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Frontiers of Jurisdiction: From Isolation to Connectedness

Allan R. Stein†

The theme of this Symposium is “Frontiers of Jurisdiction.” The metaphor of the “frontier” is particularly apt in this context. It evokes a place at the outer margins of state authority: the Old West, outer space, the sea—a place where the authority of a state is ambiguous; where private ordering may do more work than public; where the demarcation lines of official authority are blurred; and where numerous states may assert regulatory claims. It is a place where some laws—murder and robbery—get enforced, but others—gambling and prostitution—are honored in the breach. Those “frontier” qualities have a remarkable correspondence to the problems discussed in this Symposium, right down to the gambling and sex. The only things missing are the whiskey and horses.

To the extent that the word “frontier” describes a physical space on the outskirts of physical borders, the description is, for the most part, only a metaphor here. In each of these problems—the continued viability of general jurisdiction, cross-border cyber-space searches, universal jurisdiction, and legislative jurisdiction over the internet—we know, more or less, where the defendants acted, where the victim was injured, and where the defendant is located at the time of the litigation. The marginality derives not from ambiguities in physical space, but from conceptual ambivalence in our understanding of state authority.

This ambivalence is, in significant measure, a function of a technological change. Jurisdictional principles derived from a world where physical borders were more or less effective in allocating the sovereign prerogatives of states are strained by technologies, such as the internet, that connect people across borders.

† Professor of Law, Rutgers University School of Law, Camden. I would like to thank Ari Affilalo, Roger Clark, Perry Dane, Linda Silberman, Beth Stephens and Domingo Villaronga for their helpful comments and suggestions. Virginia Langfitt provided valuable research assistance. Please note that this Article was written before the tragic events of September 11, 2001. It may well be that those events have further transformed our thinking about the effects of globalization on our jurisdictional conceptions.
As we turn to newer jurisdictional theories that can accommodate this interconnectedness, we delegitimate older jurisdictional assumptions premised on isolation. The four seemingly discrete subjects considered in this Symposium are, in fact, all variations on the same theme. Each problem represents the confrontation of the previously isolated, autonomous sovereign with a newly interconnected world and the resulting growing pains accompanying that encounter: the old jurisdictional clothes do not fit the new body politic, but we are not ready to donate them to Goodwill quite yet.

The jurisdictional problems under discussion implicate two kinds of state authority: authority to prescribe rules of conduct (legislative or "prescriptive" jurisdiction), and authority to provide a remedy (judicial and investigatory jurisdiction). While the justifications for each kind of authority vary, they have much in common. Each problem forces us to ask, in slightly different ways, the same question: what justifies the operation of the coercive power of a state against an individual? In particular, the problems expose a tension between two competing visions of state authority, one based on mere presence and another based on mere regulatory interests.

I. JURISDICTIONAL JUSTIFICATIONS

A. Presence-Based Justifications

A presence-based theory of state authority derives from the presumptive authority that states possess over persons and property within their borders. It has its origins in a "power" theory of jurisdiction typified by Pennoyer v Neff, and is associated principally with judicial jurisdiction. It accepts the realpolitik of autonomous, non-cooperating nation-states: the king has "authority" over any person or property subject to the control of his army. In the United States, Pennoyer converted this truism into a constitutional norm, holding that state authority is justified only to the extent that it represents the exercise of that power over persons or property within the state's borders.

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1 95 US 714 (1877).
3 95 US at 722.
Presence also serves to protect a defendant’s autonomy. Because, under this approach, a defendant is subject to state authority when she is within the state territory, she can control her amenability to jurisdiction by staying away.

In this sense, more modern contractarian accounts of jurisdiction, such as “purposeful availment,”4 are related to presence by seeking to honor a defendant’s autonomy.5 Like presence-based explanations, contractarian theories of jurisdiction are premised on a view of individuals as inherently free from obligations to each other and to any particular sovereign authority. Through this lens, a defendant’s relationship with a sovereign may be viewed as governed by the same principles that mediate individuals’ relationships to each other.6 Indeed, Professor Epstein has done an able job demonstrating how private law can serve as a jurisdictional model.7

Notice the parallel between the contractarian model of jurisdiction and the hermetically-sealed Pennoyer sovereign: both state and individual are viewed as autonomous and disconnected. Individuals, like states, incur obligations only if assumed of their own volition. Both are otherwise autonomous, free actors.8

However deep our ideological commitments to those autonomy premises may be, technology poses a series of challenges. Through technology, individuals are able to cause harm in states where they have no physical or volitional connection. The internet is only the most recent manifestation of this phenomenon. Almost fifty years before the internet, the Supreme Court be-

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4 See Hanson v Denkla, 357 US 235, 253 (1958) (“It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws.”). See also note 79.
5 See Burger King Corp v Rudzewicz, 471 US 462, 479–80 (1985):

This “purposeful availment” requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of “random,” “fortuitous,” or “attenuated” contacts . . . or of the “unilateral activity of another party or third person” . . . . Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a “substantial connection” with the forum State.

7 See Richard A. Epstein, Consent, Not Power, as the Basis of Jurisdiction, 2001 U Chi Legal F 1, 2 (discussing how “the consent principle neatly explains the dynamics of many of our jurisdictional doctrines”).
8 See Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940, 3 Research in Law & Sociology 2, 11 (1980) (describing legal consciousness in the Pennoyer period as dominated by view of legal actors and institutions as autonomous).
lieved that "modern transportation and communication" had transformed jurisdictional law to take account of the "national economy":

Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.  

Thus, in order to protect persons and property within its borders, a state must have the authority to regulate beyond its borders.

Moreover, as we have learned from the Symposium Panel discussing whether the United States should be able to investigate offshore criminal acts committed via the internet, technology also has transformed the nature of state power. Physical territory is no longer a good measure of the reach of a state's coercive ability. States, like individuals, can now exert influence well beyond their borders. This was probably always true of the more powerful states, but technology is the great leveler; the same technology that allows U.S. officials to probe offshore computer records exposes American citizens to surveillance by foreign governments. However much we want to adopt an isolationist stance, such a position is increasingly at odds with reality. Whether we like it or not, the world is wired. This will introduce a new humility into our jurisdictional assumptions.

B. Regulatory Justifications

The competing, "regulatory" justification for state authority is implicit in most conflict-of-laws approaches, from *lex loci delictus* to modern interest analysis. The Supreme Court extended

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10 "The law of the place where the tort was committed." *Black's Law Dictionary* 923 (West 7th ed 1999).
the justification to support adjudicatory jurisdiction as well in *International Shoe Co v Washington.* A regulatory, or "effects" justification, posits that a state has authority to act coercively when it seeks to protect persons or property within its borders. In contrast to presence-based authority, regulatory justifications depend on respect and cooperation among sovereigns. A state adjudicating a controversy arising from out-of-state injury may choose to apply another state's law in deference to that state's superior regulatory claim. Conversely, a court asserting jurisdiction over an absent defendant relies on the extraterritorial enforcement of its judgment by other states that acknowledge its regulatory claims over the controversy.

Regulatory justifications, in contrast to justifications based on presence, raise serious concerns about the autonomy of defendants. While a defendant may be able to control his location, he may not be able to control where his actions have effects. Similarly...

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11 326 US 310, 318 (1945) (holding that even single acts by a corporate agent, "because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit"). See also *Hess v Pawloski,* 274 US 352, 356 (1927) (justifying implied consent to jurisdiction over an out-of-state driver on the ground that "the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents, and non-residents alike").

12 See, for example, Restatement (Third) of Foreign Relations § 402(c) (1987) (a state has "jurisdiction to prescribe with respect to . . . conduct outside of its territory that has or is intended to have substantial effect within its territory"); *Gray v American Radiator & Standard Sanitary Corp,* 176 NE2d 761, 766-67 (Ill 1961) (asserting jurisdiction over manufacturer on the basis of an in-state explosion allegedly caused by defective manufacturing outside the state).

