Notes

Invisibly Radiated: Federalism Principles and the Proposed Hague Convention on Jurisdiction and Foreign Judgments

BY KHOI D. NGUYEN*

The United States and 47 other countries are steeped in the negotiation of a treaty that will ensure that judgments issued by courts in one member country are enforced by other member countries.[1] This proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Hague Convention) will govern the recognition and enforcement of

* J.D. Candidate, University of California, Hastings College of the Law, 2001. B.S., University of California, Berkeley, 1997. I would like to thank Professor Richard Marcus for his continuing guidance and patience. All errors remain my own.

1. *See generally* Proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (visited Mar. 18, 2001) <http://www.hcch.net/e/workprog/jdgm.html>. This is a multilateral treaty on jurisdiction and judgments under the auspices of the Hague Conference on Private International Law. The Hague Conference is a multilateral organization with 48 member states founded in 1893 to serve as a negotiating forum for civil and commercial legal matters; the United States joined in 1964. *See* Peter H. Pfund, *The Hague Conference Celebrates Its 100th Anniversary*, 28 TEX. INT'L L. J. 531 (1993). A complete list of the members of the Hague Conference is available on the Hague Conference on Private International Law website. *See Member States* (visited Mar. 18, 2001) <http://www.hcch.net/e/members/members.html>.

For the history of this endeavor, see Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 BROOK. J. INT'L L. 7 (1998).

The latest revisions were made during a meeting held at The Hague from October 25-30, 1999. *See Future Hague Convention on International Jurisdiction and the Effects of Judgments in Civil and Commercial Matters* (visited Mar. 18, 2001) <http://www.hcch.net/e/workprog/jdgm.html>.

jurisdictionally sufficient foreign judgments in civil and commercial matters among contracting states. All future members to the Hague Convention will be required to recognize and enforce judgments rendered on approved bases of jurisdiction.[2] Likewise, judgments rendered on prohibited grounds of jurisdiction are not enforceable.[3] The October 1999 preliminary draft Convention will be finalized at two sessions of the Diplomatic Conference — the first to be held in June 2001 and the second at either the end of 2001 or the beginning of 2002.[4] It is expected that the United States, which initiated the negotiation of this treaty in 1992,[5] would sign and ratify the treaty.

This note focuses on the Hague Convention's prohibition of contracting state courts' exercise of jurisdiction based solely on transient jurisdiction and "doing business" general jurisdiction. Article 18 of the Hague Convention Draft, entitled "Prohibited grounds of jurisdiction," states:

> 2. In particular, jurisdiction shall not be exercised by the courts of a Contracting State on the basis solely of one or more of the following –
>
> . . .
>
> e) the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities;
>
> f) the service of a writ upon the defendant in that State;
>
> . . .[6]

Transient jurisdiction gives the forum state the power to adjudicate a claim against a defendant who is served with process within the state's territorial limits even though the claim is wholly unrelated to the

---

2. *See generally Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, October 30, 1999 (visited Mar. 18, 2001) <http://www.hcch.net/e/conventions/draft36e.html> [hereinafter Convention Draft].

3. *See* Convention Draft, *supra* note 2, art. 26 (stating that "[a] judgment based on a ground of jurisdiction... whose application is prohibited by virtue of Article 18 [prohibited grounds of jurisdiction], shall not be recognised or enforced.").

4. *See Future Hague Convention*, *supra* note 1.

5. In a letter dated May 5, 1992, Edwin D. Williamson, Legal Advisor of the U.S. Department of State wrote to Georges Droz, Secretary General of the Hague Conference on Private International Law proposing that the Hague Conference draft a new Convention on the recognition and enforcement of civil and commercial judgments. *See* Eric B. Fastiff, Note, *The Proposed Hague Convention on the Recognition and Enforcement of Civil and Commercial Judgments: A Solution to Butch Reynolds's Jurisdiction and Enforcement Problems*, 28 CORNELL INT'L L.J. 469, 470 n.1 (1995) *citing* Hague Conference Doc. No. L.c. ON No 15 (92).

6. *See* Convention Draft, *supra* note 2, art. 18, § 2.

defendant's temporary presence.[7] "Doing business" general jurisdiction (hereinafter "doing business") permits the forum state to decide a claim against the defendant based on the defendant's extensively continuous and systematic business activities in that state even if the claim has no relation to those activities.[8]

These proposed prohibited grounds for jurisdiction are currently accepted in the United States. The Supreme Court unanimously upheld the constitutionality of transient jurisdiction in *Burnham v. Superior Court.*[9] Similarly, in *Perkins v. Benguet Consolidated Mining Co.*, the Court held that a non-domiciliary defendant that conducts nearly all its activities in the forum may be subjected to "doing business" jurisdiction there.[10]

Therefore, to give effect to the Hague Convention Congress would need to pass enabling legislation proscribing transient and "doing business" jurisdiction in both federal and state courts, at least in cases involving foreign parties from signatory countries.[11] While Congress certainly has the authority to determine the jurisdiction of federal courts under Article III of the Constitution,[12] it would need to base such legislation on some enumerated power to do the same to state courts.

This note examines whether there is constitutional authority for Congress to pass enabling legislation proscribing state courts' use of these traditional bases of jurisdiction. It concludes that a treaty proscribing certain bases of state-court jurisdiction cannot trump

---

7. *See* ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS § 2-4, at 122-23 (3d ed. 1998).

8. *See id.* § 2-5, at 140-41.

