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THE WORLD IN OUR COURTS†

*Stephen B. Burbank**

INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS. By *Gary B. Born* with *David Westin*. Deventer/Boston: Kluwer Law & Taxation Publishers. 1989. Pp. xxv, 736. \$75.

I. INTRODUCTION

International civil litigation shares with complex litigation, of which it is often a part,¹ increasing practical importance and substantial theoretical interest. In their recently published and extremely valuable book on international civil litigation, Gary Born and David Westin posit that U.S. courts have “begun to develop a distinct, cohesive body of law” (p. 1) and that there is an “emerging field of international civil litigation” (p. 3). Although the authors have organized the book so as to treat nine topics in a way that “track[s] the course of lawsuits involving foreign parties in U.S. courts,”² they also identify and trace the influence of five “common” or “basic themes that frequently recur in international civil litigation” (p. 3). These common themes, in their minds, make international civil litigation a field rather than a collection of topics.

This scheme of organization is felicitous, offering both detailed treatment of the most important practical problems in international civil litigation and recurrent opportunities to think about unifying themes. The book is as much a treatise as it is a collection of materials for course study, reflecting not only an extraordinary bibliographic

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Just prior to publication of this review, the Supreme Court acted on the proposed amendments to Federal Rules of Civil Procedure 4 and 26 that are criticized *infra* text accompanying notes 161-200 and 228-40, declining to transmit them “at the present time pending further consideration by the Court.” Letter from Chief Justice William H. Rehnquist to Vice President Dan Quayle (Apr. 30, 1991) (copy on file with author).

1. See Burbank, *The Costs of Complexity* (Book Review), 85 MICH. L. REV. 1463 (1987). International civil litigation tends to be complex not so much because of party structure, but because of the substantive or procedural issues involved. See *infra* text accompanying notes 14-55 (legislative jurisdiction), 102-200 (service of process abroad), 201-40 (taking evidence abroad).

2. P. 2. The nine topics, treated in successive chapters, are Judicial Jurisdiction, Service of Process Abroad, Forum Selection, Taking Evidence Abroad, Foreign Sovereign Immunity, Subject Matter and Legislative Jurisdiction, The Act of State Doctrine, Recognition and Enforcement of Foreign Judgments, and International Arbitration.

achievement³ but also the ambition of the authors, practitioner/scholars who, in the best tradition of international lawyers, have made numerous contributions to knowledge.⁴ As a result, *International Civil Litigation* should quickly both stimulate and become the standard text for courses in law schools, and it is an essential volume for the libraries of firms involved in international practice. It is also a good place for scholars interested in expanding their horizons, whether from a base in domestic or in international law, to begin to think about problems at the "crossroads."⁵

As one such scholar, whose base lies in the domestic law of procedure (including conflicts and evidence), I have found it fruitful, if not necessary, to approach *International Civil Litigation* by considering the roles of domestic analogies. Certainly, as the authors contemplated, this has proved a useful pedagogical strategy. Most students come to the study of international litigation after learning the rules governing domestic litigation. Even if only as a concession to the shortness of life, initiates look for the familiar as a means to grasp the unfamiliar, and domestic analogies can effectively stress continuities and highlight discontinuities. In this case "students" includes many, perhaps most, teachers and practitioners of international civil litigation, for whom the approach should also prove congenial. Finally, it is a useful perspective from which to judge the authors' claim that there is, or is about to be, a field here in the sense of a discretely identifiable "law of international civil litigation" (p. 3), as well as to address the implicit normative questions: should there be such a field and, if so, what should it contain?

In pursuing these inquiries, I do not mean to question the utility of the course of study offered in *International Civil Litigation*. On the contrary, as I have already suggested, the authors' materials, including their penetrating questions and textual analyses, make a compelling case for the systematic study of the problems presented in litigation that involves foreign parties. I am persuaded, in other words, that international civil litigation is an area or field of law of what Michael

3. Particularly because many teachers, students, and practitioners using *International Civil Litigation* for the first time may be unfamiliar with much of the vast literature cited by the authors, a bibliography, organized by topic, would be useful. I would also recommend that the next edition include a table of cases.

4. See, e.g., Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INTL. & COMP. L. 1 (1987); Westin & Born, *Applying the Aerospatiale Decision in State Court Proceedings*, 26 COLUM. J. TRANSNATL. L. 297 (1988); Westin, *Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England*, 19 LAW & POLY. INTL. BUS. 325 (1987). Mr. Born also edits a newsletter for his firm, Wilmer, Cutler & Pickering. According to the first issue, it "will be distributed quarterly, free of charge, to lawyers and others interested in U.S. litigation involving foreign parties or transactions." *Editor's Introduction*, Intl. Litig. Newsletter, Feb. 1990, at 1. I have found the newsletter, "[t]he organizational and analytical approach of [which] is modelled on" *International Civil Litigation*, very valuable.