There is some tension in conflict-of-laws approaches between whether this regulatory interest ought to be tied to the place of activity or domicile. The older lex loci rule of the First Restatement of Conflict of Laws was more territorial than the later approach of the Second Restatement. Under the First Restatement, a party's rights were vested according to the place where the last liability-creating action occurred. See Restatement of Conflict of Laws §§ 377-79 (1934) (dictating that the laws of the state "where the last event necessary to make an actor liable for an alleged tort takes place" govern liability and injury issues). Under the Second Restatement, as well as other modern conflict-of-laws approaches, the law of a party's domicile may trump the law of the place of the wrongful activity. See Restatement (Second) of Conflict of Laws § 145 (1971) (dictensing that the rights and liabilities in tort are governed by the law of the state that "has the most significant relationship to the occurrences and the parties"). See also id at § 145 comment d ("[L]ocal law of the state where the parties are domiciled, rather than the local law of the state of conduct and injury may be applied to determine whether one party is immune from tort liability"). However, insofar as domicile is defined by reference to a territorial state, both approaches are ultimately bottomed on giving effect to a state's territorial regulatory interests; the authority a state has over its domiciles is an authority over persons habitually present within its territory. See Perry Dane, *Conflict of Laws,* in Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* 209, 211-14 (Blackwell 1996).

13 See *World-Wide Volkswagen Corp v Woodson,* 444 US 286, 296 (1980) ("If foreseeability were the criterion . . . every seller of chattels would in effect appoint the chattel..."
larly, such justifications also generate more inter-sovereign colli-
sions. Presence-based jurisdictional models and their progeny
have the virtue of limiting the number of sovereigns with regula-
tory claims over any particular behavior—namely, only those
states with which defendants have chosen to affiliate. The Achil-
les' heel of effects justifications is the absence of a limiting prin-
ciple. Effects-based authority raises the specter of interjurisdic-
tional gridlock in a world where actions have global effects.

In situations where both presence-based as well as regulat-
ory forms of justification are available, a state's assertion of au-
thority is non-controversial, at least in the modern era. When a
defendant acts in a territory and causes effects there, a state's
authority to exercise jurisdiction is clear, even if the defendant is
not present at the time of the litigation.

Assertions of authority based on only one form of justifica-
tion, however, generate interjurisdictional confusion. The four
topics of the Symposium represent, in my view, the consequences
of basing state authority on a single form of justification. The
general jurisdiction and universal jurisdiction problems in the
Symposium represent situations in which the defendant has had
some significant presence in the state (at the time of either the
litigation or the cause of action), but the state lacks a significant
regulatory stake because the defendant's actions do not implicate
the well-being of its inhabitants. The internet problems, in turn,
are situations in which the state has some significant regulatory
interest because the defendant's actions affected the well-being of
its residents, but the state lacks conventional authority to control
persons acting within its territory.

We have come to think of these problems as discrete: one
deals with judicial authority, the others legislative or executive;
some deal with criminal authority, others with civil; some deal
with international controversies, others with domestic; one deals
with constitutional limits, another with international norms.
While these distinctions can be significant, we tend to overplay
the differences. In fact, if these problems are examined as a
whole, some universal principles of authority start to emerge.
Therefore, in the next section these differences are collapsed to
try to conceptualize the nature of sovereign authority. Subse-
sequently, I will try to tease out the different contexts and see what
difference, if any, they make.

his agent for service of process. His amenability to suit would travel with the chattel.

See also text accompanying notes 70–76.
II. THE SYMPOSIUM PANELS

A. Presence-Based Authority

The problems discussed in both the General Jurisdiction and Universal Jurisdiction Panels share the same difficulty: the adjudicating state lacks a significant connection with the underlying controversy. The key difference between the two is that the authority claimed for general jurisdiction is all-purpose and violates international norms of jurisdiction, while the authority asserted for universal jurisdiction is for the limited purpose of policing violations of internationally-accepted norms. Both, however, share problems inherent in asserting presence-based authority.

1. General jurisdiction.

It is important to distinguish among the various forms of general jurisdiction. No one, including the international community, doubts a state's authority to assert jurisdiction over any controversy brought against one of its citizens, regardless of the connection of the controversy to the forum. That form of general (or all-purpose) jurisdiction is not problematic. Similarly, few question the ability of parties to submit volitionally to the judicial authority of any state, regardless of that state's connection to the controversy.

The controversial cases of general jurisdiction are ones where non-consensual state authority is based on a non-citizen's past or current presence in the state. Transient service on an individual under *Burnham v Superior Court of California* and systematic corporate contacts under *Perkins v Benguet Consolidated Mining Co* are both problematic forms of general jurisdiction based on non-consensual state authority.
solely on presence, although most of the panelists have addressed only the pervasive-contacts form here.¹⁸

All the panelists seem to agree that this form of general jurisdiction is problematic, although they differ in their conclusions about whether to abandon it. Dean Borchers sees the doctrine as an unfortunate but necessary gap-filler for inadequacies in specific jurisdiction.¹⁹ Professor Twitchell, similarly, sees general jurisdiction as a necessary evil; in a system wrought with unpredictable rules, it is the one easily predictable principle.²⁰ Professor Juenger seemed prepared to limit the doctrine to permitting general jurisdiction only in the defendant's home state.²¹

As Professor Juenger explained, general jurisdiction is derived from the power premise of *Pennoyer*,²² under which the exclusive test for state authority is the presence of the defendant or his property at the time of the litigation.²³ Ironically, while Justice Field derived this standard of jurisdictional reasonableness from international norms (perhaps erroneously, it appears²⁴), it is precisely this jurisdictional base which now appears to appall the rest of the world.²⁵ This principle transformed into a “contacts-based” justification in response to the rise of the corporate form. Without the tangible form of a body, corporations did not fit into the *Pennoyer* model of jurisdiction based on a defendant’s location. Thus, “contacts” evolved as a jurisdictional proxy: we can see the corporate footprints, even if we can not see the feet. We treat the corporate defendant as “present” for *Pennoyer* purposes—that is, subject to all-purpose judicial authority—whenever there are lots of long-standing footprints.

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¹⁸ But see Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U Chi Legal F 171, 179–81 (discussing jurisdiction based on transient service under *Burnham*).


²⁰ Twitchell, 2001 U Chi Legal F at 171 (cited in note 18) (revising her previous position advocating “cutting back on ‘doing-business’ general jurisdiction, [and] limiting it to the place of incorporation and the defendant’s principal place of business”).

²¹ Juenger, 2001 U Chi Legal F at 159, (cited in note 14) (arguing that total elimination of general jurisdiction would “pour the baby out with the bath water”).

²² 95 US at 723–24 (“Where a party is within a territory, he may justly be subject to its process, and bound personally by the judgment pronounced on such process against him.”) (citation omitted).


²⁴ See id at 146–47 (suggesting English law no longer recognized tag jurisdiction at the time *Pennoyer* was decided).

²⁵ See id at 161–62 (discussing the “blacklisting” of general jurisdiction under Article 18 of the Hague Draft Proposal).
So what is the problem? When the defendant has demonstrated long-standing connection with the state, what is wrong with forcing him to litigate there? Litigation is not likely to be terribly inconvenient for a defendant who is in the forum continuously. Why is this so different from citizenship-based authority, which is universally accepted?

Professor Twitchell has suggested that the difference may be a matter of proportionality: the burdens of subjecting a non-citizen defendant to general jurisdiction may exceed any benefit obtained from even continuous contact with the forum. I must admit that I have always viewed the quid pro quo rationale for any assertion of jurisdiction as highly suspect. Unlike Professor Twitchell, I see no greater proportionality justification in assertions of specific jurisdiction. That is to say, the burden of defending litigation in any particular case may far outweigh whatever benefits a defendant obtained from his related contacts with the state. The imbalance between benefits and burdens in general jurisdiction does not strike me as any more unconscionable. Indeed, I would think there is likely to be greater proportionality in the case of general jurisdiction than specific.

Professor Lea Brilmayer has suggested that the difference might be understood in terms of democratic theory. Citizens of a state have a voice in the political process, whereas outsiders do not: "The basic inquiry must be whether the defendant’s level of activity rises to the level of activity of an insider, so that relegat-

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26 Twitchell, 2001 U Chi Legal F at 175–76 (cited in note 18) (arguing that unlike specific jurisdiction “[t]here is [ ] no equivalent proportionality for an activities-based general jurisdiction. Regular and continuous activity in the forum may benefit the defendant in many regards, but this alone does not justify the burden of unlimited jurisdictional exposure in that forum.”).


28 It seems to me Professor Twitchell begs the question when she concludes that “[a] quid pro quo justification works well for specific jurisdiction” because “a defendant that actively markets its products to other states should expect to be subjected to suits there arising from injuries caused by defective products.” Twitchell, 2001 U Chi Legal F at 175 (cited in note 18). Although she may be right that the assertion of jurisdiction does not come as a surprise to a defendant, I question whether that is a function of a fair exchange of benefits for burdens.