9. 495 U.S. 604 (1990) (upholding jurisdiction over a nonresident who had been served with process while visiting the state).

10. 342 U.S. 437 (1952) (upholding jurisdiction in an Ohio state-court suit against a Philippine corporation that performed all of its management functions in Ohio during World War II, on a totally unrelated claim, because of systematic and continuous contacts with the state). *But see* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984) (holding that regular and substantial purchasing activity in the forum is insufficient to support "doing business" jurisdiction). The Court has not provided further guidance beyond *Perkins* and *Helicopteros* regarding the quantity and quality of contacts sufficient for "doing business" jurisdiction. *See* CASAD & RICHMAN, *supra* note 7, § 2-5 at 142.

11. The Convention is only pertinent in cases involving one or more non-U.S. parties. The Convention's prohibitions "shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State." *See* Convention Draft, *supra* note 2, art. 2, §1, with a few exceptions not applicable here.

12. *See* U.S. CONST. art III, § 2, cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

properly construed limits, deriving from the principles of federalism and the Tenth Amendment,[13] on the enumerated power of Congress.

To reach these issues, section I briefly discusses the Hague Convention, its values, and why the proscription of these bases of jurisdiction is integral to its existence. Section II illustrates the significant role states play in the assertion of personal jurisdiction in their courts. Section III addresses the commerce power as a possible constitutional support for proscribing certain bases of state-court jurisdiction under the Hague Convention.[14] Section IV discusses the treaty power as another support of the Hague Convention. Both sections III and IV conclude that the legislation to implement the Hague Convention is likely to be held unconstitutional due to the Court's recent interpretation of the Tenth Amendment and the principles of federalism. The note ends with the recommendation that the only constitutional and practical means to this end is to allow individual states to enact legislation similar to the provisions of the proposed Hague Convention, discarding these bases of jurisdiction.

I. Road to the Hague Convention

Although the Hague Convention primarily concerns the recognition and enforcement of judgments, these acts are premised on the agreeable exertions of jurisdiction by signatory states. At the root of the Hague Convention is the acknowledgment of the wildly varying ways nations assume jurisdiction in litigation against domestic and foreign defendants. The simplest and most general explanation for these jurisdictional differences is the common law-civil law dichotomy. The civil law tradition practices the Roman idea of jurisdictional restraint in the spirit of fairness while the U.S. common law tradition roots jurisdiction in the inherent territorial power of the sovereign — the "power theory."[15] Each tradition recognizes different bases of jurisdiction that often seem excessive by the other. For example, while France, a civil law country, criticizes U.S. transient jurisdiction as exorbitant, its authorization of jurisdiction

13. U.S. CONST. amend. X. ("The power 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.").

14. Subsequently, the term Hague Convention will be used to specifically refer to only the proscription of existing U.S. bases of jurisdiction: transient and "doing business," as opposed to the entire Hague Convention itself.

15. *See generally* RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 379-80, 405-06, 413-34 (6th ed. 1998) (illustrating the difference between civil and common law).

based purely on the nationality of the plaintiff attracts the same criticism from the United States.[16] The acceptance of certain bases of jurisdiction by one country and not another gives rise to potential forum shopping, which creates a sense of fear and hostility in the domiciliaries and courts of the other country.

European countries of both legal traditions solved this problem by adopting the Brussels Convention in 1968.[17] The Brussels Convention retains the fairness principle of the civilian jurisdiction tradition[18] while requiring member states to give up their own exorbitant forms of jurisdiction, but, alas only in regard to litigation against domiciliaries of other member states.[19] For example, upon becoming a signatory, England abandoned transient jurisdiction and France discarded jurisdiction based on the plaintiff's French nationality.[20]

To date, the United States is not a party to any bilateral or multilateral treaty governing the recognition and enforcement of civil and commercial judgments.[21] Thus, the United States initiated the negotiation of the Hague Convention, seeking to create a more consistent recognition and enforcement of U.S. judgments in foreign countries through the adoption of an internationally uniform and coherent agreement governing the assertion of jurisdiction.[22] To be a signatory of the Hague Convention the United States would also have

16. *See* Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 92 (1999). Professor Clermont characterizes jurisdiction based on nationality as the result from the fact that without the restraints of the power theory, civil law systems have "succumbed even more blatantly to parochial impulses." *Id.* However, even under the U.S. approach, there is a strong interest, at least at the reasonableness stage, in allowing jurisdiction if the plaintiff is a citizen of the forum.

17. *See* Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention], reprinted as amended in 29 I.L.M. 1413 (1990). England represents the common law tradition.

18. *See, e.g.*, Brussels Convention, *supra* note 17, art. 2 (defendant's domicile as the foundational idea), reprinted as amended in 29 I.L.M. 1418; art. 5 (long-arm-like jurisdiction for tort and contracts actions), 29 I.L.M. 1419; art. 16 (exclusive local jurisdiction in actions concerning real property), 29 I.L.M. 1422; art. 13-15 (allowing certain disadvantaged plaintiffs to sue at home), 29 I.L.M. 1421-22; art. 17 (authorizing forum selection clauses), 29 I.L.M. 1422.

19. *See id.* art. 3, 4, reprinted as amended in 29 I.L.M. at 1418-19.

20. *See* Clermont, *supra* note 16, at 93.

21. The United States is not a member of the following Conventions on jurisdiction and enforcement of civil and commercial judgments: the Brussels Convention (1968), the Lugano Convention (1972), or the Inter-America Convention (1984). *See* Fastiff, *supra* note 5, at 470 n.2.

