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Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments

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Andrew L. Strauss*

INTRODUCTION

Despite all of the attention given to personal jurisdiction in civil cases by the United States Supreme Court, the Court has never articulated a discrete approach to international jurisdiction. Rather, in cases with foreign plaintiffs or defendants such as Perkins v. Benguet Consolidated Mining Co.,1 Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,2 Helicopteros Nacionales de Colombia, S.A. v. Hall,3 and Asahi Metal Industry Co. v. Superior Court,4 the Court has approached international jurisdiction as an ad hoc appendage to its doctrine of domestic jurisdiction. Specifically, the Court, as well as the legal community in general, has assumed that the U.S. Constitution prescribes America's international jurisdictional reach as if it were prescribing domestic jurisdiction among states within the United States. Thus, with minor variation,5 the Court applies the constitutionally-derived minimum contacts test to international cases.

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1 342 U.S. 437 (1952).
5 See id. at 115 (noting that there may be special considerations involved in the exercise of personal jurisdiction where issues of foreign policy are implicated).
The moment is right for examining this assumption. As the topic of this Symposium suggests, the United States and other countries are now in the process of negotiating a Hague Convention which will prescribe personal jurisdiction in international cases. If the Constitution does, in fact, govern the international ambit of the United States' jurisdiction in these cases, there is a potential for conflict between the Constitution and the treaty. The existence of such a potential conflict would lead to the possibility that the treaty, at least in part, would be held invalid by United States courts. This could both damage U.S. relations with its treaty-making partners and undermine the treaty's purpose of promoting a coordinated and coherent international jurisdictional system. Such results would be particularly unfortunate at a time when the legal demands of the global economy have amplified the advantages of developing and maintaining a well-coordinated international jurisdictional system. These advantages are three-fold.

First, a mutually agreed-upon international jurisdictional system is integral to overcoming existing barriers to the satisfaction of foreign judgments—the major goal of the proposed Hague Convention. Clearly, in a world where defendants' assets may not be in the jurisdiction rendering judgment, if judgments cannot be satisfied across national borders, the efficacy of the international dispute resolution system is greatly impaired. National courts have refused to execute foreign judgments in cases in which they consider the foreign court to have asserted its jurisdiction too broadly.

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8 See Andrew L. Strauss, Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts, 36 HARV. INT'L L.J. 373, 423 (1995) (concluding that an international jurisdictional system is necessary, given the "transnational economic and social interaction that has accompanied the rise of the global economy").

9 For a discussion of national court refusal to recognize foreign court judgments deemed too broad, see Gary B. Born, Reflections on Judicial Jurisdiction in International Cases, 17 GA. J. INT'L & COMP. L. 1, 22-23 (1987); Friedrich K. Juenger, The Recognition of Money Judgments in Civil and Commercial Matters, 36 AM. J. COMP. L. 1, 13 (1988); see also BIN
fore, the greater the uniformity of principles of jurisdiction that can be agreed upon, the greater the range of cases about which the parties negotiating the proposed Hague Convention can reach agreement to require states to satisfy foreign judgments.

Second, a successfully functioning treaty regime would help reduce opportunities for forum shopping. If nations maintain the ability to determine their own jurisdictional realms autonomously while simultaneously failing to apply uniform choice of law rules, the outcome of cases will depend upon plaintiffs finding the forum that applies the most pro-plaintiff substantive law. This frustrates the goal of legal predictability and continues an international system which does not have the ability to coordinate which state's laws should apply in a given situation. A treaty-based system of international jurisdictional rules, while unlikely to eliminate the potential for forum shopping completely, would provide that it only occur to the extent that it is not inconsistent with the intended functioning of an ordered international system.

Third, such a treaty could correct the discriminatory way in which American citizens are subjected to overly-broad assertions of jurisdiction by European countries. These countries are already parties to a European jurisdiction and satisfaction of judgments treaty regime, under which principles of jurisdiction are well-defined. The Convention, however, requires that parties enforce judgments of other signatory states against domiciliaries of non-

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11 See Brussels Convention, supra note 10, at tit. II; Lugano Convention, supra note 10, at tit. II.
party states like the United States even when those judgments result from domestic assertions of jurisdiction that are far broader than the limitations prescribed as between treaty parties. See Brussels Convention, supra note 10, at tit. III (providing for discriminatory enforcement against non-party countries).

Specifically relevant are Articles 14 and 15 of the French Civil Code which permit French courts to assert jurisdiction over foreign nationals whenever a French national is either a plaintiff or defendant in a suit. Article 14 states that "[a] foreigner, even if not residing in France, may be cited before French courts for the execution of obligations by him contracted in France with a Frenchman; he may be brought before the courts of France for obligations by him contracted in foreign countries towards Frenchmen." The French Civil Code, art. 14 (John H. Crabb trans., Fred B. Rothman & Co. 1995). Article 15 further provides that "[a] Frenchman may be brought before a court of France for obligations by him contracted in a foreign country, even with a foreigner." Id. at art. 15.

The language of Article 14, see supra note 13, has been liberally interpreted to apply to torts. See Judgment of Dec. 13, 1842 (Comp. Du Britannia v. Comp. Du Phenix), Cass. req., 1843 [S. Jur. I] 14 (Fr.).

In Germany and the countries influenced by the Zivilproceßordnung... unlimited judicial jurisdiction may be premised on the presence of even trifling or intangible assets..."; see also Arthur Taylor 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, 1049 (1981) (discussing the broad "any assets" basis for jurisdiction under the German Code of Civil Procedure).

Finally, although rare, the present lack of a coordinated treaty regime also allows for negative conflicts of jurisdiction where no state has the authority or willingness to assert jurisdiction over a dispute. A treaty regime could coordinate jurisdictional responsi-
bilities so that some forum would always be available to hear any legitimate dispute.

Because the advantages of participating in a coordinated jurisdictional system are significant, it would be unfortunate if the Constitution were to be interpreted to stand in the way of their realization. I do not believe that such an interpretation is required. My thesis is that the Framers of the Constitution understood international jurisdiction between the nation-states of the world to be allocated by the international order, and only meant the Constitution to prescribe domestic jurisdiction among the fifty states within the United States and between those states and the federal system. I have argued elsewhere that consistency with the paradigm of state sovereignty (which provides the conceptual foundation for the international system), requires that the global order define the ambit of nation-state jurisdiction. In this Article, I argue that this paradigmatic approach is specifically embodied in the United States Constitution.

To set the stage, Part I.A discusses the basic principles used by American courts to determine which law is applicable when domestic and international law are in conflict. With this background in mind, Part I.B turns to the specific problem of how an American court would resolve a conflict between a treaty governing international jurisdiction and U.S. law, particularly the Constitution. Part I.B closes by explaining why constitutional provisions would be considered supreme over provisions of a jurisdictional treaty. The remainder of the Article explains that no such conflict should be seen to exist since the Constitution does not prescribe international jurisdiction. The foundation for this argument is laid out in Part II.A where I identify the fundamental constitutional principles for determining where U.S. constitutional law ends and international law begins. My claim is that these principles, derived from the basic paradigm of state sovereignty, provide that domestic law regulates private actors and the state's internal organs of administration, while international law regulates relations between nation-states. Part II.B applies these principles to jurisdiction.