29 The courts have exercised specific jurisdiction where it was hard to see any benefit inuring to a defendant by virtue of his contacts with the forum. See, for example, *Calder v Jones*, 465 US 783, 784–86 (1984) (subjecting the author of a defamatory article about a California resident to jurisdiction in California notwithstanding his lack of any direct personal contact with the state).
ing the defendant to the political process is fair." Thus, it is more problematic to assert jurisdiction over outsiders, at least until they obtain insider-like participation in the polity.

The democratic theory rationale strikes me as closer to the mark, yet still unsatisfactory. Many "insiders" (prisoners, for example) have no meaningful voice in political deliberations. Yet we would not hesitate to assert general jurisdiction over such citizen-defendants. Conversely, mere participation in a state's political processes seems to be an inadequate predicate for general jurisdiction. It is difficult to imagine that any court would assert general jurisdiction over a non-resident corporation that merely poured millions of dollars into a state to influence a referendum but did not otherwise conduct business there. More fundamentally, Brilmayer's theory fails to account for the jurisdiction of non-democratic sovereigns altogether. Do monarchies or dictatorships that do not permit meaningful citizen participation in the political process lack legitimate general jurisdiction (by U.S. jurisdictional standards) over their citizens? Could such a state legitimately assert jurisdiction over outsiders who have the same, negligible influence on the political processes? Remember that the Court in Pennoyer purported to base its jurisdictional norms on "well-established principles of public law." The due process protection the Court was extending was not based on the peculiar nature of the American government, but rather on its perception of an international standard of legitimacy.

Nonetheless, I share the panelists' intuition that there is a problem with the doctrine of general jurisdiction, and I share Professor Brilmayer's intuition that a state has a different kind of authority over citizens than non-citizens. While we have some sense that our "home" state—our "king"—may have authority over us regardless of where we have acted, we do not owe the same universal allegiance to other states that we merely visit—even those we visit frequently or in which we may wield significant political influence. A citizen's relationship with his sovereign is uniquely non-territorial. The singularity of that relationship is underscored by the principle that a person can have only a single

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32 95 US at 722.
“domicile” at any given time and does not lose that domicile until a new one is acquired.\textsuperscript{33} I am not prepared to say that one can never form a “citizen-like” relationship with multiple sovereigns, but mere “continuous and systematic activity” does not begin to capture this citizen-like relationship.

This emphasis on the unique nature of citizenship admittedly may have more resonance for individuals than for corporations, and more resonance internationally than domestically. Our conceptions of corporate citizenship tend to be fairly mechanical,\textsuperscript{34} and we do not have a very robust sense of state citizenship.\textsuperscript{35} But even on a state level, I think we see a difference between citizenship and frequent-visitor status that goes beyond issuance of drivers’ licenses.

This point comes into stark relief if we consider legislative rather than judicial authority. Imagine that \textit{Roe v Wade}\textsuperscript{36} has been overturned, and a state where abortion is illegal passes a law forbidding its citizens from having an abortion in another state. The legitimacy of such a law would at least be a close call.\textsuperscript{37}

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\textsuperscript{33} See Restatement (Second) Conflict of Laws § 11(2) (1971) (“Every person has a domicil at all times and, at least for the same purpose, no person has more than one domicil at a time.”); \textit{White v Tennant}, 8 SE 596, 597 (W Va 1888) (“A domicile once acquired remains until a new one is acquired elsewhere, \textit{facto et animo.”}). As Professor Weintraub has pointed out, the definition of “domicile” may well vary according to its legal context. See Russell J. Weintraub, \textit{Commentaries on the Conflict of Laws} § 2.16 (Foundation 4th ed 1986). Thus, a definition of domicile for the purpose of ascertaining diversity jurisdiction serves a different function than for conflict-of-laws purposes, and domicile for the purpose of ascertaining tax liability may differ from domicile for purposes of selecting a tort liability rule. It is noteworthy that the courts seem to follow the principle of exclusivity in all contexts, at least as far as individuals are concerned. See id at § 2.5.
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\textsuperscript{34} See, for example, 28 USC § 1332(c)(1) (1994) (defining corporate citizenship for purposes of diversity jurisdiction as both the place of incorporation and principal place of business). Notwithstanding the duality of corporate, compared to individual, citizenship, courts exhibit a notable obstinacy in insisting that a corporation can have only one principal place of business. This may evince a sentiment similar to that animating the single citizenship rule for individuals, in other words, the unique nature of a citizen’s relationship to its sovereign. See Charles Alan Wright, et al, 13B \textit{Federal Practice and Procedure: Jurisdiction} § 3624 (West 2d ed 1984).
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\textsuperscript{36} 410 US 113 (1973).
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“States do possess the power to regulate their citizens’ conduct in other states in the usual case.” However, it is unimaginable that the state could apply that law to someone who merely maintained a vacation home in the state, even one that she visited regularly. There is, in this sense, a serious authority problem with general jurisdiction over non-citizens.

Moreover, imposing on a party multiple “all-purpose” obligations of allegiance creates serious inequities in the litigation process. Given our commitment to honoring the plaintiff’s choice of forum, general jurisdiction unbalances the scales of justice. It permits plaintiffs to obtain the upper hand by shopping for the most favorable forum. One critical difference between citizenship and general jurisdiction is that citizenship limits a defendant’s jurisdictional exposure to one (or at most two) places. Both pervasive contacts and transient service on individuals multiply geometrically the number of possible forums where a defendant, particularly large corporate defendants in the case of pervasive contacts, may be sued. And that is the rub.

Forum shopping has two kinds of effects, both of which present problems. The first is manipulation of the law applied to the controversy. A breakdown in the uniformity of approaches to choice-of-law has accompanied the expansion of personal jurisdiction over the last fifty years. This variety of conflicts approaches enables a plaintiff to manipulate the law applied in a given case by selecting the forum based on its choice-of-law rules. There

USC § 2423(b) (1994) (criminalizing travel by U.S. citizens to foreign countries for the purpose of engaging in sexual relations with person under the age of eighteen).


39 But see Allstate Insurance Co v Hague, 449 US 302, 313-14 (1981) (noting, among other things, the forum state’s interest in regulating out-of-state conduct of an insurance company doing business in Minnesota as a justification for the application of Minnesota law). Admittedly, subjecting a party to multiple legal rules is far more problematic than subjecting them to multiple litigation forums. Subjecting a party to multiple legal standards can create debilitating uncertainty. Indeed, the major impetus behind the single domicile rule is that “some . . . legal interests should at all times be determined by a single law.” Restatement (Second) of Conflict of Laws § 11 comment c (1971). Exposure to multiple litigation forums under the general jurisdiction doctrine does create the same kind of bind. It can, nonetheless, have dramatic impact on choice of law, as I detail below. See text accompanying notes 40-48.

40 For a general discussion, see Eugene F. Scoles and Peter Hay, Conflict of Laws 51-67 (West 2d ed 1992) (describing how the plaintiff’s characterization of a case can shape the outcome of the litigation).

41 See, for example, Kozoway v Massey-Ferguson, Inc, 722 F Supp 641 (D Colo 1989). In Kozoway, a Canadian plaintiff injured in Canada by a hay baler manufactured in Iowa sued defendant, a Maryland corporation, in Colorado, where defendant was subject to general jurisdiction. Id at 641-42. Had suit been filed in Iowa, the court would have applied Canadian law under its “place of injury” conflict-of-laws rule. Id at 643. Canadian
are, as Professor Borchers points out, constitutional limits on those choices, and a state with no other connection to the controversy would be hard-pressed to justify applying its own law.\(^4\)

But even where the applicable substantive law would not be affected by the choice of forum, that choice can carry other significant advantages. First, constitutional due process limits on choice of substantive law are apparently irrelevant to a state’s selection of its own procedural law. Thus, in *Sun Oil Co v Wortman*,\(^4\) Kansas was permitted to apply its long statute of limitations to a claim lacking any significant connection with the state.\(^4\) Because the defendant maintained systematic contacts with Kansas (as it presumably did with all fifty states), the plaintiff was able to shop for an extremely long statute of limitations.\(^4\) Moreover, a forum is always entitled to apply its own choice-of-law rules even when it would not be permitted to apply its own substantive law,\(^4\) and that choice can confer substantial benefits on a party.\(^4\)

Even where the formal legal rules are unaffected by the forum choice, other forum characteristics can put plaintiffs at a significant advantage; the availability and sympathy of juries, discovery, and contingent fees all vary significantly from state to state.\(^4\) General jurisdiction gives plaintiffs the ability to take advantage of all such differences.