22. *See* Clermont, *supra* note 16, at 89.

to discard transience and "doing business" as grounds for exercising jurisdiction. Eliminating these bases of jurisdiction is the key to attract other countries to become signatories to the Hague Convention, especially the Brussels Convention countries that have no real incentives to join otherwise.[23]

While they are controversial, these bases of jurisdiction have substantial historical and constitutional foundations in this country. There is a history of judicial approval for transient jurisdiction, which was recently held to be constitutional in *Burnham*.[24] The Court also noted, "[w]e do not know of a single state or federal statute, or a single judicial decision resting upon state law, that has abandoned in-state service as a basis for jurisdiction."[25] However, the use of transient jurisdiction meets criticisms at home and abroad.[26] Once the most important basis of U.S. jurisdiction against defendants outside the states' territorial limits,[27] today jurisdiction based solely on service of process within the forum is rarely used, and when used against foreign defendants, the ensuing judgments face the prospect of the lack of recognition and enforcement abroad.[28] It has been suggested

23. The Hague Convention could put these bases of jurisdiction on a "gray" list (in the format of a mixed convention along with the accepted "white" list and prohibited "black" list) where ensuing judgments are recognized and enforced at the discretion of the enforcing forum. Again this would not be much of a change from the current system and might not be enticing to the European countries.

24. 495 U.S. 604. "The short matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'" *Id.* at 619.

25. *Id.* at 615.

26. *See, e.g., The Future of Personal Jurisdiction: A Symposium on* Burnham v. Superior Court, 22 RUTGERS L.J. 559 (1991). *See also* Joachim Zekoll, *"Could a Treaty Trump Supreme Court Jurisdictional Doctrine?": The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1296-97 (1998) (explaining that transient jurisdiction conflicts with international standards). The Restatement (Third) of the Foreign Relations Law of the United States, section 421, Reporters' Note 4 (1987) stated, "Jurisdiction based on service of process on one only transitorily present in a state is no longer acceptable under international law if that is the only basis for jurisdiction and the action in question is unrelated to that state."

27. *See* Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT'L & COMP. L. 111, n.38 (1999) ("[T]ag jurisdiction . . . [is]. . . best understood historically by considering the important role that it once played in mitigating the rigors of a territorial system highly protective of defendants when travel was difficult and expensive, and thus serving the interests of plaintiffs and states.").

28. *See* Clermont, *supra* note 16, at 112, *citing* DAVID EPSTEIN & JEFFREY L. SNYDER, INTERNATIONAL LITIGATION § 6.04[3] (2d ed. 1994); LOUIS ELLEN TEITZ, TRANSNATIONAL LITIGATION § 1-6, at 50-52 (1996).

that transient jurisdiction should only be used when all other appropriate bases of jurisdiction are not available.[29] Similarly, the peculiarly U.S. doctrine of "doing business" jurisdiction finds support from the Court's opinion in *Perkins*.[30] Since then, however, courts typically resort to it only when no other appropriate bases of personal jurisdiction reach the defendant.[31] Generally, the Court has left states the discretion to exercise "doing business" jurisdiction,[32] and a number of states have enacted "doing business" statutes that remain important bases of jurisdiction today.[33]

In relinquishing transience and "doing business" as grounds for jurisdiction, the United States would reap the Hague Convention's purported benefits. The beneficiaries of the Hague Convention would be U.S. litigants in civil or commercial actions involving foreign parties. Without such a Convention, U.S. plaintiffs risk having U.S. judgments unrecognized and unenforced in Brussels Convention countries. Likewise, as defendants in actions involving plaintiffs from Brussels Convention member states, U.S. parties are still subjected to the pre-Brussels Convention exorbitant bases of jurisdiction of those states.[34] The Hague Convention would bring the United States into parity with European Union countries in terms of recognition and enforcement of foreign judgments. Furthermore, other non-Brussels Convention countries could become signatories to the Hague Convention to avoid being subjected to disfavored U.S. and European forms of jurisdiction. By expanding the regional standard of the Brussels Convention to an international level, the Hague Convention might promote more unfettered international commerce.

With the purported benefits of the Hague Convention apparent, the question shifts from "should the United States become a member" to "could the United States become a member." In

29. *See* Clermont, *supra* note 16, at 112. Professor Clermont also suggested that perhaps the U.S. should insist on a new provision for jurisdiction against terrorists and human rights violators, against whom the human rights community has relied on transient jurisdiction. *See id.*

30. 342 U.S. 437.

31. *See, e.g.*, Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 854 (N.Y. 1967).

32. *See* JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE § 3.10, at 125 (3d ed. 1999).

33. *See, e.g.*, KAN. STAT. ANN. § 17-7303 (1999); N.Y. BUS. CORP. LAW § 1301(b) (McKinney 2001); 15 PA. CONS. STAT. § 4122(a) (2000).

34. *See* Brussels Convention, *supra* note 17, art. 3 & 4. Some of these foreign judgments, however, may not be enforced in the United States for being based on exorbitant forms of jurisdiction.

answering the latter question, it is instructive to first examine the role states play in the exercise of personal jurisdiction in their courts. Against that background, this note will explore possible constitutional authorization in the Commerce and Treaty Clauses for Congress to abrogate this state function.