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18 See generally Strauss, supra note 8, at 373.
19 See infra notes 26-35 and accompanying text.
20 See infra notes 36-43 and accompanying text.
21 See infra notes 44-63 and accompanying text.
22 See infra notes 64-69 and accompanying text.
authority between constituent units of an organizational system, Part II.B broadly demonstrates that while the Constitution prescribes jurisdiction among the fifty states of the United States, it defers to international law to prescribe jurisdiction among the nation-states of the world. Part III.A conducts a brief historical review of cases to show that this was well understood during the "era of territorial jurisdiction." Part III.B discusses the transition to the present era of contacts jurisdiction, and explains that contacts jurisdiction has obscured the basic purpose of jurisdiction. As a result, people today erroneously assume that the Constitution governs international jurisdiction. Contacts jurisdiction has come to be viewed as not about allocating authority among states, but about protecting the rights of defendants from over-assertions of authority by the state, a subject that can easily be misconstrued as a matter for domestic regulation. The Article explains how contacts jurisdiction has appeared to lose its jurisdictional function both because it allows for states to have overlapping jurisdictional realms, and because the Supreme Court, in proclaiming the domestic doctrine of contacts jurisdiction, resorted to a formulation which denied that the doctrine affected the allocation of authority between states.

I. RESOLVING CONFLICTS BETWEEN U.S. AND INTERNATIONAL LAW

A. The Doctrine of Dualism

The usual starting point for resolving conflicts between domestic legal doctrine and international treaty law is the doctrine of dualism as it has been adopted in the United States. Dualism posits that domestic (or "municipal law," as it is often called) and international law are two completely separate systems of law. As such, each has its own law making, enforcement, and adjudication sys-

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23 See infra notes 70-82 and accompanying text.
24 See infra notes 84-122 and accompanying text.
25 See infra notes 93-112 and accompanying text.
27 See id. (stating that "dualism regards international law and the internal law of states as wholly separate legal systems").
tems.\textsuperscript{28} American courts, as agents of the American system, are limited to applying American law. By long-standing authority, however, "[i]nternational law is part of our law,"\textsuperscript{29} and when appropriate, it is incorporated into, or becomes a part of, American federal law.\textsuperscript{30} In fact, Article VI of the United States Constitution defines "treaties" along with the Constitution itself as the "supreme Law of the Land."\textsuperscript{31}

As the equivalent of federal law, in the event of a conflict between the requirements of a treaty and requirements imposed by other federal, state, or constitutional edicts, treaty law is subject to the same rules of precedence as federal legislation.\textsuperscript{32} It is supreme (for most, if not all, purposes) to state law.\textsuperscript{33} In relation to federal legislation, it is subject to the later-in-time rule, which holds that a subsequently passed federal law takes precedence over an earlier passed one.\textsuperscript{34} Finally, in the words of the Restatement, "provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions, and requirements

\textsuperscript{28} See id. ("(R)ules of international law apply within a state only by virtue of their incorporation into the state's internal law. They are binding, in other words, as rules of internal law and not international law.") (footnote omitted).

\textsuperscript{29} The Paquete Habana, 175 U.S. 677, 700 (1900).

\textsuperscript{30} See \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} § 111(1) (1987) [hereinafter \textit{RESTATEMENT OF FOREIGN RELATIONS}] (stating that "[i]nternational law and international agreements of the United States are law of the United States and supreme over the law of the several States").

\textsuperscript{31} U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the \textit{supreme Law of the Land}; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. (emphasis added).

\textsuperscript{32} See United States v. Belmont, 301 U.S. 324, 331 (1937) (asserting the legal hierarchy of treaty law and other international agreements over state law).

\textsuperscript{33} The application of international law in American courts, similar to federal law, may be subject to any reservations of power that the Tenth Amendment to the United States Constitution reserves exclusively for the states. \textit{See U.S. CONST. amend. X} ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Justice Holmes in \textit{Missouri v. Holland}, 252 U.S. 416, 434-35 (1920), was, however, dismissive of Tenth Amendment limits on treaty powers. The door, however, may not be entirely closed. \textit{See} Jeffrey L. Friesen, Note, \textit{The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models}, 94 COLUM. L. REV. 1415, 1422 (1994) (stating that "\textit{Missouri v. Holland} . . . does [not] make the Tenth Amendment a nullity").

\textsuperscript{34} See \textit{RESTATEMENT OF FOREIGN RELATIONS}, supra note 30, § 115. For further discussion of the rule, see \textit{JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES} 81-101 (1996).
of the Constitution, and cannot be given effect in violation of them.”

B. Personal Jurisdiction and Domestic Law

How does all of this relate to personal jurisdiction? Personal jurisdiction in the United States is understood narrowly as a question of constitutional law. This suggests that our inquiry should be limited to an analysis of the relationship between the Constitution and the proposed Hague Convention. Jurisdiction in the final sense is, however, a question of which forum ultimately hears a dispute. Our discussion must therefore be expanded, at least briefly, to include the relationship between the proposed convention and the whole body of law which identifies the presiding forum.

American forums may at their discretion establish rules and procedures which allow them to decline to exercise their constitutional grant of jurisdiction. Some state forums within the United States employ “long-arm” statutes which may serve to limit cases that state courts may hear. Federal district courts use the long-arm statutes of the states in which they sit in diversity cases and in federal question cases where there are no specific federal long-arm provisions. In addition, each state and the federal government maintain additional rules of venue which direct cases to those courts within the forum which are geographically most convenient. Finally, the federal system and many states employ transfer doctrine as well as the doctrine of forum non conveniens. These

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35 Restatement of Foreign Relations, supra note 30, § 111 cmt. A; see Reid v. Covert, 354 U.S. 1, 17 (1957) (“This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.”) (footnote omitted).

36 See Stephen C. Yeazell, Civil Procedure 70 (4th ed. 1996) (“Because the federal Constitution defines the lines of authority among the competing centers of power, courts look to the Constitution for their basic framework in deciding issues of judicial jurisdiction. . . . What we now call personal jurisdiction [is] part of the Constitution.”).


38 See id. at 24-28 (discussing the use of long-arm statutes by the states).

39 See Fed. R. Civ. P. 4(k) (specifying the jurisdictional reach of federal courts); see also Myrna S. Raeder, Federal Pretrial Practice § 4-13(a), at 110-11 (2d ed. 1995) (explaining that in the absence of a federal statute which provides otherwise, federal courts apply the jurisdictional laws of the state in which the court sits).


41 See Raeder, supra note 39, at 119-23 (discussing the doctrine of forum non conveniens); see also Alexander Reus, Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany, 16 Loy.
doctrines allow judges to transfer cases to other courts within the 
forum or dismiss the case so that it can be refiled in another forum 
if it would be more convenient for the case to be heard elsewhere.42 

Because the American dualist approach to domestic incorporation 
of international law views treaties as supreme to earlier-in-time 
federal law as well as most state law,43 the only question meriting 
serious exploration is the possibility that an international jurisdic-
tional treaty would be superseded by conflicting American constitu-
tional principles of jurisdiction. Approached as a matter of consti-
tutional interpretation, the question turns on understanding the 
allocation of law making authority between the domestic and inter-
national orders reflected in the Constitution.