Perhaps a subtler problem with these remedial differences concerns the allocation of authority among the potential forum states. The doctrine permits the forum state to set standards of care, assess responsibility, and award damages in a matter in which it has no regulatory stake. While it may do so under the guise of applying another state’s law, the judge and jury are

\(^4\) Borchers, 2001 U Chi Legal F at 132 & nn 82–83 (cited in note 19) (suggesting that the Due Process Clause and the Fifth Amendment may play a role in limiting a plaintiff’s choice of forum).


\(^4\) Id at 722.

\(^4\) Id. See also *Ferens v John Deere Co*, 494 US 516, 531 (1990) (mandating application of Mississippi statute of limitations to Pennsylvania-based claims transferred from Mississippi to Pennsylvania on plaintiff’s motion pursuant to 28 USC § 1406).


\(^4\) See note 41 and accompanying text.

\(^4\) See Silberman and Stein, *Civil Procedure* at 218 (cited in note 41).
drawn from the wrong political community. The forum is thus illegitimately appropriating the sovereign prerogative of another state.

It is this subtler form of regulatory poaching that concerns the Universal Jurisdiction panelists.

2. Universal jurisdiction.

Internationalists may find jarring my reference to universal jurisdiction as “presence-based.” The doctrine is a principle of international law permitting a state to prosecute a defendant for certain predicate crimes even in the absence of any connection between the forum state and the crime. In what way is that related to general jurisdiction and other presence-based jurisdictional justifications?

The answer is that the jurisdictional predicate for the prosecution is mere custody over the defendant. The state can obtain custody either when the defendant enters its territory or by seeking extradition pursuant to a treaty with another state that has physical custody. Effectively, the doctrine permits a state with only presence-based jurisdictional authority to regulate through criminal prosecution extraterritorial behavior that does not implicate its domestic interests. Accordingly, it is as much presence as universal jurisdiction which does the heavy lifting in allocating authority among sovereigns. Universal jurisdiction thus shares with general jurisdiction the quality of allowing a defendant’s


body to become the jurisdictional predicate of what might be seen as extraterritorial meddling.

Most of the panelists seem to agree that this is normatively undesirable. I am enough of a positivist to share Professor Rubin's skepticism of the description of the predicate crimes as "universal norms,"[52] and enough of a pragmatist to worry about the impact of international prosecutions on the ability of states to rid themselves of despots.[53] On the other hand, I wonder whether such a threat might deter despotic behavior in the first place.[54]

What I find intriguing here, however, is the contrast with general jurisdiction. As the General Jurisdiction Panel noted, the pervasive contacts approach has been fairly universally condemned outside of the United States; indeed, the use of pervasive contacts as a basis for jurisdiction seems to have been the central obstacle to a Hague judgments convention.[55] In contrast, universal jurisdiction is a fairly well-established, albeit contestable, principle of international law.[56] Given that both are premised on

52 Alfred P. Rubin, Is International Criminal Law “Universal”? 2001 U Chi Legal F 351, 358–64 (viewing with skepticism the claim that there are “universal” norms that may be enforced through universal jurisdiction).

53 See Henry A. Kissinger, The Pitfalls of Universal Jurisdiction, 80 Foreign Affairs 86, 96 (July/Aug 2001) (concluding that the pursuit of universal jurisdiction as evidenced in the Pinochet case “could threaten the very purpose for which the concept has been developed”); Michael P. Scharf, Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?, 31 Tex Intl L J 1, 5–6 (1996) (critically evaluating the U.S. role in helping bring an end to the human rights abuses of the Haitian military regime by offering amnesty to military leaders); Anthony D’Amato, Peace vs. Accountability in Bosnia, 88 Am J Intl L 500, 505 (1994) (noting the value of waiving prosecution for war crimes as a “bargaining chip” in peace negotiations).


56 The Restatement (Third) of Foreign Relations § 404 (1987) provides that:

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide,
a presence-based jurisdictional justification, how are we to understand the rejection of one and acceptance of the other?

The obvious, but nevertheless important, answer is that the problem of "extraterritorial meddling" is significantly alleviated in the universal jurisdiction context by at least the appearance that the forum state is doing the world's bidding.\(^7\) The forum state cannot be accused of extraterritorial meddling because the state where the crime was committed can have no proper autonomy interest in legitimating the underlying behavior.

Here is the critical insight to draw from these cases that will inform our understanding of jurisdiction generally: sovereignty in an interconnected world is not a-substantive. In order to test a sovereign prerogative, one needs to know what the sovereign is trying to do, not simply where. Interference with behavior that serves no legitimate domestic purpose is far less problematic than regulation that simply seeks to replace one regulatory preference with another. International law scholars will hardly be stunned by this insight, for it is one of the central premises of international law. It is less obviously part of American domestic jurisdictional consciousness. This principle is, nevertheless, embedded in our jurisdictional rules, and that can be gleaned from the internet cases.

B. Effects-Based Authority

Like purely presence-based authority, effects-based or regulatory claims of authority create the risk that multiple sovereign authorities will assert control over the same activity. Effects-based claims are even more prone to multiple regulatory claims than presence-based claims, since the jurisdictional predicate of presence is something of a limiting principle; only those states with significant connections with the defendant are empowered. As the two Cyberspace Panels demonstrate, the number of regulatory claims that states merely affected by extraterritorial behavior could bring is potentially enormous.

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\(^7\) See Randall, 66 Tex L Rev at 831–32 (cited in note 49) (discussing the theory that defendants in universal jurisdiction prosecutions are "hostis humani generis" or "enemies of mankind").
1. Internet regulation.

The central challenge of regulatory or effects-based justifications is the search for a limiting principle. What stops a state from regulating globally any conduct that causes some effect in the forum? The internet problems suggest three separate but interdependent limiting principles: (1) behavior targeted at the affected state is more amenable to extraterritorial regulation than untargeted behavior—that is to say, behavior that has an effect on a state, but was not directed toward that state; (2) socially valuable behavior is less subject to extraterritorial interference than purely destructive behavior (the principle previously drawn from the presence-based cases); and (3) the more serious the domestic effect, the greater the extraterritorial regulatory authority of the affected state.

These principles are quite explicit components of the dormant Commerce Clause doctrine applied in American Libraries Association v Pataki to invalidate a New York law criminalizing digital dissemination of sexually-oriented materials deemed harmful to minors, including transmission over the internet. The court in Pataki reasoned that out-of-state actors would be unduly constrained because of the uncontrollable consequence that material posted by them might be accessed in New York. Such a burden on interstate commerce exceeded any local benefit derived from the regulation.

Professors Goldsmith and Sykes have criticized Pataki for what they view as a sloppy cost-benefit analysis. They argue that the court was unduly concerned with the mere under-inclusiveness of the regulation, and that out-of-state actors have more control over the dissemination of their material than the court appreciated. Their criticisms are well-taken. Pataki nonetheless represents a conceptual breakthrough in the problem of allocating jurisdiction over behavior that has multi-state impact.

58 969 F Supp 160 (S D NY 1997).
59 Id at 177.
60 Id at 177-79.
61 Id at 179 (“Balanced against the limited local benefits resulting from the Act is an extreme burden on interstate commerce.”). The court also noted the substantial under-inclusiveness of the regulation: the Act did not cover pornography posted from a foreign country and covered only pictorial, not verbal, postings. See id at 178-79.
63 Id at 814.
64 Id at 815-16 (noting the ability of web site operators to verify a viewer’s age through a credit card or adult identification code).
In particular, it made explicit factors implicit in, but not addressed by prior attempts to allocate jurisdiction over internet-related activity.

Courts' prior experience in allocating authority over internet-related behavior has come largely in the personal jurisdiction context. While there is considerable consistency in the outcomes, there is a conflict (particularly in Lanham Act cases) over whether mere dissemination of actionable material in the forum is a sufficient jurisdictional predicate. Rather than simply argue about whether mere effects in the forum are a sufficient jurisdictional predicate, Pataki offers us a more refined analysis, taking into account the severity of the effects, the value of the defendant's behavior, and the degree to which the forum's assertion of jurisdiction impacts out-of-state behavior. Pataki recognizes that assertions of state authority must be evaluated not simply by looking at the relationship between the defendant and the forum, but in consideration of the impact of a state's assertion of authority on other state's regulatory preferences. While one may quarrel with the court's execution, it seemed to be asking the right questions.