II. States' Role in the Exercise of Jurisdiction

State legislatures and judiciaries play an active part in the exercise of personal jurisdiction in state courts. A state court can only exercise jurisdiction over a party or a piece of property when it has both statutory and constitutional authorities.[35] The Due Process Clause[36] of the federal constitution sets the outer bounds of a state's permissible jurisdictional power but does not actually confer any jurisdiction on state courts.[37] It is the state's long-arm statute that grants power to its courts to exercise personal jurisdiction.[38]

The use of a long-arm statute by a state to assert jurisdiction over a nonresident defendant was first upheld by the Court in *Hess v. Pawloski*.[39] Later, state legislatures began enacting comprehensive jurisdictional statutes based on the defendant's conduct in the state after *International Shoe Co. v. Washington*[40] validated the expansion of state court jurisdiction under the Due Process Clause.[41] These long-arm statutes come in two general varieties: "enumerated act" statutes and "to the limits of due process" statutes.[42] An "enumerated act" long-arm statute bases jurisdiction over nonresidents on a variety of contacts with the forum.[43] An example is Illinois' long-arm statute:

> (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this State;

35. *See* FRIEDENTHAL, *supra* note 32, § 3.1 at 96.

36. U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law").

37. *See* FRIEDENTHAL, *supra* note 32, § 3.1 at 96.

38. *See id.*

39. 274 U.S. 352 (1927) (upholding the validity of a nonresident motorist statute).

40. 326 U.S. 310 (1945).

41. *See* FRIEDENTHAL, *supra* note 32, § 3.12 at 141-42.

42. *See* CASAD & RICHMAN, *supra* note 7, § 4-1 at 381-82.

43. *See* FRIEDENTHAL, *supra* note 32, § 3.12 at 142.

> (2) The commission of a tortious act within this State;
> (3) The ownership, use, or possession of any real estate situated in this State;
> . . .[44]

Alternatively, a "to the limits of due process" long-arm statute is drafted so that it can expand or contract with the state and federal Supreme Courts' interpretation of due process.[45] California has such a long-arm statute:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.[46]

Since 1963, every state, as well as the District of Columbia, has either by statute or court rule extended jurisdiction over nonresident defendants and corporations in cases where it would be constitutionally permissible.[47] Today, almost twenty states have long-arm statutes that allow the exercise of personal jurisdiction to the maximum extent permitted by the Constitution.[48] Another twenty-five have statutes that have been interpreted, in whole or in part, to reach the limits of the Constitution.[49]

The legislative rationale of the long-arm statute is to provide a convenient local forum for state citizens to litigate claims that arise from the activities of nonresidents in the state.[50] This is a valid exercise of the state's police power so long as it comports with due process requirements.[51] The recognition of a state's supremacy in enacting its long-arm statute is further evident in the determination of whether a federal court may exercise jurisdiction over a defendant. Besides comporting with federal constitutional due process standards, a federal court must also find statutory authority for the exercise of jurisdiction under the laws of the state in which it sits.[52]

---

44. 735 ILL. COMP. STAT. 5/2-209 (2000).

45. *See* FRIEDENTHAL, *supra* note 32, § 3.12 at 143.

46. CAL. CIV. PROC. CODE § 410.10 (2001).

47. *See* CASAD & RICHMAN, *supra* note 7, § 4-1 at 381.

48. *See* FRIEDENTHAL, *supra* note 32, § 3.12 at 144. For a compilation of the long-arm statutes of all 50 states and the District of Columbia, see CASAD & RICHMAN, *supra* note 7, app. E at 389-487.

49. *See* FRIEDENTHAL, *supra* note 32, § 3.12 at 144.

50. *See id.* at 143.

51. In *Hess*, at the state level, the Supreme Judicial Court of Massachusetts held the long-arm statute to be a valid exercise of the police power. 274 U.S. at 354-55. The U.S. Supreme Court did not discuss the police power in holding that the same statute comports with the due process standards.

52. *See* Wolf v. Richmond County Hosp. Authority, 745 F.2d 904 (4th Cir. 1984), *cert.*

The prevalence of state long-arm statutes illustrates the important role states play in assessing whether personal jurisdiction is proper in their courts. More importantly, because a majority of states have long-arm statutes that reach the limits of the Constitution it follows that there are only two appropriate ways to proscribe transient and "doing business" jurisdiction. The Court could either find these bases of jurisdiction unconstitutional or states could eliminate them statutorily. After *Burnham* and *Perkins*, the constitutionality of transient and "doing business" jurisdiction, respectively, is no longer in doubt. Thus, there remains but one option: states' discretionary power to extend or withhold these bases of jurisdiction.

III. Commerce Power

One constitutional support for congressional enabling legislation pursuant to the Hague Convention comes from the commerce power.[53] Under its Article I power, Congress can regulate single state activities so long as those activities have a substantial effect on interstate commerce.[54] The level of deference the Court will give to Congress in determining whether a regulated activity substantially affects interstate commerce depends on whether the activity is "commercial" in character.[55] There is a presumption of constitutionality for federal regulations of single state commercial activities if "there is any rational basis on which Congress could have concluded that the activities have a substantial effect on interstate commerce."[56]

In implementing the Hague Convention, the "activity" that Congress seeks to regulate is the jurisdiction of state courts in cases involving at least one foreign party. It is certainly possible to make the argument that the acceptance of transient and "doing business"

denied, 474 U.S. 826 (1985).

53. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."). Once, it was argued that congressional power to regulate foreign commerce exceeds the power to regulate interstate commerce because the latter is done at the expense of the reserved power of the states. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 356 n.9 (1996). However, it is now generally accepted that Congress' power is the same in relation to both. *See id.*

54. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.9, at 459 (3d ed. 1999).