II. INTERPRETING THE CONSTITUTION

A. The Sovereignty Paradigm and the U.S. Constitution

Finding the answer to the question of whether the Constitution is 
meant to prescribe international jurisdiction lies in understanding 
the intellectual universe in which the architects of the Constitution 
were operating. In this universe, the distribution of all global po-
itical power, including the extent to which the authority of nation-
states yields to the authority of the international system, is derived 
from the paradigm of state sovereignty.44 Under the classic formu-
lation of the sovereignty paradigm, the state is the ultimate and 
supreme political entity within its jurisdictional sphere.45 As such,
all private, non-state actors coming within a state's jurisdictional sphere, as well as the state's own internal organs of administration, are subject to the absolute exercise of that state's domestic authority. What is left to the international order under this paradigm is to govern relations between these sovereign political entities.

Because state sovereignty despite certain qualifications continues to be the basic organizing principle of the international system, most of us continue to accept implicitly its basic allocation of responsibility between the domestic and international orders. Highway speed limits are decided domestically. Laws regulating the rules of international armed conflict are the province of the international order. While rarely stated explicitly, the allocation of responsibility is implicit throughout the entire Constitution. The document's first three Articles establish the basic framework for internal self-governance. They do not attempt to establish a regulatory structure for the world at large. Article I establishes a legislative branch with powers vested in "a Congress of the United States" to "provide for the common Defence and general Welfare of

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46 Today, under the well-accepted restrictive form of foreign sovereign immunity, foreign states that enter the jurisdictional realm of their fellow states (to engage in private commerce, for example) will often be subject to the domestic authority of local courts. See generally Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1994); CHARLES LEWIS, STATE AND DIPLOMATIC IMMUNITY (1980).

47 Modern developments qualify the absolute nature of this authority. See Strauss, supra note 8, at 393 & n.71 (noting limitations on the absolute authority of states to regulate the conduct of private actors, particularly in the area of human rights).

48 Public international organizations, formally created by states, have in reality become increasingly autonomous and today should probably also be themselves considered independent subjects of international governance. See id. at 393 & n.72.

49 See supra notes 45-48 and accompanying text.

50 The sovereignty paradigm does not distinguish as between levels of government within the domestic order. Although at times influenced by the federal government, the states within the United States establish highway speed limits within their boundaries.

51 The Preamble to the U.S. Constitution identifies "[w]e the People of the United States," as those attempting to form, "a more perfect Union," (quite clearly between the states within the United States), and that "this Constitution for the United States of America" was "ordain[ed] and establish[ed]" to "establish Justice [apparently within the American system], insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." U.S. CONST. pmbl. (emphasis added).

52 Id. at art. I, § 1 (emphasis added).
the United States." These are among the list of enumerated powers specifically identified in Section 8.

54 See id. at art. II, § 1 (vesting executive power in the President of the United States).

55 See id. at art. II, § 1, cl. 5 (outlining the eligibility requirements of citizenship, age, and residency for the office of President).

56 Id. at art. III, § 1 (emphasis added) (providing for one Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish").

57 Id. at art. III, § 2 (emphasis added).

58 See Edwin D. Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U. Pa. L. Rev. 26, 45 (1953) (noting that the Framers of the Constitution were extremely well-schooled in international law, and describing the Constitution as a charter of authority, allocating jurisdiction between the different branches of the distinct national and state authorities in order to achieve, in part, the essential constitutional objective of paving a "way to nationhood—one nation firmly hooped together' with respect to everything external") (citation omitted).

59 U.S. CONST. art. IV, § 1.

60 That the Full Faith and Credit Clause of the Constitution applies only between individual states of the United States has never been in question. The satisfaction of judgments between courts of different nation-states is determined in accordance with international principles of comity. See Arthur T. von Mehren & Donald T. Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 HARV. L. REV. 1601, 1607 (1968) (discussing inherent differences between American and international practice). See generally Joel R. Paul, Comity in International Law, 32 HARV. INT'L L.J. 1 (1991) (exploring meanings and origins of comity in international law).
within the United States, and is not intended to allocate authority between courts within the United States and those within foreign countries.61

The implied general distinction between an inner-realm under the domain of the Constitution and an outer-realm under the domain of the international order surfaces in Article II, Section 2, which establishes the treaty-making power of the Executive and the Senate.62 By providing a process for internal ratification of the external obligations undertaken by the United States, the Constitution manifests the Framers' understanding that the document is meant to establish a structural framework for American self-regulation, and that the country is only one of many participants in a separate international law making system whose domain is relations among nation-states.

To the extent that the above analysis leaves any room for doubt about whether the Constitution's Framers intended that American constitutional law should be interpreted as requiring the United States to violate a jurisdiction treaty, canons of American legal construction require that such doubt be resolved in favor of consistency with the treaty.63

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61 According to Article III, the judicial power of the national authority was to “be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const. art. III, § 1. Article III, Section 2 enumerates specific areas of subject matter jurisdiction for the exercise of national, as opposed to state, judicial power. See id. at art. III, § 2. Alexander Hamilton specifically addressed the way in which judicial authority to resolve disputes with foreign implications should be allocated among American courts:

The union will undoubtedly be answerable to foreign powers for the conduct of its members. . . . So great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.


62 The President:

shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

63 In an often-cited opinion, Chief Justice Marshall wrote that “an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.” Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). See RESTATEMENT OF FOREIGN RELATIONS, supra note 30, § 114 (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an inter-
All of this analysis merely makes explicit what is implied in undertaking to draft a constitution for the United States: that the Framers incorporated into the Constitution their understanding of where America ends and the international order begins.

B. The Constitutionally Accepted Sovereignty Paradigm and Personal Jurisdiction

How does this constitutionally reflected allocation of responsibility apply to personal jurisdiction? An elemental understanding of personal jurisdiction unencumbered by the highly particularized U.S. Supreme Court jurisprudence on the subject reveals that personal jurisdiction, like all jurisdiction, is about the allocation of administrative authority between subunits of an organizational system. The concept is so basic that without it, anything but small-scale social organization would be impossible. There simply would be no way to determine which administrative subunits of an organization have the responsibility for exercising authority in which areas. Chaos would ensue.

Consistent with the basic concept of jurisdiction, subunits cannot self-define their own jurisdiction. Our own federal system makes

national agreement of the United States.”); id. § 401 cmt. b (observing that domestic law is generally construed to avoid conflict with international law). While this rule generally applies to statutes, logically the Constitution should likewise be construed as consistent with international law, unless it also clearly indicates to the contrary.

A Dictionary of the Social Sciences explains:

The term jurisdiction denotes the sphere of authority exercised by a state, agency of the state, international juridical or administrative organization, or a non-governmental association, over places, persons, or things. In international law it includes the general authority recognized as belonging to a state or to an international agency, and the particular authority recognized in national law as belonging to an agency of government or to a statutory or voluntary non-governmental association.