The courts have not used the Commerce Clause to test excessive assertions of judicial authority for almost seventy years, but there is no reason its application should be so limited. Indeed, at one time the Court experimented with limiting personal jurisdiction through the application of Commerce Clause principles, but

67 In International Milling Co v Columbia Co, 292 US 511, 517 (1934), the Supreme Court declared Davis v Farmers Co-Operative Equity Co, 262 US 312 (1923), which had been the primary authority for viewing excessive assertion of jurisdiction as violative of the Commerce Clause, to be "confined narrowly within the bounds of its own facts."
68 In Farmers Co-Operative, 262 US at 317–18, the Court employed the Commerce Clause to deny jurisdiction because "ordinarily, effective administration of justice clearly [did] not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside." Id at 317. See also Denver & Rio Grande Western Railroad Co v Terte, 284 US 284, 287 (1932) (holding that the exercise of jurisdiction was improper as an undue burden upon interstate commerce).
ultimately opted to use the Due Process Clause instead. Assertions of judicial authority can burden interstate behavior as much as applying a state's substantive law. A defendant fearful of being haled into a distant court could well be chilled from exercising its internet speech. Overly aggressive assertions of personal jurisdiction in internet cases may again lead the courts down the Commerce Clause path.

But I want to make a broader claim: the propriety of asserting personal jurisdiction cannot be separated from the question of extraterritorial effects, and such a consideration is already implicit in the Court's Due Process jurisprudence. In *World-Wide Volkswagen Corp v Woodson*, the Court rejected an attempt by Oklahoma to assert jurisdiction over a New York defendant that was responsible for the sale of an allegedly defective automobile driven by the plaintiffs to Oklahoma. Central to the Court's analysis was the extraterritorial spillover: "The Due Process Clause . . . allows potential defendants to structure their primary conduct with some minimum assurance as to where what conduct will and will not render them liable to suit." As I have argued elsewhere, that autonomy-related concern ultimately is based not merely on a theory of predictability but also on the impropriety of Oklahoma's interference with defendant's conduct in New York. The defendant could have structured its primary conduct to avoid out-of-state jurisdiction: it could have not sold automobiles in New York. The problem is that Oklahoma has no business interfering with that kind of New York activity in these circumstances—that is, where Oklahoma's regulatory claim was undifferentiated ex ante from any other state's. Thus, Oklahoma's assertion of jurisdiction undermined the sovereignty of New York: "Even if the defendant would suffer minimal or no inconvenience from being forced to litigation before the tribunals of another State . . . the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its

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69 For a general discussion, see Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts from Pennoyer to Denckla: A Review*, 25 U Chi L Rev 569 (1958).
70 See Stein, 32 Intl Lawyer at 1179–91 (cited in note 65); Stein, 65 Tex L Rev at 711–60 (cited in note 6).
71 444 US 286 (1980).
72 See id at 296–99.
73 Id at 297.
74 See Stein, 32 Intl Lawyer at 1183 (cited in note 65).
75 See Stein, 65 Tex L Rev at 749–51 (cited in note 6).
terstate federalism, may sometimes act to divest the State of its power to render a valid judgment."\textsuperscript{76}

In other cases in which the underlying conduct had less legitimate local value, the Court has been far less solicitous of the spillover consequences of assertions of extraterritorial authority. Thus, in \textit{Calder v Jones},\textsuperscript{77} the Court upheld California's assertion of jurisdiction over a Florida defendant who wrote a defamatory article about actress Shirley Jones, notwithstanding any purposive act on defendant's part to direct his actions toward California, the state of the plaintiff's residence.\textsuperscript{78}

Thus, the courts have been more reluctant to sustain jurisdiction where they see the defendant as having engaged in a legitimate domestic activity than in cases in which they perceive the defendant as having targeted intentional wrongdoing toward the forum. Only in the former class of cases are the courts concerned about extraterritorial spillover effects. Making this distinction explicit can only help to bring greater consistency and coherence to the decision-making.

The Commerce Clause spillover principles, I think, work reasonably well for limiting both legislative and judicial jurisdiction. First, the targeted principle (expressed in the Commerce Clause cases as a concern about "burdening" interstate behavior) is a more appropriate tool than "purposeful availment"\textsuperscript{79} to redress both comity and defendant autonomy concerns. It redefines the issue as one of regulatory precision and proportionality rather than one of quid pro quo.\textsuperscript{80} A state exercises legitimate authority

\textsuperscript{76} \textit{World-Wide Volkswagen}, 444 US at 294.
\textsuperscript{77} 465 US 783 (1984).
\textsuperscript{78} See id at 789.
\textsuperscript{79} See \textit{World-Wide Volkswagen}, 444 US at 298 (finding jurisdiction is proper when "a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State'"), quoting \textit{Hanson v Denckla}, 357 US 235, 253 (1958).
\textsuperscript{80} The frequently invoked justification for assertions of jurisdiction under the purposeful availment test is that the defendant has been compensated for the burden of jurisdiction by receiving a benefit from its contacts with the forum. See, for example, \textit{Burger King Corp v Rudzewicz}, 471 US 462, 476 (1985) ("[B]ecause defendant's activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well."). See also \textit{International Shoe}, 326 US at 319:

\begin{quote}
[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.
\end{quote}
over a defendant when its regulatory interest is differentiated ex ante from those of other states. Where behavior is targeted at a state, that state's regulation of the behavior will have a minimal spillover on the regulatory interests of other states, and the defendant can control his amenability to jurisdiction.

A focus on regulatory precision also lends itself to flexibility in the face of technological change. The technology of the internet, while itself significantly contributing to jurisdictional chaos, also offers the best hope for rationalizing interstate regulation. As Lawrence Lessig has pointed out, while the internet currently employs an architecture which maintains anonymity and makes state-specific controls difficult, that architecture is changing. Specifically, the use of digital certificates will enable internet actors to know, at little or no cost, with whom they are communicating. This technology thus offers a mechanism for a state to regulate extraterritorial behavior that has a state-specific impact without burdening extraterritorial behavior that does not have such impact. For example, a state wanting to prevent its citizens from gambling could require an out-of-state virtual casino to forego transactions with its citizens. Such a state would thereby advance its legitimate territorial interests with minimal burden on other extraterritorial behavior.

This justification has been roundly criticized as an “unconscionable” deal. See, for example, Burnham, 495 US at 624 (suggesting that transient service could not be justified under and benefits-burdens rationale); Lea Brilmayer, How Contacts Count: Due Process, Limitations on State Court Jurisdiction, 1980 S Ct Rev 77, 87–88, 96 (arguing that “[w]hen the State bases jurisdiction on related contacts, it is merely requiring the defendant to bear the costs arising out of occurrences in the forum,” but “requiring [an out-of-state] defendant to litigate in the forum is an impermissible means of regulating substantively relevant impact there where the defendant had no control over the location of the impact, because the result is that the plaintiff's option to litigate in a convenient place is paid by out-of-state consumers”); Stein, 65 Tex L Rev at 700 (cited in note 6):

If jurisdiction rests on consent, then the inquiry should focus on whether the consent was in truth voluntary. If, alternatively, jurisdiction requires a substantively fair exchange, then the inquiry should be whether the exchange of benefits for burdens was equitable. The Court, however, never resolved that ambiguity. As a consequence, the application of the exchange rationale became a mechanical exercise divorced from its underlying justification.

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81 Lawrence Lessig, Code and Other Laws of Cyberspace 38–39, 49–53 (Basic 1999) (discussing how the internet is now building architecture of identification, such as digital certificates, to authenticate personal facts). See also Goldsmith and Sykes, 110 Yale L J at 809–13 (cited in note 62) (suggesting that web content providers can control flows on the internet by using identification technologies that, although currently imperfect, will likely “be precise and inexpensive in the near future”).

82 Consider Goldsmith and Sykes, 110 Yale L J at 809–10 (cited in note 62) (pointing out how internet content providers currently can verify age).
As Pataki suggests,\textsuperscript{39} the value of the regulated activity is also relevant. We are not worried about "burdening" extraterritorial behavior that has little value. (This, again, is a variation on the universal jurisdiction principle.) Consider a web page that had, as its sole purpose, the dissemination of a destructive computer virus to any browser that connects to it. It would be difficult to imagine anyone worrying about the spillover effects of regulation by virtually any affected state. Nor can one imagine anyone sympathizing with the culprit's plea that he was unable to control where the virus spread.

