a country could theoretically claim world-wide jurisdiction and make its courts available to any plaintiff who was willing to pay the proper fees. Other than the non-domestically applicable, and correspondingly underdeveloped, international law of jurisdiction,[153] there is little to discourage such behavior. Before dismissing this problem as hypothetical, recall that, under the French Code Civile, French courts can assert jurisdiction over any case involving a French plaintiff.[154] Thus, if I get into a traffic accident with a French citizen outside of my office in Delaware, I could be sued in France. Likewise, German law provides that if the defendant has any property in Germany, then German courts have unlimited personal jurisdiction over that defendant.[155] If I, therefore, happen to own a few shares of Daimler-Benz stock, German courts could assert unlimited personal jurisdiction over me.

False comfort might be found in the belief that judgments in such cases would, for reasons I have explained, generally be hard to satisfy outside the jurisdictions rendering them. All parties to the Brussels Convention, however, are obligated under the terms of the Convention to recognize and enforce each other's judgments.[156] The Convention

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Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison, 30 STAN. J. INT'L. L. 525, 544 (1994). Acceptance of this doctrine has, however, been controversial in the United States. *See* Helicopteros Nacionales de Columbia S.A. v. Hall 466 U.S. 408, 419 n.13 (1984) (declining to consider the express adoption of jurisdiction by necessity, as such a change would constitute a "potentially far reaching modification of existing law"). *See also* Tracy Lee Troutman, *Jurisdiction by Necessity: Examining One Proposal for Unbarring the Doors of Our Courts*, 21 VAND. J. TRANSNAT'L L. 401 (1988)

153. *See supra* note 9 (discussing the existence of this law). *See also supra* note 17 (discussing the likely content of this law).

154. *See supra* notes 56–59 and accompanying text.

155. 3 German ZivilprozeBordnung [ZPO], art. 23.

156. *See* Brussels Convention, *supra* note 12, title III.

does forbid signatory states from solely relying on "exhorbitant" jurisdictional bases, like those provided by French and German law, when asserting jurisdiction over domiciliaries of other signatory states.[157] The Convention, however, actually goes so far as to discriminatorily require that parties must enforce judgments of other signatory states against foreign domiciliaries, even when the only basis for jurisdiction is an "exhorbitant" one.[158] This should be of particular concern to the United States, whose citizens are perhaps the most likely target of such discrimination.[159]

In addition to being unfair to individuals, very broad state claims of jurisdiction, particularly when applied in a discriminatory fashion, have the potential to cause tensions between states. That states take such offenses against their nationals "personally" is reflected by the fact that international law has traditionally viewed illegitimate uses of power by states with regard to nationals of foreign states as a vicarious offense against the foreign state itself.[160] In fact, early international human rights law was limited to the protection of aliens on the theory that only states, not individuals, had exclusive rights under international law.[161]

B. Which International Law of Jurisdiction?: Custom vs. Treaty

Once the desirability of a domestically applicable international law of jurisdiction is accepted, the question arises, which is preferrable: creating a new multilateral jurisdictional treaty, as would be provided by a Hague Convention, or deriving the international law of jurisdic-

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157. *Id.* art. 3.

158. *Id.* art. 4

159. One commentator identified this as:

> the most regressive step that has occurred in international recognition and enforcement practice in this century. If not corrected, the example set by the Convention may well set in motion forces that will undermine much of what theory and practice have done during our century to create, with respect to the recognition and enforcement of judgments a decent and workable international order.

Von Mehren, *supra* note 9, at 1060.

160. *See* RESTATEMENT (THIRD) *supra* note 9, intro. to pt. VII. ("Injury by a state to the nationals of another state implicates relations between those states, and responsibility for such injury was established early as a norm of customary international law. The injury to the person has been seen as an offense to the state of his nationality.").

161. *Id.* Pursuant to this theory, "[s]tate responsibility for injury to aliens . . . is not seen as creating rights for the alien under international law; he or she benefits because the law sees an offense to the individual as an offense against the state whose nationality the individual bears." LOUIS HENKIN ET AL., INTERNATIONAL LAW, CASES AND MATERIALS 595 (3d ed. 1993). The *Restatement (Third)* also refers to, "[t]he difference in history and in jurisprudential origins between the older law of responsibility for injury to aliens and the newer law of human rights," and notes that the dogmas that gave only states rights under international law limited the application of standards of justice to foreign nationals. RESTATEMENT (THIRD) *supra* note 9, introduction to pt. VII.

tion from existing customary practice?[162] The treaty approach should be pursued. The process of negotiating a treaty best allows for conflicting national views on the proper scope of jurisdictional law to be resolved and for a global consensus to be reached. In addition, while custom often has to be derived from ambiguous and contradictory examples of state practice, conventions, once in place, are finely tuned written documents that precisely state the law.[163] Finally, if states accept that the international law of jurisdiction should be applied, whether in the form of custom or treaty, a multilateral treaty such as a Hague Convention would provide a clearly defined norm that could be applied as customary international law in countries that have not acceded to the Convention.[164]

CONCLUSION

In Part II of this Article, the positivist analysis, I explained that, if legal doctrine is to reinforce rather than weaken the existing international system, in accordance with the sovereignty paradigm, it must provide that the international law of adjudicative jurisdiction should be applied by domestic courts in civil cases involving foreign parties. In Part III of the Article, I provided additional normative arguments for why the domestic application of a well-developed international law of jurisdiction best answers the institutional needs of the international judicial system.

This Article is a call for the United States, as well as other countries who are members of the Hague Convention, to successfully conclude and ratify an international jurisdictional treaty. It is also a call to courts both in the United States and abroad to begin to apply the international law of jurisdiction in whatever form it develops.

One of the great challenges currently facing specialists in international law is to define structures that will effectively coordinate the allocation of international regulatory authority. Hopefully, this Article has met this challenge in the area of adjudicatory jurisdiction. The international community in this and other areas must summon the political will to implement such structures. Failure to do so, given the tremendous increase in transnational economic and social interaction that has accompanied the rise of the global economy, will cause ever

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162. *See supra* note 15 (explaining that custom and treaty are the two primary sources of international law). *See supra* note 13 (discussing plans for a possible Hague Convention).

163. For further discussion of the advantages of treaty law over custom, see generally J. Patrick Kelly, Legitimizing International Law: Customary International Law Reconsidered, (forthcoming 1996) (unpublished manuscript on file with the author) (arguing that custom should be eliminated as a source of international law.)

164. For a reference to countries applying various of the Hague conventions as customary international law, see *supra* note 10.

increasing regulatory confusion, economic inefficiency, and political conflict.