See Strauss, supra note 45, at 1215 (discussing the impossibility of organizing global social life without jurisdictional authority).

See id. (describing the need to have jurisdiction in order to allocate regulatory responsibility among administrative units).

See id. (concluding that "there would be no way to accomplish effectively the intricate and myriad tasks necessary for governing a modern complex society").

See 2 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 957 (Guenther Roth & Claus Wittich eds. & Ephraim Fischoff et al. trans., Univ. of California 1978) (1968) (“The principle of hierarchical office authority is found in all bureaucratic
this obvious. If Louisiana was charged with deciding its own jurisdiction, there would be no jurisdictional constraints on Louisiana. In a hypothetical federal system of jurisdictional self-prescription, Louisiana and every other state could exercise regulatory authority in whatever area they pleased, and the fundamental organizational purpose of jurisdiction would be defeated.

If self-prescription is inconsistent with the premise underlying jurisdiction, then the allocation of jurisdictional responsibilities between the nation-states of the world must be left to the international order. Under the constitutionally-reflected sovereignty paradigm, international jurisdiction cannot be a matter for domestic regulation, but rather, as a question necessarily involving relations between nation-states, it is a classic subject for prescription by the international order. The Constitution, therefore, must intend itself to prescribe the jurisdicational responsibilities of the fifty states within the United States and the federal government and leave the allocation of jurisdiction among the nation-states of the world to the international order.

As I will now demonstrate, that the Constitution is not meant to extend into the realm of prescribing international jurisdiction was taken for granted during the era of territorial jurisdiction.

III. APPLYING THE CONSTITUTIONALLY-ACCEPTED SOVEREIGNTY PARADIGM TO INTERNATIONAL CASES

A. Easy Application: The Era of Territorial Jurisdiction

During the era of territorial jurisdiction (predating the founding of the United States and ending definitively in 1945), the courts,
and the legal community in general, assumed that the U.S. Constitution's role was not to prescribe personal jurisdiction in international cases. Rather, in assuming that the limits of nation-state jurisdiction came from the international order, courts during this period took for granted that our Constitution was not intended to upset the allocation of responsibility between the domestic and international orders implied by the sovereignty paradigm.

The hallmark of the territorial era was an understanding that nation-states possessed absolute sovereignty over their territories and conversely were excluded from exercising sovereign powers in the territories of other nation-states. It followed that a nation-state only had personal jurisdiction over a defendant who was inside of its own territory. A state asserted this jurisdiction by physically seizing or arresting the defendant. Eventually the system evolved to allow symbolic seizure of the defendant through service of process. That in this simple jurisdictional world the Constitution was not intended to claim authority to prescribe whether the United States could assert personal jurisdiction over someone who was in another country was taken as obvious by the legal community, which assumed implicitly the sovereignty paradigm's division of domestic from international responsibility.

So straightforward was the territorial formula and so clear was its international function of allocating power among nation-states.
that no one would have assumed that it was a creation of our own Constitution. In fact, quite the opposite was the case. Courts explicitly reported their understanding that the international order governed jurisdiction between nation-states in their attempts to derive an analogous system of jurisdiction for the parallel community of states within the United States.

_Pennoyer v. Neff_, the 1877 case which, in many people's minds, exemplifies the territorial era, provides the most famous such reference. In that case, the Court needed an authoritative basis to justify its use of the territorial approach to allocating judicial powers among the "sovereign" states of the American federation. The Court found such a basis in the "well-established principles of public [international] law respecting the jurisdiction of an independent [nation-]State over persons and property."76

Many other nineteenth-century cases also stand as evidence of the implied presumption that the international order prescribes the jurisdiction of nation-states. For example, in the 1828 case of _Piquet v. Swan_, the former Federal Circuit Court for the District of Massachusetts proclaimed:

[the courts of a state, however general may be their jurisdiction, are necessarily confined to the territorial limits of the state. Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them, would be deemed an usurpation of foreign sovereignty, not justified or acknowledged by the law of nations.]78

Likewise in 1848, the Supreme Court of Georgia, in holding that Georgia could not assert personal jurisdiction over a resident of South Carolina, reported its understanding that "the rule is firmly fixed, that no sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions. This is the rule, by the laws of nations—by the Common Law, and

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75 95 U.S. 714 (1877).
76 _Id._ at 722. Justice Field concludes:
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.

_Id._
77 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134).
78 _Id._ at 611 (emphasis added).
It is recognized by the American Courts. Additionally, in 1850 in D'Arcy v. Ketchum, the Supreme Court itself, anticipating its decision in Pennoyer, made reference to the international order's prescription of international jurisdiction. Holding that an American state could refuse to give effect to a sister American state's judgment on the basis of a claim of lack of jurisdiction, the Court proclaimed that, "[w]e 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." Many other cases of the era evidenced a similar understanding.

With the rise of contacts jurisdiction, however, this simple territorial model of jurisdiction would lose its viability, and with it

81 See id. at 174 (discussing the limits of nation-state jurisdiction as established under the rules of international law).
82 Id.
83 Other cases during the era of territorial jurisdiction also evidence the implied presumption that the international order prescribes the jurisdiction of nation-states. See Wildenhus's Case, 120 U.S. 1, 19 (1887) (citing a French case for the proposition that "every state has sovereign jurisdiction throughout its territory") (citation omitted); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 517, 589 (1839) (analogizing American states to nations for jurisdictional purposes); Kibbe v. Kibbe, 1 Kirby 119, 126 (Conn. Super. Ct. 1786) (finding that a Massachusetts court had no jurisdiction over a resident of Connecticut); Peckham v. North Parish in Haverhill, 33 Mass. (16 Pick.) 274, 286 (1834) (holding that corporations established under a foreign state are beyond the jurisdiction of Massachusetts courts); M'Queen v. Middletown Mfg. Co., 16 Johns. 4, 7 (N.Y. 1819) (holding that jurisdiction does not attach to a corporation outside the sovereignty where that corporation's body exists); Phelps v. Holker, 1 Dall. 261, 284 (Pa. 1788); Campbell v. Wilson, 6 Tex. 379, 391 (1851) (stating that, from "an international point of view, jurisdiction, to be rightfully exercised, must be founded on the person . . . or the thing being within the territory") (citation omitted); see also Max Rheinstein, The Constitutional Bases of Jurisdiction, 22 U. CHI. L. REV. 775, 782 n.23 (1955) (discussing cases which address territorial limits on judicial power in reference to judgments); id. at 783 n.28 (discussing cases which address territorial limits on the state power to grant divorces); id. at 783 n.29 (discussing cases which address territorial limits on the state power to tax); id. at 783 n.30, 784 n.31 (discussing cases which address the state power to legislate).

Patrick Borchers, based upon his review of early personal jurisdiction cases, has concluded that courts prior to Pennoyer consistently applied the international territorial principles of personal jurisdiction. See 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, 25-32 (1990) (summarizing the relevant cases).

John Drobak, based upon his own research, has similarly concluded:

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); see id. at 1019-25 (summarizing the relevant cases).
would go the clarity of understanding that made the application of international law to international cases appear so natural.