55. *See id.*

56. *Id.*

jurisdiction by U.S. courts may affect the decision of foreign commercial entities in conducting business with U.S. individuals and entities or within the United States. Viewing these bases as exorbitant and arbitrary, foreign participants may be reluctant to become involved in the stream of commerce of the United States lest they be hailed into a U.S. court unexpectedly or unfairly. At the very least, there is enough nexus between the potential application of these bases of jurisdiction and possible hindrance of interstate commerce to qualify congressional proscription of transient and "doing business" jurisdiction as "commercial" in character.

Yet, to find that Congress might be able to legislate state-court jurisdiction under its commerce power is not enough to reach a definitive conclusion as to the constitutionality of the Hague Convention and its implementing legislation. By proscribing certain bases of state-court jurisdiction, Congress might intrude upon an area of traditional state sovereignty. This potential conflict with the principles of federalism warrants an examination of the possible effect on such legislation by the Tenth Amendment, which provides that "[t]he power 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."[57]

A. Tenth Amendment & Commerce Power

The Court's current Tenth Amendment jurisprudence is highly probative of how the constitutional issue of the Hague Convention may play out. Throughout its history, the Court has been inconsistent in its Tenth Amendment jurisprudence, alternating between two different approaches: 1) the Tenth Amendment is a reminder that Congress may only legislate within the scope of its authority under the Constitution — a truism, and 2) the Tenth Amendment is an affirmative protection of states' rights and the principles of federalism that acts as a counterweight against exercise of enumerated powers by Congress.[58] The following chronological discussion briefly traces the status of the Tenth Amendment in recent history and ultimately shows that the Court now views this amendment as an actual limit on the federal government and not just a truism.

57. U.S. CONST. amend. X.

58. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 222-23 (1997).

B. Truism Past

From 1937 until 1992, the Court expressly rejected the view that the Tenth Amendment is an independent limit on Congress' legislative power. In *United States v. Darby*,[59] a challenge to the constitutionality of the Fair Labor Standards Act of 1938, the Court declared: "The Tenth Amendment states but a truism that all is retained which has not been surrendered."[60]

During this period of time, only one case deviated from the *Darby* reading of the Tenth Amendment, *National League of Cities v. Usery*.[61] That case involved a challenge to the 1974 amendments to the same Fair Labor Standards Act.[62] The amendments sought to govern minimum wages and maximum hours of employees of states and their political subdivision.[63] The appellants argued that Congress violated an affirmative limitation on the exercise of its commerce power when it sought to directly regulate the activities of states as public employers.[64] Writing for the 5-4 majority, then-Associate Justice Rehnquist noted that "there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce."[65]

Congressional application of the minimum wages and maximum hours provisions to the states violated the Tenth Amendment because the law operates to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[66] These functions are tasks state and local government typically perform in administering public law and providing public services.[67] The one deficiency of *National League of Cities* was the difficulty in determining what constituted a traditional government function. This problem would open the door for a host of inconsistent lower court attempts at the definition and create opportunities for the Supreme Court to distinguish the holding of *National League of Cities* in later cases.[68]

59. 312 U.S. 100 (1941).
60. *Id.* at 124.
61. 426 U.S. 833 (1976).
62. *See id.* at 838-39.
63. *See id.* at 837.
64. *See id.* at 841.
65. *Id.* at 842.
66. *Id.* at 852.
67. *See id.* at 851.
68. CHEMERINSKY, *supra* note 58, at 229-231.

Finally, in *Garcia v. San Antonio Metropolitan Transit Authority*,[69] the Court expressly overruled *National League of Cities*. *Garcia* involved a challenge to the decision of the Wage and Hour Administration of the Department of Labor that denied a public mass-transit system (SAMTA) an exemption from the wages and hours requirement of the Fair Labor Standard Act (FLSA).[70] Citing *National League of Cities*, the District Court found for the SAMTA holding that municipal ownership and operation of a mass-transit system was a traditional governmental function and thus exempted from the obligations of the FLSA.[71]

The Supreme Court reversed. Writing for the Court, Justice Blackmun, who switched his vote to create a 5-4 majority with the dissenters from *National League of Cities*, noted that the previous approach of determining whether a particular government function is "traditional" or "integral" was unworkable.[72] He argued for judicial restraint in enforcing the Tenth Amendment because it "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[73] Further, while acknowledging that states "occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position," he argued that the political system, instead of the judiciary, should be the protector of state prerogatives.[74]

The dissenters in *Garcia* attacked these two arguments. Justice Powell argued that the Court could define the parameters of the Tenth Amendment just as it has defined other ambiguous constitutional provisions.[75] Justice O'Connor challenged the majority's second point arguing that the political process would not adequately protect the interests of state governments.[76] Finally, in his short dissent, Justice Rehnquist predicted that, in time, the minority's position on the Tenth Amendment would prevail.[77] It is also worthwhile to note that despite being a low point of judicial

69. 469 U.S. 528 (1985).
70. *See id.* at 534.
71. *See id.* at 530.
72. *See id.* at 546-547.
73. *Id.* at 556.
74. *Id.* at 551.
75. *See id.* at 561 (Powell, J., dissenting).
76. *See id.* at 587 (O'Connor, J., dissenting).
77. *See id.* at 580 (Rehnquist, J., dissenting).

protection of federalism, even the majority in *Garcia* acknowledged that there are "limitation[s] on federal authority inherent in the delegated nature of Congress' Article I powers"[78] and that "the States unquestionably do 'retain a significant measure of sovereign authority.'"[79]

C. Toward an Affirmative Protection

In 1992, the Court's Tenth Amendment jurisprudence took a sudden turn in *New York v. United States*.[80] There, the Court, by a 6-3 margin, invalidated a federal law for violating the Tenth Amendment.[81] The state challenged provisions of the Low-Level Radioactive Waste Policy Act that required, among other things, states to either accept ownership of radioactive waste or to regulate it according to the instructions of Congress.[82] Writing for the Court, Justice O'Connor stated that this so-called "take title provision" would impermissibly commandeer the state governments by directing states to enact or administer a federal regulatory program.[83] The law therefore exceeded the limits on the scope of congressional powers under Article I and violated the Tenth Amendment.