The preceding leads us to one of the central riddles of jurisdiction, particularly as I have constructed it here: how can we make sense of rules allocating jurisdiction which themselves turn on normative judgments about the legitimacy of the substantive laws in question? Do we not need to know who has authority to make those judgments? Does it make any sense to test a French claim to regulate sale of Nazi memorabilia in the United States by looking at the social value of those sales? Is that not exactly what is at issue?

My answer is that it does make sense. Many of the contributors to this Symposium have commented on our interconnected world. It is surely more interconnected in the sense that actions in one place have greater effects elsewhere than they had previously. But it is interconnected in another way as well: governments recognize that they can no longer operate in isolation from other governments. They recognize that their citizens encounter multiple sources of law, and states are increasingly cooperating with each other to provide an effective legal order. As demonstrated by the proposed Hague Convention,\textsuperscript{40} even the United States wants to connect its judicial system to a wider legal regime. Law is developing its own network; nations are coordinating and sharing their authority.

As demonstrated by our own history, joining a legal network carries with it benefits and burdens. The Full Faith and Credit Clause empowered states to have their judgments enforced in

\textsuperscript{39} See text accompanying notes 58–66.

other states. But the Clause carried with it a concomitant obligation of respect and self-restraint. Pennoyer was quite explicitly a command to Oregon to limit its jurisdictional claims by respecting the sovereignty of other states in the network. As my mother would put it, "Keep your elbows in, you're at the table."

This, I think, is the essential meaning of comity: respect for a different legal ordering. As a jurisdiction-mediating principle, this translates into a sensitivity toward both competing regulatory preferences and the impact of effects-based authority on those competing preferences.

Introducing comity into the jurisdictional equation will not be simple. One state's extraterritorial meddling is another's domestic regulation. Consider, for example, the Yahoo! case. In May, 2000, French courts enjoined Yahoo!, a U.S. web site operator, from offering French citizens Nazi memorabilia for sale on its U.S. web auction site. Specifically, the French court ordered Yahoo! to engineer their web site to facilitate recognition of French IP addresses and bar access to its websites from those addresses. The court also ordered Yahoo! to require a declaration of nationality from users with nationally ambiguous IP addresses.

From the French perspective, the United States could be seen to be engaging in extraterritorial meddling by promoting (or at least permitting) local activity that causes extraterritorial harm in France. Conversely, the French prosecution was seen from the

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85 US Const Art IV, § 1. See, for example, Fauntleroy v Lum, 210 US 230, 237 (1908) (holding that even a mistaken application of Mississippi law by a Missouri court nevertheless was entitled to enforcement in Mississippi).
89 Id.
U.S. perspective as an illegitimate attempt to regulate conduct in the United States.\(^9\)

I do not know that putting comity on the jurisdictional scales requires us to identify which country is "poaching," that is, infringing on the sovereign regulatory prerogatives of another state. Rather, what courts ought to look for is some possibility of accommodation, as the French Court arguably did in the Yahoo! case. The court did not prohibit Yahoo! from offering the material on its web sites.\(^9\) Nor did it impose strict liability on Yahoo! for disseminating the material to any French citizen. Rather, it imposed filtering requirements on Yahoo! that it perceived to be relatively modest, particularly given the financial resources of the defendant.\(^9\) This was clearly a court, like Pataki, trying to balance its domestic regulatory needs against the spillover costs on other states that may not share its regulatory preferences.\(^9\)

Had the Yahoo! court imposed a more extensive restraint on the defendant, forbidding any sale of Nazi memorabilia to prevent absolutely exposure of the material to French citizens, the effect of that remedy on U.S. regulatory policy—namely, free speech on the internet—would have been significant. The remedy the French court in fact imposed might not be quite as airtight, but the cost of marginal under-enforcement to French policy is significantly lower than the alternative cost of over-enforcement to U.S. regulatory policy.

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\(^9\) See, for example, Lisa Guernsey, *Welcome to the Web. Passport, Please?*, New York Times G1 (Mar 15, 2001) (posing the question raised by the Yahoo! decision of "how can one jurisdiction decide what can or cannot be displayed on the World Wide Web?"); Mark Grossman, *Technology Law Column: Protect Yourself When Doing International Business on the Web*, The Miami Herald (May 28, 2001) (noting that Yahoo! raises the issue of "to what extent are we prepared to allow every country to regulate every website").

\(^9\) Apparently, Yahoo! volitionally removed Nazi memorabilia from all of its web sites shortly after the French decree. See Razavi and Samman, *19 Communications Lawyer at 28* (cited in note 87).

\(^9\) The French court's remedy was based on an extensive expert report concluding that the filtering was quite feasible given existing technology. See id (describing the findings of an expert committee created by the French courts "to study the feasibility of a filtering system to make Nazi-related content inaccessible to French users"). The court understood the under-inclusive nature of the remedy—a determined French buyer could circumvent the filtering—and did not impose liability on Yahoo! in those cases.

\(^9\) Compare Jack Goldsmith, *Yahoo! Brought to Earth*, Fin Times (London) 27 (Nov 20, 2000) (arguing that the French court reached reasonable accommodation and that the holding only has implications for companies with presence or property in France); Razavi and Samman, *19 Communications Lawyer at 28–29* (cited in note 87) ("The court looked for a pragmatic solution rather than a perfect juridical solution, which might have included asking to close the American site or make it totally inaccessible to French users."). See also Goldsmith and Sykes, *110 Yale L J at 120* (cited in note 62) ("[S]tates may not impose burdens on out-of-state actors that outweigh the in-state benefits.").
This comparative impairment approach can take account of the evolving technology of the internet. As the feasibility of geography-specific regulation increases, the spillover costs are reduced. It is quite conceivable that France could, at some point, more completely prevent the dissemination of material to its citizens without thereby burdening the dissemination of that material to everyone else.

But why would France, or the United States for that matter, want to retrench its jurisdictional claims? One answer, I think, is suggested by the Cybercrimes Panel. Globalization in general, and the internet in particular, promise to impose a kind of Rawlsian veil of ignorance on jurisdiction policy. Expansive assertions of jurisdiction by one state can increasingly be met by reciprocal actions of another state.94

In a non-connected world, one state might be tempted to assert its effects-based jurisdictional authority without reference to spillover effects. Any fear of reciprocal, expansive assertions of authority by other sovereigns would be mitigated by a sense that their capacity to enforce is limited. Technology and globalization change that. As discussed by the panelists, any claim by the United States of authority to seize data on foreign servers is tantamount to an invitation to foreign governments to search U.S. computers.95 The technology forecloses unilateral practice. What's good for the goose is good for the gander.

The proposed Hague Convention on enforcement of judgments, discussed by Dean Borchers and Professors Juenger and Twitchell, is another example of the same phenomenon. The United States was not a signatory to the earlier Brussels/Lugano European treaties on the enforcement of judgments.96 Under

94 Indeed, the Yahoo! case is a good illustration. Following issuance of the French injunction, Yahoo! sought its own injunction in a U.S. court against the UEJF and LICRA to prevent its enforcement. See note 87. The U.S. court denied the motion brought by the UEJF and LICRA to dismiss for lack of personal jurisdiction, finding that their acquisition of an injunction against a California defendant and requiring actions to be taken in California, constituted sufficient connection with the forum to support jurisdiction. Yahoo!, 145 F Supp 2d at 1173–74.

95 See, for example, Patricia L. Bellia, Chasing Bits across Borders, 2001 U Chi Legal F 35, 61–80 (discussing unilateral cross-border searches); Jack L. Goldsmith, The Internet and the Legitimacy of Remote Cross-Border Searches, 2001 U Chi Legal F 103, 116 (“If FBI officials can engage in remote cross-border searches, then governmental officials—not to mention private parties—in other countries can do the same to U.S. computer databases. The practice threatens to spin out of control, resulting in massive violations of territorial sovereignty and computer privacy that make all nations worse off.”).