I will now turn to explaining how courts and commentators came to misunderstand the nature of jurisdiction during the contacts era, and how this misunderstanding led to the assumption that domestic jurisdictional principles should be applied in international cases.

B. The Conundrum of Contacts Analysis

1. The Conversion to Contacts

In 1945, the landmark case of *International Shoe Co. v. Washington* brought the era of territorial jurisdiction to an end. In that case, which presented a question regarding the jurisdiction of a state within the United States, the Supreme Court explicitly endorsed what came to be identified as the minimum contacts test. The Court proclaimed that:

[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."

Commentators generally agree that economic developments forced the Supreme Court to make the transition from territoriality

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84 326 U.S. 310 (1945).
85 When I speak of the end of the era of territorial jurisdiction it should not be taken to mean that territoriality as the primary basis for jurisdiction ended in 1945, but only that personal jurisdiction was no longer strictly limited to the forum where the defendant was territorially present. In fact, the analysis which follows relies on the prevailing assumption underlying Supreme Court opinions that the Court does not have the independent power to expand the basis for state jurisdiction beyond territoriality.
to contacts jurisdiction. Most significant was the increasing number of corporate defendants which made reliance on the defendant’s presence within the forum as the *sine qua non* for the exercise of state power no longer possible. As the facts in *International Shoe* itself made clear, while the corporation is metaphorically deemed to be a person, it is in reality a legal “fiction” composed of a multitude of many different persons all performing different functions. The entity, therefore, has no physical presence, much less one in a particular jurisdiction. Should the entity be deemed “to be” where it was formally incorporated, where its board of directors sat, where its owners (the shareholders) were, where its workers were, or where its customers were? Without a satisfactory answer to these questions, the courts were forced to change the basis for ju-

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88 In 1932, in their very influential work of the day, *The Modern Corporation and Private Property*, Adolf A. Berle and Gardiner C. Means wrote of the tremendous growth in corporations:

Thus, in field after field, the corporation has entered, grown, and become wholly or partially dominant. The date of its appearance and the degree of its dominance have in general varied with two factors, the public character of the activity in question and the amount of fixed capital necessary to carry on business. It came first in the fields of public utilities, common carriers, banks and insurance companies (which even in the 1840’s were conceded to perform public functions) and last in the areas of personal service and agriculture . . . On the basis of its development in the past we may look forward to a time when practically all economic activity will be carried on under the corporate form. ADOLF A. BERLE & GARDINER C. MEANS, *The Modern Corporation and Private Property* 17 (rev. ed. 1982) (footnote omitted).

89 In addition to the rise in corporate defendants, other social, economic, and technological changes contributed to making the territorial approach to jurisdiction anachronistic. For example, commentators frequently point to the rising popularity of automobiles. See id. Under the strict territorial approach to jurisdiction, drivers could commit a tort in one state, drive out of state before the victim could arrange for process to be served, and thereby shield themselves from suit.

90 See *International Shoe*, 326 U.S. at 313-14. In *International Shoe*, the state of Washington attempted to assert jurisdiction over a corporation whose contact with that state was limited to the selling of its goods. See id. In addressing the metaphysical problem of defining corporate presence the Court wrote:

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its “presence” without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far “present” there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms “present” or “presence” are used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process.

*Id.* at 316-17 (citations omitted).
jurisdiction. For many years before *International Shoe*, lower courts had been moving away from a territorial approach toward a more expansive view of jurisdiction.\(^{91}\) In *International Shoe*, literal presence within the forum was replaced by the notion that under the Due Process Clause of the U.S. Constitution, certain contacts with the forum justified jurisdiction.\(^{92}\)

2. The Illusion that Contacts Jurisdiction Is Not About the Allocation of Regulatory Authority

Today, as evidenced by the question before this Symposium, courts\(^{93}\) and commentators\(^{94}\) operating within the new contacts

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\(^{91}\) Before the development of minimum contacts, state assertions of jurisdiction over corporations were based on the fiction that corporations had consented impliedly to the jurisdiction of every state where they conducted business. In *Lafayette Insurance Co. v. French*, 59 U.S. (18 How.) 404 (1855), and *St. Clair v. Cox*, 106 U.S. 350 (1882), the Supreme Court held that a state could condition a corporation's right to do business within its borders on its consent to the personal jurisdiction of that state. *See Lafayette*, 59 U.S. at 407; *St. Clair*, 106 U.S. at 356. The Court attempted to use the concept of implied consent to get around the limitations of territoriality in several other areas as well. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927) (approving a state statute subjecting nonresident motorists to personal jurisdiction for in-state accidents based on a theory of implied consent). The obvious problem with this approach is that it was based on what Professor Ronald Dworkin calls "counterfactual consent," meaning that there is, in fact, no consent. Ronald Dworkin, *Why Efficiency?: A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563, 575 (1980) (demonstrating that the argument that "I would have consented had I been asked . . . provides no reason in itself for enforcing against me that to which I would have (but did not) consent").

\(^{92}\) *See International Shoe*, 326 U.S. at 316. For an excellent and detailed textbook examination of the U.S. minimum contacts doctrine as developed through subsequent case law, see RICHARD H. FIELD ET AL., *CIVIL PROCEDURE* 923-1052 (7th ed. 1997).

\(^{93}\) Four Supreme Court cases have dealt with assertions of jurisdiction over foreign defendants. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). *Asahi* presented a jurisdiction question where both parties were foreign. *See Asahi*, 480 U.S. at 106. In all of these cases, the Court simply assumed that the U.S. domestic law of jurisdiction was applicable. Of course, the United States is not presently party to a jurisdictional treaty that would be applicable, but the Court failed to consider the possibility that other sources of international law—specifically custom—might apply. Courts assumed that the international law of jurisdiction applied to international jurisdiction during the territorial era, despite their being no jurisdictional treaty. For a more detailed discussion of the Supreme Court's failure to consider applying the international law of jurisdiction to international cases, as well as the existence of a possible jurisdictional role for custom, see Strauss, *supra* note 8, at 383-87, 389.

\(^{94}\) Several commentators have argued that in cases involving foreign defendants or federal assertions of jurisdiction, the United States as a whole, rather than a particular state within it, should be considered the relevant sovereign with which a defendant must have minimum contacts. These commentators have all assumed that it is the U.S. Constitution rather than international law that prescribes this jurisdiction. *See generally, e.g.*, Born, su-
framework no longer assume that the international order should prescribe international jurisdiction. Rather, to the contrary, they assume that the Constitution prescribes the contacts that are necessary for assertions of jurisdiction. This is equally true whether the assertion of jurisdiction is by one of the fifty states who collectively operate as constituent units of the American federation or whether it is by the United States as a whole operating as a part of the international order.