Justice O'Connor used a "mirror image" analogy to describe the distribution of power as a continuum, with the power vested in the federal government ending where the power reserved to the states begins.[84] She wrote, "if a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."[85] Significantly, the Court clearly rejected *Garcia*'s conclusion that the federal judiciary would not use the Tenth Amendment to invalidate federal laws.[86] The Court also expressly rejected the argument that a compelling government interest is sufficient to permit a law that

78. *See id.* at 550.
79. *Id.* at 549.
80. 505 U.S. 144 (1992).
81. *See id.* at 149.
82. *See id.* at 153.
83. *See id.* at 188.
84. *See id.* at 156.
85. *Id.*
86. *See id.*

otherwise would violate the Tenth Amendment.[87]

The Court again recognized the Tenth Amendment as an affirmative protection of states' rights in *Printz v. United States*.[88] There, by a 5-4 vote, the Court held that a provision of the Federal Gun Control Act requiring local law enforcement officers to run background checks on certain categories of gun purchasers was an unconstitutional commandeering of state executive branches.[89] The Court found this to be a violation of the principles of federalism and the Tenth Amendment.[90] Justice Scalia's majority opinion is supported by three bases, two of which are relevant here. First, there is no constitutional history to show that Congress has been given authority to control the activities of state legislatures or executive officials.[91] Second, the federal system, as envisioned by the Constitution, does not give the federal government the power to control state legislative or executive officers solely for the purpose of implementing federal law.[92]

The most recent in this line of cases, *Reno v. Condon*,[93] reinforces the holding of *New York* and *Printz*. In *Condon*, the state of South Carolina challenged the constitutionality of the Driver's Privacy Protection Act (DPPA), which regulates states' ability to disclose a driver's personal information without the driver's consent.[94] The Court unanimously held that while *New York* and *Printz* enunciated certain federalism principles that may limit congressional power, Congress did not violate them in enacting the DPPA.[95] Chief Justice Rehnquist wrote, "the DPPA does not require the States in their sovereign capacity to regulate their own citizens.... It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals."[96]

87. *See id.* at 161.
88. 521 U.S. 898 (1997)
89. *See id.* at 935.
90. *See id.* at 935-36 (O'Connor, J., concurring).
91. *See id.* at 903-17.
92. *See id.* at 921-24.
93. 528 U.S. 141 (2000).
94. *See id.* at 143.
95. *See id.*
96. *Id.* at 151.

D. Tenth Amendment & the Hague Convention

New York, *Printz*, and *Condon* illustrate the Court's willingness to use the Tenth Amendment and the principles of federalism to limit congressional power in appropriate situations. Thus, it is likely that the Court would not hesitate to include the Tenth Amendment in determining the constitutionality of congressional legislation proscribing state-court bases of jurisdiction.

The essential holding of *New York* and *Printz* is that Congress cannot make state governments, or their subdivisions or branches, instruments for carrying out congressional agenda.[97] Under the Hague Convention, the proscription of transient and "doing business" jurisdiction at the state level would require state legislatures to amend their long-arm statutes. This act would be tantamount to commandeering the state governments to carry out congressional dictates, contrary to the constitutional principles enunciated in *New York* and *Printz*. And unlike *Condon*, the Hague Convention requires "the States in their sovereign capacity to regulate their own citizens," state "[l]egislature[s] to enact any laws or regulations," and "state officials to assist in the enforcement of federal statutes regulating private individuals."[98] Thus, a conclusion contrary to *Condon* is warranted: the Hague Convention runs afoul of federalism principles enunciated by the Court in *New York* and *Printz*.

IV. Treaty Power

The Treaty Clause of the Constitution is another distinct possible support for the negotiation and ratification of the Hague Convention and provides the congressional authority to enact legislation in pursuant to it. Yet, congressional exercise of the treaty power, like any other federal power, is potentially restricted by the application of the principles of federalism and the Tenth Amendment. Though the Court has now interpreted the Tenth Amendment as an affirmative protection of states' rights in commerce clause cases, it has not had a recent opportunity to do so in a treaty clause case. It is argued here that the effect is the same. Consequently, while Congress may regulate the recognition and enforcement of international judgments under its treaty power, it cannot do so through proscribing existing state-court bases of jurisdiction.

97. *See* ROTUNDA & NOWAK, *supra* note 54, § 4.10 at 470.

98. *Condon*, 528 U.S. at 151.