96 The European Communities Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (“Brussels Convention”), 1972 OJ (L 229) 32, reprinted in 8 ILM 229 (1968). The Convention has been amended since 1968, and the
Brussels/Lugano, defendants from non-signatory nations were exposed to the exercise of "exorbitant" jurisdiction, which was prohibited against domiciles of member states. Moreover, each member state was obligated to enforce any such judgment, whether or not it would have exercised such an exorbitant basis in its own courts. As U.S. litigants engaged in greater global economic activity and increasingly held assets in member states, they were at a risk unknown in an isolated, local economy. Moreover, as interactions with foreign parties increased, there was a growing perceived need for international enforcement of U.S. judgments. Accordingly, the United States wanted to be included in a judgments convention; it needed to provide an effective legal order for its citizens, and one that reflected economic reality. But inclusion came at the cost of "elbows in." The European countries insisted that the United States abandon general jurisdiction as a precondition to receiving the privilege of international enforcement.

It may be that the kind of extraterritorial restraint I am suggesting is best imposed by treaty and legislation rather than by courts pursuant to jurisdictional challenges. There is a collective action problem in telling U.S. courts to "keep their elbows in" without any guarantee that foreign courts will do the same. Although the Supreme Court is in a good position to solve the collective action problem domestically by imposing restraint on all state and federal courts, it cannot command reciprocal restraint by foreign governments. Moreover, as a separation of powers matter, it would seem particularly appropriate for the political branches to calibrate U.S. jurisdictional claims in relation to current consolidated version may be found at 1990 OJ (C 189), reprinted in 29 ILM 1413 (1990).

97 See Brussels Convention at Arts 3–5, 28, 29 ILM at 1418–19, 1425 (cited in note 96).

98 See id at Art 28, 29 ILM at 1425. See also Silberman, Can the Hague Judgments Project Be Saved? (cited in note 55) (describing the circumstances of when members of the Brussels Convention are obligated to enforce the judgments entered by other member States against domiciliaries of non-member states).

99 Consider Silberman, Can the Hague Judgments Project Be Saved? (cited in note 55) (suggesting that the United States participation in the Hague Convention was motivated to some degree by the desire to avoid the excesses of jurisdiction and enforcement under the Brussels Convention against U.S. domiciliaries as well as the hope to gain more effective recognition of its own judgments abroad).

100 Id.

101 See Clermont, 85 Cornell L Rev at 95–96 (cited in note 2). The treaty would have restrained the use of general jurisdiction over domiciles of member states even where no extraterritorial enforcement was sought. See Silberman, Can the Hague Judgments Project be Saved? (cited in note 55).
other sovereign interests. In a very real sense, these are foreign policy choices.

III. LIMITATIONS AND ALTERNATIVES

A. The Costs of Cooperation

Sovereignty is not simply the exercise of power, but a commitment to a particular legal order. As we have learned from the both the Cybercrime and Universal Jurisdiction Panels, the surrender of sovereign control that comes with international cooperation presents problems. International order may come at the expense of domestic order. Professor Bellia has demonstrated how the cooperation implemented by treaty may collide with our domestic constitutional commitments. Thus, when the United States "permits" other states to engage in certain law enforcement activities, it may betray its constitutional obligation to respect the privacy and autonomy of its own citizens. Professor Bellia concludes that such domestic commitments trump any perceived need for coordinated law enforcement.

A similar concern appears to drive some of the opponents of universal jurisdiction. Indeed, for Professor Bradley, the central problem of universal jurisdiction is that it violates several structural constraints on American government.

The proposed Hague Convention on enforcement of judgments poses a similar challenge. Under the current Brus-
sels/Lugano Conventions (to which the United States is not a signatory), mere injury in the forum is a sufficient basis for personal jurisdiction, notwithstanding the absence of any forum-directed activity on the defendant's part. Thus, the European community appears committed to an exercise of personal jurisdiction that would be deemed in violation of the Fourteenth Amendment under *World-Wide Volkswagen.* Both the direct exercise of such jurisdiction by an American court, as well the U.S. enforcement of a foreign default judgment based on mere injury, would be problematic.

The solution to all of these problems is, on one level, relatively simple: whatever accommodations the United States makes to an international legal order, it cannot do so in contravention of the Constitution. That does not preclude, however, the possibility that constitutional standards may themselves be amenable to a flexible interpretation in regard to treaty obligations.

Consider, for instance, the collision of Brussels/Lugano with *World-Wide Volkswagen.* One of the central concerns of *World-Wide Volkswagen* was that a forum state should not illegitimately assume power properly belonging to another state. That con-

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107 Brussels Convention at Art 5(3), 1990 OJ at 4, 29 ILM at 1419 (cited in note 96) (providing for tort jurisdiction in “the place where the harmful event occurred”). See Borchers, 61 Albany L Rev at 1161–64 (cited in note 102) (arguing that although Article 5(3) of the Brussels Convention may provide a clear and sensible jurisdictional rule, it may not be entirely consistent with American jurisdictional doctrine).

108 See 444 US at 295 (rejecting personal jurisdiction over a defendant based on a single in-forum injury in the absence of those “affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction” required as a matter of due process). See also *Asahi Metal Industry, Co, Ltd v Superior Court of California,* 480 US 102, 109–11 (1987) (explicating the due process limitations on a court's ability to exercise jurisdiction over a non-resident defendant); Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and European Community: Lessons for American Reform,* 40 Am J Comp L 121, 123 (1992) (comparing tort jurisdiction under Article 5(3) of the Brussels Convention with that of *World-Wide Volkswagen*).

109 See Borchers, 61 Albany L Rev at 1167 (cited in note 102) (“[T]here are good reasons to think that the constitutional limitations on jurisdiction will not present serious obstacles to an international judgments convention.”); Stanley E. Cox, *Why Properly Con- strued Due Process Limits on Jurisdiction Must Always Trump Contrary Treaty Provi- sions,* 61 Albany L Rev 1177, 1178 (1988) (“[A] constitutional provision always takes precedence over a treaty, provided that the constitutional provision is of the sort meant to guarantee individual rights against majority infringement or against arbitrary exercises of governmental power.”).

110 See 444 US at 294:
cern would appear to be substantially mitigated by the power-sharing implemented by treaty. The defendant's home state certainly does have legitimate jurisdiction. If the home state wants to, in effect, "transfer" the case to the state of injury, that would represent a very different kind of problem than the unilateral assertion of jurisdiction by the state of injury in World-Wide Volkswagen.111

Nor should our commitment to constitutional supremacy necessarily preclude the United States from acknowledging, even formally, that individuals can increasingly be subject to multiple, conflicting legal regimes. The realities of a connected world require states to rethink how the maps of sovereignty are drawn.112 We can no longer pretend that physical presence in one place means only that one state will lay claim to regulatory authority.

As applied to Professor Bellia's problem of transnational investigatory authority, perhaps the awareness of overlapping sovereign claims should inform our sense of whether a treaty permitting expansive searches by foreign governments of computers located in the United States ought to be considered state action by the United States. To a significant degree, all the United States has done is acknowledge technological reality; it has not facilitated the search, but only declined to make it a cause for interna-

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111 Some scholars view Justice White's observation in Insurance Corp of Ireland v Compagnie des Bauxites de Guinee, 456 US 694, 702–03 n 10 (1982), that the due process limitations on the exercise of personal jurisdiction "must be seen as ultimately a function of the liberty interest... rather than as a function of federalism concerns" as a repudiation of this federalism perspective. See, for example, Robert H. Abrams and Paul R. Dimond, Toward a Constitutional Framework for the Control of State Court Jurisdiction, 69 Minn L Rev 75, 80–81 (1984). As I have argued elsewhere, I do not believe the federalism concerns and the liberty interests are inconsistent. See Stein, 65 Tex L Rev at 711–14 (cited in note 6).

112 Legal pluralists, who recognize that legal authority is not exercised exclusively by governments, have long asserted that physical borders are an imperfect measure of how legal authority is allocated. See Perry Dane, The Maps of Sovereignty: A Mediation, 12 Cardozo L Rev 959, 996–98 (1991) (arguing against "state exclusivism" and a view of the physical extension of the law that relies on "borders [that] must always be definitively, formally, defined").
tional protest. The foreign government has not been deputized; it already had a badge.  

The constraint of fidelity to domestic legal norms will no doubt make it more complicated to craft an international legal order. That complexity underscores the point that cooperation and restraint are not code for the surrender of sovereignty. The challenge is not to build a single legal order, but to make sense out of the increasing collisions of discrete legal systems.