Where does this assumption come from? There are two common underlying illusions about contacts jurisdiction. These illusions give rise to this assumption that international jurisdiction is no longer about the international question of the allocation of authority between the constituent subunits of the international system. First, the fact that contacts jurisdiction allows for nation-states to have overlapping jurisdictional realms obscures the fact that jurisdiction continues to be about the allocation of authority. Under the territorial scheme, because jurisdiction was mutually exclusive—assigned only to the one forum where the defendant was present—quite obviously a finite reserve of regulatory power was being allocated among states. But under contacts jurisdiction, defendants potentially have requisite contacts with multiple forums, each of which possess the simultaneous power to exercise jurisdiction in a given case. The existence of non-exclusive, overlapping jurisdiction creates the impression that administrative power does not need to be allocated among nation-states. Jurisdiction, one might come to assume, must be about something other than the international allocation of administrative authority. Nevertheless, it is essential to remember that jurisdiction remains about what jurisdiction always has been fundamentally about: the allocation of sovereign authority. Even overlapping and non-exclusive jurisdictional realms serve to distribute administrative authority.

At an even more fundamental level, contacts doctrine, as formulated by the U.S. Supreme Court, denies that the Court, in authorizing states within the United States to exercise authority outside their traditional territorial confines, was engineering a transforma-
tion of state jurisdictional powers.95 Rather, under the Supreme Court's formulation, state jurisdictional powers do not change. Instead, the state's ability to assert jurisdiction extraterritorially is premised upon the agreement of out-of-state defendants to acquiesce to state powers.96 Because contacts jurisdiction under this formulation is not about empowering the state to exercise new jurisdictional powers, contacts doctrine applied internationally brings with it no new power to, in fact, be allocated by the international order.

The Supreme Court adopted this formulation because it did not appear to believe that it could alter the basic territorial powers of the state. The reasons for this probably lie in history and in psychology. The state, and especially the popular conception of it as a territorially-defined sovereign entity, has not been just a political convention of the modern world. Since the emergence of the nation-state after the Thirty Years War in 1648,97 humankind has been so psychologically wedded to the idea of the territorially sovereign state as to have turned it into a kind of religious icon.98 The abso-

95 See Allan R. Stein, Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction, 65 Tex. L. Rev. 689, 696 (1987) (explaining that rather than reworking the Pennoyer-era conceptions of jurisdiction, the contacts doctrine just recognizes that "a sovereign may form a relationship with an individual that supplements the sovereign's internal regulatory authority," thus justifying jurisdiction).

96 See Strauss, supra note 8, at 399 (stating that "[d]octrine-makers, however, believing that the state's territorial jurisdictional character was immutable, rationalized contacts jurisdiction with the notion of consent") (footnote omitted).

97 This is the date most accepted for the development of the modern nation-state. For a discussion of this development, see generally Arthur Nussbaum, A Concise History of the Law of Nations (rev. ed. 1954).

98 The supernatural basis of the state is reflected in the concept of the divine right of kings who were closely identified with the state itself. The writings of Jean Bodin, who is often considered the intellectual father of the modern nation-state, reflect this understanding:

Since there is nothing greater on earth, after God, than sovereign princes, and since they have been established by Him as His lieutenants for commanding other men, we need to be precise about their status (qualité) so that we may respect and revere their majesty in complete obedience, and do them honor in our thoughts and in our speech. Contempt for one's sovereign prince is contempt toward God, of whom he is the earthy image.


Starting in the latter part of the eighteenth century, international law generally took a positivist turn away from theism, but intense devotion to the state and the concept of statehood still remains a dominant factor in international social life. Richard Falk has recently written:

[S]overeignty and statehood remain a normative horizon for most peoples in the world, especially for those who are victimized, and provides the outer limit for the most collective of rights, the self-determination of peoples. The persisting vitality of sovereignty as a normative ideal reflects the power of nationalism as the decisive basis of political
lutist formulation of the state as an immutably defined territorial entity is reflected in Chief Justice John Marshall's famous 1812 declaration in *Schooner Exchange v. M'Faddon*:99

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by 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.100

With the arrival of the contacts era, the Justices of the Supreme Court, operating as the high priests of this secular religious tradition, seem to have simply assumed that it was beyond their power to alter the fundamental territorial character of the fifty “sovereign” united states.101 Instead of simply expanding the powers of these states to allow for contacts jurisdiction, they evidently felt it necessary to invent a formulation which only allowed the states to assert jurisdiction if “there be some act by which the defendant *purposefully* avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and pro-

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99 11 U.S. (7 Cranch) 116 (1812).
100 *Id.* at 136.
101 The basic formulation in *International Shoe* and its progeny assumes that the state has the intrinsic power to exercise territorial jurisdiction, but that only through conceptual machinations which do not alter the basic territorial character of the state can non-territorial assertions of jurisdiction be justified.

Specifically, these cases do not redefine straightforwardly the basic territorial character of the state by proclaiming simply a new jurisdictional entity with altered powers. Rather, in assuming the state’s intrinsic territorial character, jurisdiction is justified as “fair” if the defendant has “contacts, ties, or relations” to that predefined territorial entity. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). *See generally* Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. Fla. L. Rev. 293, 308 (1987) (supporting the notion that territorial powers simply are assumed). While the Supreme Court’s conceptualization of the rationale for contacts jurisdiction has not been completely consistent, *see infra* notes 102, 110, the basic assumption that the state is intrinsically territorial has not changed.
tections of its laws.”

Thus, the state could remain exclusively territorial and yet exercise jurisdiction over defendants who had in some way independently acquiesced to its power. The Supreme Court, in endorsing this new jurisdiction, was, despite the pretense of maintaining territoriality, altering fundamentally the nature of state power. In reality, the state’s powers were being expanded to cover situations where the defendant had extraterritorial contacts with the state, and it did not matter whether the defendant actually accepted this power. Tracking a development that had been taking place for a long period of time in prescriptive jurisdiction, the state was losing its exclusively territorial dimension.

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102 Hanson v. Denckla, 357 U.S. 235, 253 (1958) (emphasis added); see Burger King Corp. v. Rudzewicz, 471 U.S. 462, 482 (1985) (stating that a defendant who establishes a contractual relationship with a plaintiff in a forum state purposefully avails himself of the forum state’s laws); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (explaining that personal jurisdiction was not properly asserted over defendants whose product finds itself in the forum state, but who have availed themselves of none of the privileges and benefits of the forum state’s law); Kulko v. Superior Court, 436 U.S. 84, 94 (1978) (holding that a father who allowed his child to spend time with the mother in California had not purposefully availed himself of California law). Synthesizing all of the post-International Shoe personal jurisdiction cases to determine the exact extent to which this purposeful availment formulation has prevailed is complex and beyond the scope of this Article, but Kevin M. Clermont in his very influential work, Restating Territorial Jurisdiction and Venue for State and Federal Courts, 66 CORNELL L. REV. 411 (1981), concluded, “by aggregating the case law,” that jurisdiction “exists over a defendant who has purposefully availed himself of the privilege of conducting activities within the forum state.” Id. at 424; see 1 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 2.05 (2d ed. 1991) (discussing the importance of purposeful availment).