A. Treaties & the Constitution

The Constitution devoted little text to the treaty power. The Treaty Clause provides that 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."[99] Beyond this, the Constitution "does not expressly impose prohibitions or prescribe limits on the Treaty Power, nor does it patently imply that there are any."[100] To this end, the language of the Supremacy Clause[101] was once used to support "a myth that treaties are equal in authority to the Constitution and not subject to its limitations."[102] The relevant part of the Supremacy Clause reads: "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 supreme Law of the Land . . . ."[103] The purported differences in the way Acts of Congress and treaties are made had been interpreted as demonstrating that treaties are not subjected to the constraints of the Constitution.[104] This view was premised on the interpretation of "in pursuance" of the Constitution to mean "consistent with its substantive prohibitions."[105] Thus, treaties made "under the authority of the United States" did not have to comport with the Constitution.[106]

However, this peculiar choice of words of the Supremacy Clause has been explained differently. The Framers understood "in pursuance" of the Constitution to mean, or also mean, "following its adoption"; using the phrase for its temporal connotation.[107] The "in pursuance" language was not used for treaties because the Framers wished to have treaties made before, as well as after, the adoption of the Constitution (treaties that were then being resisted in some States) to continue to be the law of the land and binding on the States.[108] Subsequently, the issue of where treaties stand in relation to

99. U.S. CONST. art. II, § 2.

100. HENKIN, *supra* note 53, at 185.

101. U.S. CONST. art. VI, § 2, cl. 2.

102. HENKIN, *supra* note 53, at 185.

103. U.S. CONST. art. VI, § 2, cl. 2 (emphasis added).

104. *See* HENKIN, *supra* note 53, at 186.

105. *See id. See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

106. *See* HENKIN, *supra* note 53, at 186.

107. *See id.*

108. *See id., citing* 2 Farrand (n.11 to Ch. I) 417 (noting the use of "which shall be made" for Laws of the United States and "made, or which shall be made" for treaties).

the Constitution was resolved by Justice Black's plurality opinion in *Reid v. Covert*.[109] He stated that "no agreement with a foreign nation can confer power on Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[110] Henceforth, treaties are subjected to the confines of the supreme law of the land — the Constitution.[111]

While it is now accepted that the treaty power is subject to the confines of the Constitution, it is unclear how the current Court would decide a challenge to a treaty based on the theory that it violates the Tenth Amendment. The sole Supreme Court precedent on this issue is the 80-year old *Missouri v. Holland*, where the Court rejected the claim that state sovereignty and the Tenth Amendment limit the scope of the treaty power.[112] However, after *New York* and *Printz*, there is a clear indication that the Court is willing to use the Tenth Amendment to invalidate federal laws that infringe states' rights. It remains to be seen how this federalism trend will affect future treaties such as the Hague Convention.

B. *Missouri v. Holland*

In *Holland*, the state of Missouri challenged the constitutionality of a treaty, and the ensuing congressional enabling legislation, between the U.S. and Great Britain that protected migratory birds.[113] Missouri asserted that the regulation of migratory birds is within the

109. 354 U.S. 1, 16-17 (1957) (plurality opinion reversing the conviction of a U.S. military dependent who was convicted in Britain without a jury trial pursuant to jurisdiction under a treaty between the U.S. and Great Britain; the Court held that the federal government cannot, through a treaty, deprive citizens of their Sixth Amendment right to a jury trial). Though Justice Black was only writing for a plurality of four, none of the other Justices suggested that they disagreed with his view. *See* HENKIN, *supra* note 53, at 459, n.51. *See also* Geofroy v. Riggs, 133 U.S. 258, 267 (1890) (holding that a treaty cannot cede the territory of a state).

110. *Reid*, 354 U.S. at 16.

111. *See* ROTUNDA & NOWAK, *supra* note 54, § 6.5 at 574.

112. 252 U.S. 416 (1920).

113. *See id.* at 430. The way the case developed is of special interest: Congress originally enacted a statute regulating migratory birds within the states. This statute was challenged in two separate federal district courts (United States v. McCullagh, 221 F. 288 (D. Kan. 1915) and United States v. Shauver, 214 F. 154 (E.D. Ark. 1914)) and both struck down the statute as unconstitutional because its subject matter was beyond the enumerated powers of Congress. Afterward, in trying to circumvent the courts' rulings, the federal government negotiated and ratified a treaty with Great Britain (which was then in charge of the foreign affairs of Canada) for the protection of migratory birds in the United States and Canada. *See* Convention for the Protection of Migratory Birds, Aug. 16, 1916, Can.-U.S., 39 Stat. 1702.

power reserved to the states by the Tenth Amendment.[114] Therefore, it argued that the legislation was an intrusion on state sovereignty and that Congress could not accomplish through the treaty power what it lacked the power to achieve in the absence of the treaty.[115]

The Court disagreed. It held that the Constitution expressly grants the federal government the power to make treaties and that states therefore could not claim that the treaty, or a statute adopted pursuant to it, violates the Tenth Amendment.[116] *Holland* confirmed that Congress has the power to do what is "necessary and proper" to implement a treaty even if its action was not within any other congressional powers.[117] Subsequently, the opinion has been interpreted to insulate the treaty power from federalism-based attack.[118] In the years following *Holland*, the assumption was that "there are no significant 'states' rights' limitations on the treaty power."[119] This is evident in the fact that no treaty has ever been struck down by the Supreme Court as an infringement on state sovereignty.[120]

C. *Missouri v. Holland* & the Hague Convention

As it stands, *Holland* poses an obstacle to a Tenth Amendment challenge of a treaty. *Holland* may not, however, carry as much weight today as it did in the 1920s, when it was decided. There has been a proliferation of treaties since then, which amplifies the concerns of misuses of the treaty power without a check on possible infringement of states' rights.[121] There is also the renewed significance of the Tenth Amendment as a limitation on the exercise of federal power. Additionally, *Holland* may not have much value as a precedent because the Court has stated that stare decisis carries less weight with respect to constitutional decisions because Congress

114. *See Holland*, 252 U.S. at 430.