B. The Limits of Private Ordering

One inevitable response to regulatory confusion is suggested by Dean Perritt: private ordering holds out the promise of providing legal certainty in an environment of jurisdictional confusion. Dean Perritt recognizes, however, the limits of such a solution. Parties contract against the background of legal rules and depend upon courts to give effect to their ordering. Even when the parties are in a position to exercise self-help, they depend on the forbearance of courts to respect the consequences of private enforcement.

Dean Perritt offers the apt example of the blacklisting of email abusers pursuant to the Mail Abuse Prevention System, or "MAPS." That private ordering is potentially undermined by lawsuits brought by the blacklisted parties against the blacklist. The effectiveness of that private enforcement mechanism depends on whether the blacklisted party is able to seek judicial redress. That requires the complicity of the state. Privatization thus represents a choice by the state not to regulate in deference

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113 An instructive parallel is the treatment of allegedly unconstitutional actions by Indian tribal governments. In *Talton v Mayes*, 163 US 376, 384–85 (1896), the Court held the Fifth Amendment requirement of a grand jury inapplicable to criminal trials by tribal courts on the theory that, notwithstanding the treaties with the United States ceding jurisdiction to the Cherokee Nation, the tribal courts were exercising sovereign power that was independent and prior to federal power. See also *United States v Wheeler*, 435 US 313, 329 (1978) (holding double jeopardy clause inapplicable to the retrial of a defendant previously tried by a tribal court, saying that "the tribe acts as an independent sovereign, and not as an arm of the Federal Government").


115 See Jack Goldsmith, *Against Cyberanarchy*, 65 U Chi L Rev 1199, 1245–46 (1998) (arguing that to make private ordering effective, "national courts must subsequently recognize the validity of the private dispute resolution process, ... enjoin subsequent litigation in derogation of the results of the private dispute resolution, and enforce any judgments that cannot be done so privately").

to private ordering. Like any regulatory preference, it is subject to the vagaries of jurisdictional conflicts.

Once we recognize that the state is a silent partner to private ordering, we see the limits of contract as a jurisdictional panacea. Although the parties may contractually opt for a particular choice of law and/or forum to give effect to their ordering, any court in which a party seeks judicial redress must choose to respect the contractual choice. As Dean Perritt recognizes, that decision may well turn on judgments about the quality of consent, as well as the substantive fairness of their contract. And different states may well have different attitudes toward those questions.

As Professor Epstein concedes, private ordering is particularly ineffective in resolving jurisdictional controversies between strangers where an action in one place has brought about an injury in another: “it is very difficult to envision on a transaction-by-transaction basis any rule that, after the fact, is likely to bring about a Pareto improvement, that is, one that improves the welfare of both sides simultaneously.” Accordingly, it is impossible to resolve this central jurisdictional conflict through the lens of private ordering, because there is no single forum or law to which both parties would have agreed ex ante.

That is not to say that private ordering cannot alleviate some jurisdictional problems. It may well be that there is greater international consensus on honoring private ordering than on the principles that ought to govern interjurisdictional transactions in the absence of private ordering. An internet service agreement that forbids selling offensive material over the internet is far more likely to be enforced internationally than is the law of any country in which information about the sale was disseminated.

C. Conclusion: Spaghetti Westerns

Finally, I want to try to untangle some of the spaghetti I lumped together at the outset. A full exposition of these issues is well beyond the scope of my assignment as commentator. But let me isolate some of the larger strands. Is it appropriate to collapse, as I have, authority to legislate and authority to adjudicate? The conventional account is that interstate conflict is mitigated, if not eliminated by appropriate choice-of-law rules. A

117 Id at 269–70.
118 Epstein, 2001 U Chi Legal F at 29 (cited in note 7).
119 The primacy of choice-of-law as the device-of-choice to mediate competing state regulatory interests is demonstrated by Justice Rehnquist’s opinion in Keeton v Hustler.
state's assertion of personal jurisdiction, under this view, does not implicate sovereign prerogatives to the same extent as applying its law and accordingly should not be as constrained as choice of law. In other words, as long as a state applies the "proper" law to an adjudication, its assertion of personal jurisdiction does not infringe significantly on regulatory prerogatives of other states.

I think we are learning that the conventional view overstates the case. Several of the Universal Jurisdiction panelists were worried about the perils of provincial prosecutions under universal jurisdiction; they certainly recognize that authority to enforce law is a meaningful and problematic regulatory act. The same legal rules applied by different authorities can have radically different meanings. I have elsewhere argued that the Court's personal jurisdiction doctrine is based on the premise that adjudicatory authority is primarily justified by regulatory interests.

It is true that procedure does not directly regulate

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*Magazine, Inc.,* 465 US 770 (1984). There, the Court minimized the significance of the fact that New Hampshire, by virtue of asserting personal jurisdiction, was able to extend its long statute of limitations to a defamation claim having only a minor connection to New Hampshire:

> Strictly speaking, however, any potential unfairness in applying New Hampshire's statute of limitations to all aspects of this nationwide suit has nothing to do with the jurisdiction of the Court to adjudicate the claims. "The issue is personal jurisdiction, not choice of law." . . . The question of the applicability of New Hampshire's statute of limitations to claims for out-of-state damages presents itself in the course of litigation only after jurisdiction over respondent is established, and we do not think that such choice of law concerns should complicate or distort the jurisdictional inquiry.


120 Ironically, at least as a matter of due process, the Court has subjected personal jurisdiction to far more searching constitutional scrutiny than choice of law. See *Allstate Insurance Co v Hague,* 449 US 302, 317–18 (1981) ("By virtue of its presence, Allstate can hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state courts might apply forum law to litigation in which the company is involved."); Linda J. Silberman, *Shaffer v. Heitner: The End of an Era,* 53 NYU L Rev 33, 82 (1978) (suggesting that there should be greater due process constraints on choice of law than on personal jurisdiction).

121 See, for example, Rubin, 2001 U Chi Legal F at 370 (cited in note 52) ("We may act by our own perceptions and apply [our interpretations of international law] within our own jurisdiction to prescribe and adjudicate, but if we apply them to others, like revolutionaries or Muslims, how do we argue that the international legal order prevents their applying their prescriptions to us?").

122 Consider Stein, 65 Tex L Rev 689 (cited in note 6). See also Stanley E. Cox, *Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation—There Is No Law*
conduct, but it has enough of an effect to make it sensible to view it as a regulatory act.

Like Justice Field in Pennoyer, I have also conflated domestic and international principles of jurisdiction. This is characteristic of the Court's personal jurisdiction jurisprudence in general. Although the Court has expressed concern over the heightened convenience problems implicated in international cases, it has not treated a state's claim of authority over a foreign defendant as different in kind from its authority to adjudicate the claims of domestic, out-of-state defendants. As I alluded above, there may, in fact, be some important differences.

First, to the extent that jurisdictional principles reflect the appropriate spheres of power in a legal network, those spheres may vary according to the nature of the network. As the Supreme Court stated in World-Wide Volkswagen, the legitimacy of an assertion of jurisdiction turns, in part, on "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." Where, as within the United States, the administration of justice is a coordinated effort, with states sharing substantially common regulatory values, interstate assertions of jurisdiction may be less problematic than when substantially different legal systems collide. In other words, authority in a legal network may be shared, conceivably permitting and facilitating more expansive assertions of jurisdiction than would otherwise be possible.

But cooperation cuts two ways. Interstate "poaching" within the United States violates the "elbows-in" principle; the cost of membership in a coordinated legal network is self-restraint. Thus, to some extent, we would expect to see more respect for the

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123 See Asahi Metal Industry, Co, Ltd v Superior Court of California, 480 US 102, 116 (1987) (weighing "the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State" in determining that California's exercise of personal jurisdiction over the foreign defendant "would be unreasonable and unfair").

124 444 US at 292.
autonomy of member states within a coordinated network than among isolated sovereigns.\textsuperscript{125}

In closing, I want to return to the "frontier" metaphor I started with. There is a wonderful irony here. Our picture of the Old West was the consequence of a legal vacuum: too much territory, not enough sheriffs. The parallel frontier qualities we have seen here are, in significant measure, a consequence of too much law operating in too little space. The collision of competing sovereign claims seems to have indeed produced a frontier, but one borne of connectedness, comity and restraint rather than of isolation.

\textsuperscript{125} See, for example, Brussels Convention at Art 3 (cited in note 96) (permitting "exorbitant" bases of jurisdiction against non-signatory state defendants).