103 In justifying contacts jurisdiction without altering the fundamental territorial character of the state, the Supreme Court was faced with a major conceptual dilemma. By definition, an entity whose jurisdiction is to remain territorially defined cannot assert jurisdiction extraterritorially. The Court, however, found a solution. The conceptual problem is avoided to the extent that the offshore defendant can be conceived to have independently submitted to the forum. See Brilmayer, supra note 101, at 306 (affirming the importance of consent in the Court’s jurisdictional analysis, Brilmayer notes that “if keeping with consent as a basis for assertion of authority, the Court has on numerous occasions emphasized the importance of the defendant’s awareness or intent to submit to jurisdiction”). For Brilmayer’s more in-depth discussion of the political theory supporting consent as a basis for personal jurisdiction, see generally LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS (1989).

104 Prescriptive jurisdiction is defined by the Restatement of Foreign Relations as the authority of a state “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court.” RESTATEMENT OF FOREIGN RELATIONS, supra note 30, § 401(a).

105 The Restatement lists four primary bases for prescriptive jurisdiction in addition to territoriality: “Effects principle” (“jurisdiction with respect to activity outside the state, but having or intended to have substantial effect within the state’s territory”); “Nationality, domicile, and residence” (jurisdiction to prescribe the activity of a state’s own nationals or of those who are domiciled or residing within it even when they are not within its territorial boundaries or otherwise subject to its jurisdiction); “protective principle” (“the right of a state...
longer did state jurisdiction (either for states within the United States or for the nation-states of the world) begin and end with the state's territorial boundaries.\textsuperscript{106} Contacts jurisdiction meant a re-definition of the powers of both the states within the United States and of the nation-states of the world, and, as we have seen under the constitutionally reflected sovereignty paradigm, it is the domain of the international order to oversee the allocation of such new powers among nation-states.\textsuperscript{107}

Contacts jurisdiction's nonexclusive, overlapping jurisdictional realms and the Supreme Court's denial that such jurisdiction involved expanding state powers caused jurisdiction in the contacts era to appear to lose its raison d'être—the allocation of regulatory authority. Jurisdiction was not, however, to be left by courts and commentators as an empty procedural vessel without an underlying rationale. And so into the conceptual void (courtesy of the perceived need to look to the acquiescence of defendants to rationalize extraterritorial jurisdiction) came a new jurisdictional mission—protecting the rights of defendants. The Court in \textit{Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee}\textsuperscript{108} articulated it most strongly. That personal jurisdiction can be waived by the de-
fendant,\textsuperscript{109} declared the Court, “portray[s] it for what it is—a legal right protecting the individual.”\textsuperscript{110} More accurately stated, the convenience of litigating in a particular forum for defendants was the primary\textsuperscript{111} (though not only)\textsuperscript{112} criterion used to allocate authority

\textsuperscript{109} The Court also pointed to the fact that the defendant can be estopped from raising the jurisdictional issue to support its conclusion that personal jurisdiction is a legal right protecting the individual. See id. at 704.

\textsuperscript{110} Id. While a concern with the rights of defendants has dominated the contacts era jurisdictional discourse and has shaped the contacts era understanding of the jurisdictional mission, other concerns have also been articulated by the Court as relevant to personal jurisdiction. The Court in World-Wide Volkswagen Corp. v. Woodson identified these as follows:

[T]he 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 choose 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.


The extent to which these other criteria, sometimes referred to as “sovereignty concerns,” are important remains unclear in Supreme Court jurisprudence. See Patrick J. Borchers, \textit{Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform}, 40 \textit{AM. J. COMP. L.} 121 (1992). Professor Borchers states:

\textit{International Shoe} appeared to endorse the position that personal jurisdiction is a matter of individual entitlement, rather than a mechanism for resolving the competing claims of sovereigns. Over the course of the next forty-six years, however, the Court revived, [and] dismissed . . . [on several occasions] a 'sovereignty' factor in the jurisdictional calculus. This uneven conceptualization has made for erratic navigation.

\textit{Id.} at 126 (footnotes omitted).

To the extent that these other factors are deemed important, exactly how they combine with concerns over defendants' rights to create a coherent doctrine is also unclear. The Supreme Court, in \textit{Hanson v. Denckla}, 357 U.S. 235 (1958), and other decisions, 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. See, e.g., \textit{Hanson}, 357 U.S. at 258-59 (Black, J., dissenting) (discussing the fair play and substantial justice test). The minimum contacts test has in various decisions been understood to be the guardian of defendants' rights, while the fair play and substantial justice test has been regarded as balancing the other relevant concerns with the interests of the defendant. See, e.g., Asahi, 480 U.S. at 113 (discussing the “several factors” that go into a “determination of the reasonableness of the exercise of jurisdiction”). The Supreme Court, because of a lack of internal consensus, has been unable to state definitively the relationship between these two tests. For further discussion of these two tests and the role of “sovereignty” factors, see generally Kevin M. Clermont, \textit{supra} note 102.

\textsuperscript{111} See Stein, \textit{supra} note 95, at 690.

From 1877 to 1945, inappropriate assertions of jurisdiction were viewed not as mere infringements on a defendant's freedom, but as violations of the sovereignty of other states. The last forty years, however, have witnessed an erosion of this political element. Jurisdictional doctrine currently focuses solely on the relationship between the
for forum courts to hear civil disputes in the contacts era. With the jurisdictional purpose hidden from view, however, all that remained visible in the jurisdictional exercise was the criterion that was used for allocating judicial power. It was, therefore, easy for the primary criterion for allocating such power to become confused with the underlying purpose of jurisdiction. Following this substitution, this new “purpose” of jurisdiction came itself to reinforce the perception that jurisdiction is unrelated to the international order’s domain of relations between nations. The focus on defendants, private actors who are subject to domestic regulation under the paradigm, adds to the appearance that jurisdiction should fall within the realm of domestic law.

But by confusing criteria for allocating jurisdiction with the subject matter of jurisdiction, courts and commentators have confused the fundamental question of when states can assert authority over private actors with their ability to assert such authority once they have jurisdiction. The former, involving the distribution of the authority among the states to regulate private actors, is a matter—as we have seen—for the international order, while the latter, involving the use of that authority once granted to regulate private actors, is properly the domain of the domestic order.

3. An Option To Decline Jurisdiction?

Even if one accepts my argument that, under the Constitution, the international order governs relations between nation-states, and that international jurisdiction, including contacts jurisdiction, is about allocating authority between nation-states, we are not yet finished. Does not the Constitution, operating in accordance with the sovereignty paradigm, preserve the ability for the United States to decline to exercise its international grant of jurisdiction? This is a crucial question because the most likely potential for perceived conflict between the Constitution and a jurisdictional treaty would be if jurisdiction over certain cases were to be mandatorily assigned to the United States, and acceptance of that assignment was seen

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*defendant and the forum, and the legitimacy of the forum’s assertion of jurisdiction depends exclusively on fairness to the defendant.*

*Id.* (footnote omitted).