115. *See id.* at 432.

116. *See id.*

117. *See* HENKIN, *supra* note 53, at 204.

118. *See id.* at 190-91.

119. *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 345 (1995).

120. *See* HENKIN, *supra* note 53, at 185. *But see* Collello v. United States Sec. and Exch. Comm'n, 908 F. Supp. 738 (C.D. Cal. 1995) (holding the freezing of a Swiss bank account of a U.S. citizen at the request of the Department of Justice pursuant to a treaty unconstitutional).

121. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 460 (1998).

cannot overturn them.[122]

Furthermore, the facts of *Holland* are distinguishable from those of the Hague Convention. In *Holland*, Justice Holmes wrote:

> The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some *invisible radiation* from the general terms of the Tenth Amendment .... [Here] a *national interest of very nearly the first magnitude* is involved. It can be protected only by national action in concert with that of another power. The *subject matter is only transitorily within the State* and has no permanent habitat therein.[123]

First, there is not the same exigency in rendering uniformity in enforcing foreign judgments as in preventing the extinction of migratory birds. *Holland* asserted that the protection of migratory birds was a matter of the "sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such could."[124] The Court went on to say that without the treaty and the congressional statute "there soon might be no birds for any powers to deal with."[125] Yet, without the Hague Convention, parties to international disputes face only the same difficulties as they do today in getting their judgments recognized and enforced. While the status quo may cause some inconvenience and unfairness, there is time for the negotiating countries to come up with a treaty that comports with our understanding of states' rights. International commerce is in no danger of extinction without the Hague Treaty.

Second, the treaty in *Holland* concerns migratory birds that by nature are "only transitorily within the State."[126] Thus, in an implicit balancing of the necessity of national action and states' rights over a subject matter that is not permanently connected to the state, the Court came out in favor of the treaty. However, here the issue of state-court jurisdiction is not transitory but a permanent and important matter of state sovereignty — the states derive legitimacy for their democratic process through their ability construe and adjudicate their own law.

Lastly, *Holland* does not stand for the proposition that there are no limitations on the treaty power in relation to states.[127] It only said

122. *See id.* at 459, *citing* Agostini v. Felton, 521 U.S. 203, 235 (1997).

123. 252 U.S. 416, 433-435 (emphasis added).

124. *See id.* at 433.

125. *See id.* at 435.

126. *See id.*

127. *See* HENKIN, *supra* note 53, at 193.

that there were no limitations from any "invisible radiation" of the Tenth Amendment.[128] In recent years, however, the Tenth Amendment has been "radiating" strongly in cases like *New York* and *Printz*. Then, as now, the issue of whether the Tenth Amendment applies is dependent on the alleged infringement on states' rights: regulating migratory birds in *Holland* and proscribing state-court bases of jurisdiction under the Hague Convention. With regard to the topic of migratory birds, which due to their nature and the exigency in preventing their extinction are more properly within the province of the federal government. Regulating migratory birds is within the zone of federal authority because the protection of migratory birds is better done at the national level and the birds' connection to the individual states is minimal. In contrast, there is an inextricable connection between state-court jurisdiction and the states. States have always had primacy in determining the jurisdictional extents of their courts, within the boundaries of the state and federal Constitutions. In the context of this strong relationship, the "invisible radiation" of the Tenth Amendment would surely be felt by any congressional attempt at sidestepping this state right.

For these reasons, *Holland* should not be the controlling case in the determination of the constitutionality of congressional legislation implementing the Hague Convention. Rather, the federalism principles enunciated in *New York* and *Printz* should be guide such an analysis.

V. Conclusion

The proposed Hague Convention provides the United States with a guarantee that U.S. judgments in commercial and civil matters involving at least one foreign party will be recognized and enforced among the signatory countries. The basis for this consistent and predictable recognition and enforcement is the requirement that courts rendering the judgments must have proper jurisdiction over the parties and the controversies. The Hague Convention provides a list of accepted and prohibited grounds for the exercise of jurisdiction. Among the prohibited are transient and "doing business" bases of jurisdiction. In pursuant to the Hague Convention, Congress would have to pass implementing legislation proscribing these prohibited bases of jurisdiction in both federal and state courts.

128. *See id.*

Yet, Congress possesses no constitutional authorization to regulate in this area with respect to the states in spite of its commerce and treaty powers. Under the current interpretation of the Tenth Amendment and the principles of federalism, it is likely that any such implementing legislation would be found unconstitutional.

The alternative is to leave the states to develop their own jurisdictional law in light of the Hague Convention and under the guidance of the Constitution. Through the use of long-arm statutes, states have been in the business of determining the jurisdictional limits of their courts for a long time. Individual states can balance the benefits of the Hague Convention and any values in retaining transience and "doing business" as bases of jurisdiction. If the Hague Convention is indeed the answer to the woes of the recognition and enforcement of foreign judgments, it might just entice the states to eliminate these exorbitant forms of jurisdiction from their courts.[129] The United States would then be able to meet all of the obligations of the Hague Convention and become a signatory.

129. Additionally, Congress can entice the states to dispose of these bases of jurisdiction by using federal conditional grants. In *New York*, the Court noted, "[the Constitution] permits the federal government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes." 505 U.S. at 189.