**112** See supra note 110 and accompanying text (identifying criteria, other than protecting defendants’ rights, which are considered relevant to determinations of personal jurisdiction).
to be inconsistent with the defendant's constitutional rights under the minimum contacts test.113

There is no doubt that allowing for nation-states to decline to exercise their grant of jurisdiction would be consistent with a certain jurisdictional scheme. Under such an approach, the international order would coordinate the distribution of regulatory authority by defining when assertions of jurisdiction would be allowed without requiring nation-states to engage in such assertions. This semiflexible system will be recognized as the personal jurisdictional scheme that has been adopted domestically for use among the states of the United States.114

Another quite valid jurisdictional scheme, however, would mandatorily assign jurisdictional responsibilities to nation-states. To the extent this approach is adopted in an international treaty, the constitutionalized convenience-of-defendants criterion for allocating jurisdiction among the states of the United States should not be interpreted as encroaching on the domain of the treaty. Any confusion in this regard is just another variation on the basic confusion about what is appropriately domestic, and what is international, in the age of contacts jurisdiction. The constitutionalized convenience-of-defendants criterion's sole purpose is to determine jurisdiction. If the Framers of the Constitution did not intend for the document to govern international jurisdiction, then they likewise did not intend for its criteria for granting jurisdiction to be applied internationally. That such criteria may be deemed to be very important—even fundamental—is not the same as to say it insinuates itself into the international realm.

In sharp distinction are situations that are established to be within the Constitution's domain and where the constitutional prescriptions run counter to those of the international order. An example would be a United States prosecution for an act of hate speech that transpired in such a way as to be clearly within the realm of the Constitution's domain. This would lay the basis for a conflict between the First Amendment's guarantee of free speech115

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113 For a discussion of what these might be, see Borchers, supra note 6, at 1164-73.
114 See supra Part I.B (discussing the American approach to personal jurisdiction).
115 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); see R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992) (upholding the constitutional right to engage in cross burning as an act of hate speech); National Socialist
and international law's arguable ban on hate speech. Under the American dualist approach to the relationship between domestic and international law, the constitutional standards would prevail in U.S. Courts. As we have seen, however, international jurisdiction by the Constitution's own terms is not within its domain. Hence, no conflict would present itself between the domestic criteria used to allocate jurisdiction and the international criteria used to do the same.

4. Good Constitutional Law Makes Good Policy

Logical perhaps, but from a policy point of view are we really to deny "basic" constitutional protections to defendants in international cases? Again, a clear understanding of jurisdiction in light of the sovereignty paradigm makes the policy arguments for allowing an international treaty to govern international jurisdiction as compelling as are the constitutional arguments. The constitutional arguments are themselves, after all, driven by an attempt to allocate power coherently between the domestic and international orders.

In beginning this discussion, we should keep in mind that the Supreme Court's celebration of the convenience-of-defendants criterion as the dominant constitutional factor in jurisdictional analysis was not inevitable. No doubt it is a very important criterion for determining which state should have jurisdiction. Other criteria, however, exist as well and the equation between defendants being forced to litigate in an inconvenient forum and fundamental human rights violations is, as we have seen, a peculiar function of


The United States adhered to the International Covenant on Civil and Political Rights subject to a reservation that the Covenant "does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States." S. Exec. Rep. No. 102-23, at 22 (1992).

117 See supra Part I.A (discussing the supremacy of the U.S. Constitution over international law in U.S. courts).

118 See supra note 110 (identifying other criteria relevant to determining jurisdiction).
the need for territorial states to justify jurisdiction outside of their territories.\textsuperscript{119}

More specifically, what interests would be advanced by giving primacy to the U.S. Constitution in case of conflict with a jurisdiction treaty? Insisting on the applicability of U.S. constitutional principles would most likely protect non-American defendants whose cases would be assigned to the United States under the treaty, but who, under the American minimum contacts test, would not be subject to U.S. jurisdiction.\textsuperscript{120} Presumably these foreign citizens' own governments (in addition to our own) would have agreed to the treaty. Any country that felt that the treaty did not adequately protect its citizens could decline to become a party. Would it really make sense for the United States to breach its obligations to foreign countries and incur their wrath in the name of protecting such countries' own citizens?\textsuperscript{121}

Of course the United States should extend fundamental human rights protections to citizens regardless of the states from which they come, or for that matter, regardless of any treaty to the contrary.\textsuperscript{122} Realistically, however, a jurisdiction treaty would be extremely unlikely to have onerous provisions which would violate, in

\textsuperscript{119} See supra notes 95-107 and accompanying text (discussing emphasis on defendants rights as a response to the need to justify extraterritorial jurisdiction).

\textsuperscript{120} A situation where the treaty required the United States to take jurisdiction over an American citizen that it otherwise would not have under U.S. constitutional principles would be very unlikely to emerge. This is for the simple reason that the U.S. Constitution provides for the United States to assert jurisdiction over its own citizens. See Blackmer v. United States, 284 U.S. 421, 436 (1932) (holding that nationality or citizenship provides a basis for the exercise of personal jurisdiction). That states have the power to assert personal jurisdiction over their own domiciliaries goes back to the holding in Pennoyer v. Neff, 95 U.S. 714, 734 (1877). See also Milliken v. Meyer, 311 U.S. 457, 463 (1940) (holding that an individual is subject to personal jurisdiction in a state where he or she is domiciled).

\textsuperscript{121} The policy arguments against the United States refusing a direct assignment of jurisdiction are even stronger if one considers the probable results of such a refusal. Quite likely, there would be no forum to hear the dispute since other treaty parties would not want to countenance an American violation of the treaty with a violation of their own. The resulting situation would be worse than if the treaty provision did not exist in the first place, and could probably only be resolved through diplomacy, which could become rather contentious.

\textsuperscript{122} In fact, international law under the principle of \textit{jus cogens} most likely requires states not to give force to a treaty in violation of fundamental human rights. This principle holds that some norms of international law are superior in status and cannot be affected by a treaty. Most commentators believe that the protection of fundamental human rights is among these norms. See generally Jonathan I. Charney, \textit{Universal International Law}, 87 AM. J. INT'L L. 529 (1993) (explaining how and why fundamental human rights principles have taken on the status of \textit{jus cogens}). For the codification of the principle of \textit{jus cogens}, see Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, reprinted in \textit{8 I.L.M.} 679 (1969).
any real sense, the fundamental human rights of defendants. Rather, to the extent of inconsistency with our own Constitution, the treaty parties (including the United States if it signs the treaty) would simply have weighed the criteria for determining which forum should hear a dispute slightly differently than have our own courts in constitutionalizing the minimum contacts test. All state parties to the treaty, after all, have the same basic interest in creating an international judicial system that will allow civil disputes to be resolved effectively and judgments to be satisfied. Given the strong constitutional and policy reasons for deferring what is properly international to the international realm, only a certain xenophobia can weigh for insisting on insinuating our own domestic principles into a realm where they do not belong.

CONCLUSION

The negotiation and successful implementation of a Hague Convention on jurisdiction and satisfaction of judgments would be a very positive international development. It would not only help improve the functioning of the international judicial system, but would also help further the grander aim of creating a more coherent international order. If the international community were successfully to conclude such a jurisdiction treaty, and the United States were to accede to it, how unfortunate it would be if doctrinal confusion were to stand in the way of its successful implementation.

The Framers of the U.S. Constitution understood where America ends and the international order begins. It is now more important than ever that our courts correctly apply this understanding to present-day jurisdictional circumstances. Otherwise, they risk sabotaging globally cooperative efforts to construct an international judicial system which can meet the demands of the twenty-first century global economy.