5. See Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INTL. L. 280 (1982).

Moore calls a "nominal kind,"⁶ one that "can . . . be justified by the heuristic needs of the legal profession."⁷ I am interested in the question whether it is, as the authors seem to claim, more than that, and in particular whether it is a field or area of "a functional kind."⁸ Does that which the authors call international civil litigation seek, in Moore's words, "to realize some underlying kind of justice,"⁹ and if not, should it do so? Ultimately, my hope is to shed light on that which is, and that which could be, of special interest from the perspective of legal development, including both the applicable legal rules and the appropriate sources of the rules, whatever their content.

II. IS THERE A FIELD IN THIS CLASS?¹⁰

The themes that the authors identify as recurring in international civil litigation (pp. 3-18) are an amalgam of norms (public international law, international comity), structural concerns (international relations, federalism), and methodology (interest-balancing). Viewing international relations as a subset of separation of powers, neither the structural concerns nor the methodology is unique to international cases, and the norms have domestic analogs. Indeed, our domestic constitutional law of personal jurisdiction (full faith and credit and due process) was shaped by, or at least explained in terms borrowed from, international law.¹¹ Similarly, both the traditional choice of law apparatus of Joseph Beale¹² and the more modern techniques of Brainerd Currie¹³ bear evidence of international influences, in rules or approaches developed elsewhere or at home for international cases. In other words, viewed in historical context, domestic conflict of laws has

6. Moore, *A Theory of Criminal Law Theories*, in TEL AVIV STUDIES IN LAW (D. Friedmann ed. 1991) (forthcoming).

7. *Id.*

8. *Id.*

9. *Id.*

10. With apologies to Stanley Fish. See S. FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980).

11. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878); Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 871-80 (1989); Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 87, 124 (1983). The authors note *Pennoyer's* reliance "on two related principles of public international law." P. 23.

12. For Beale's debts to the seventeenth-century Dutch jurist, Ulric Huber, and to the nineteenth-century English jurist, A.V. Dicey, as well as to Joseph Story, see Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 306-08, 313-14 (1953). For recent work on Huber, see Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73 (1990).

13. Currie conceived of choice of law as a process of statutory construction or interpretation. He found support, and perhaps inspiration, in the work of Lord Kames of Scotland. See B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 379 (1963). Moreover, Currie's thinking was influenced by the Supreme Court's decision in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), involving the application of the Jones Act to a Danish seaman injured on board a Danish ship while in Havana harbor. See B. CURRIE, *supra*, at 364-75, 379, 434-35, 604-06, 631.

been responsive to international as well as domestic influences and, to that extent at least, international litigation has not been a discrete field.

Nor am I persuaded that international civil litigation is a discrete field today. It seems more accurate to view international civil litigation as part of a process of cross-fertilization in which (1) doctrine and techniques developed in the context of domestic cases are brought to bear on problems presented in international litigation, and (2) the increasingly international dimensions of litigation in our courts prompt changes in doctrine and techniques, which are then applied in domestic cases.

A. *Domestic to International*

As one example of a problem in international civil litigation on which our courts have brought to bear doctrine and techniques developed in domestic cases,¹⁴ consider legislative, or as it is sometimes called, prescriptive jurisdiction (pp. 432-88). For one fresh to the study of international litigation from domestic law, the concept of "the authority of a state to make its substantive laws applicable to conduct, relationships or status" (p. 432) may be difficult to grasp. Our tendency to frame issues of lawmaking power in terms of individual rights pushes into the background concerns about sovereign prerogatives that inform the concept of legislative jurisdiction and place it at the crossroads of public and private international law.

In mining domestic analogs, vertical (federal-state) thinking conjures up questions about the extent of federal legislative power, potential or exercised, as against the powers of the states. Yet, meaningful limitations on Congress' potential legislative powers are hard to find today.¹⁵ Moreover, domestic questions about the extent of exercised federal legislative power tend to be submerged in careless talk about subject matter jurisdiction, in part reflecting our constitutional history,¹⁶ that invites confusion as between legislative and judicial pow-

14. That the doctrine and techniques have been developed in domestic cases does not mean that they originated here, as the history recounted here demonstrates. Rather, we see a process in which conflicts doctrine and techniques imported from abroad and refined and applied in domestic cases, are then applied in international cases, with additional domestic refinements similarly extending their influence.

15. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (upholding the application of federal overtime and minimum wage requirements to state employees); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 700-06 (1974).

16. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 comment c (1987); Lowenfeld, *Antitrust, Interest Analysis, and the New Conflict of Laws* (Book Review), 95 HARV. L. REV. 1976, 1979 (1982) ("the idea of 'subject matter jurisdiction' is a misplaced relic from the constitutional battles of the 1920's and 1930's"); Comment, *Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases*, 132 U. PA. L. REV. 121 (1983). To their credit, the authors are alert to such confusion. See p. 404.

ers.¹⁷ Confusion on that score is also promoted by the Supreme Court's approach to filling federal legislative gaps with judge-made law.¹⁸

Horizontal (state-state) thinking is not likely to be much more helpful in a search for domestic guidance on the problem of legislative jurisdiction in international cases, although the analogy is closer. Conflicts students know that state legislatures rarely address questions of power by providing choice of law rules or otherwise indicating the intended reach of the norms they establish.¹⁹ They also know or should know that, when framed in terms of legislative intent, interest analysis is usually an exercise in fiction.²⁰ The result has been that the closest thing to legislative jurisdiction upon which such students can fasten are domestic constitutional limitations on the application of state law. Here too, the search for meaningful limitations is largely an exercise in history.²¹

Still, approaching the problem of legislative jurisdiction in international cases from a domestic perspective has some value. Once attention is focused on the appropriate analogs, it becomes clear that the uniform tendency of our domestic law has been toward the loosening of mandatory controls on the exercise of lawmaking power, federal and (inter-) state, with the result that meaningful limitations at both levels are the result of self-restraint. In that process, courts have played a prominent role, if only by default.

The same has been true, I believe, in international cases in our courts when the question has been whether there is legislative jurisdic-

17. Professor Brilmayer observes "that [because of the 'public law taboo'] in those cases where the *Restatement of Foreign Relations Law* (but not the *Restatement of Conflicts*) applies, lack of legislative jurisdiction entails lack of subject matter jurisdiction." Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 *LAW & CONTEMP. PROBS.* (No. 3), 11, 13 (1987) (footnote omitted). She adds: "In a case brought in federal court, adjudicative jurisdiction will typically depend upon whether there is a federal question, which in turn depends on whether there is local legislative jurisdiction. If foreign law governs, the case must be dismissed." *Id.* This is not helpful. See, e.g., *Bell v. Hood*, 327 U.S. 678, 681-82 (1946) ("where the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit").

18. See Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 *CORNELL L. REV.* 733, 755-62 (1986). As pointed out there, the Court too often has "leap[ed] from a conclusion of federal power to one of judicial power," *id.* at 758 (footnote omitted), and, although in recent years it has been more reluctant to apply uniform federal rules in preference to state law adopted as federal law, the Court has treated the matter as one of "judicial grace or borrowing," *id.* at 762, when in fact the process is governed by the Rules of Decision Act, 28 U.S.C. § 1652 (1988). See *infra* note 126.

19. See, e.g., *B. CURRIE*, *supra* note 13, at 81-82.

20. See Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 *MICH. L. REV.* 392 (1980).

21. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). But see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-23 (1985) (application of Kansas laws to every claim in nationwide class action unconstitutional).

tion. Perhaps a reason is that domestic experience and influences have long shaped, and continue to shape, our responses to such questions.

Professor Lowenfeld²² has noted the reference to conflict of laws in Judge Hand's opinion in the *Alcoa* case,²³ which ushered in the concept of "effects" jurisdiction in international antitrust cases (pp. 437-38, 442-43). He also pointed out that in the 1909 *American Banana* decision,²⁴ Justice Holmes made reference to a domestic conflicts classic.²⁵ If domestic conflicts thinking "changed a good deal [between] the *Alcoa* case"²⁶ and the time Professor Lowenfeld was writing, even greater changes had occurred since 1909. The one constant has been resort to domestic law for rules and techniques that may also serve in international cases.

Professor Lowenfeld is a champion of cross-fertilization, and the assimilative views he expressed in his 1979 Hague Lectures²⁷ proved highly influential in the formulation of the *Restatement (Third) of the Foreign Relations Law of the United States*.²⁸ The *Restatement's* provisions on prescriptive jurisdiction, in particular section 403,²⁹ bring to

22. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for their Interaction*, 163 RECUEIL DES COURS 311, 380-81 (1979).

23. *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945).

24. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

25. In a reference usually omitted in editions of the *American Banana* case for antitrust or international law purposes, Justice Holmes continues "This principle was carried to an extreme in *Milliken v. Pratt*, 125 Mass. 374 (1878)." In that case, as all students of American conflict of laws cases will remember, a Massachusetts lady was deprived of the defense of a Massachusetts rule prohibiting married women from guaranteeing their husbands' debts, on the ground that her guarantee had been mailed from Massachusetts to Maine and had only there become effective upon receipt by the lender and execution of the contract that gave rise to the debt.

Lowenfeld, *supra* note 22, at 435 n.119; see *American Banana*, 213 U.S. at 356. The Court also referred to A.V. Dicey's treatise on conflicts. A.V. DICEY, *CONFLICT OF LAWS* (2d ed. 1908); see 213 U.S. at 356. *International Civil Litigation* discusses *American Banana* at pp. 435-36.

26. Lowenfeld, *supra* note 22, at 381.

27. Lowenfeld, *supra* note 22.

28. See *id.* at 364; see also Lowenfeld, *Sovereignty, Jurisdiction, and Reasonableness: A Reply to A.V. Lowe*, 75 AM. J. INTL. L. 629, 637-38 (1981). Professor Lowenfeld was an Associate Reporter for this effort. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES v (1987).

29. § 403. Limitations on Jurisdiction to Prescribe

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

bear on the problem of extraterritorial jurisdiction the full panoply of techniques, from the consideration of contacts³⁰ to the evaluation of interests,³¹ that have been used to dissolve and resolve domestic choice of law problems.³² Not surprisingly, those provisions have been the object of many of the same criticisms with which modern choice of law approaches are taxed, including unmanageability and unpredictability, lack of institutional capacity and expertise, and parochial bias.³³

Just as domestic rules of constitutional law today provide few checks on federal legislative power vis-à-vis the states or on state legislative power vis-à-vis other states,³⁴ so do rules of international law

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987). Section 402 provides:

§ 402. Bases of Jurisdiction to Prescribe

Subject to § 403, a state has jurisdiction to prescribe law with respect to

(1)(a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id. at § 402. Both sections are discussed at pp. 459-65.

For illustration of the principles set forth in §§ 402-03 in specific substantive contexts, see §§ 411-13 (tax); § 414 (foreign subsidiaries); § 415 (antitrust); and § 416 (securities regulation). See also § 441 (foreign government compulsion); § 442 (transnational discovery).

30. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(a), (b).

31. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(c), (e), (g).

32. See Maier, *supra* note 5, at 286-87. Section 403(2) can be seen as a means to discover false conflicts, with § 403(3) providing the method for resolving true conflicts. See Meessen, *Conflicts of Jurisdiction Under the New Restatement*, 50 LAW & CONTEMP. PROBS. (No. 3), 47, 68-69 (1987). For the domestic analogs, see, e.g., B. CURRIE, *supra* note 13, at 177-87.

33. Pp. 461-65. For a sampling of domestic critiques of interest analysis to the same effect, see R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 230-34 (4th ed. 1987). For work that ties the critiques together, see Brilmayer, *supra* note 17.

34. The extent to which the Constitution protects foreigners in our courts is a subject that may warrant additional attention from the authors in the next edition. They note that the Court has "assumed that the due process clause [is] fully applicable to the assertion of [personal] jurisdiction over foreigners . . ." P. 67. But constitutional limitations may be relevant to other topics treated in *International Civil Litigation*, including legislative jurisdiction. See Brilmayer,

only weakly constrain extraterritorial assertions of legislative jurisdiction. Indeed, Congress can constitutionally disregard rules of international law in passing legislation for application to conduct or transactions with contacts outside of the United States (p. 443), and there is no international tribunal empowered to check its excesses.³⁵ As a result, the problems of authority in the domestic and international contexts are alike primarily because, and to the extent that, Congress fails to specify the territorial reach of federal legislation.

For a time, traditional territorial conflicts rules and twin presumptions against extraterritorial application and interpretations that would violate international law (p. 434) — *American Banana* may reflect all three³⁶ — operated to put the brakes on extraterritorial applications of U.S. law. But, as we have seen, domestic conflicts thinking changed, and the presumption against extraterritorial application may be hard to justify in connection with statutes explicitly directed to “foreign commerce.”³⁷ Today such a presumption is difficult to justify at all,³⁸ which may be one reason why so much effort has been devoted to invigorating its twin presumption. The focus of the effort has been to establish that the jurisdictional “rule of reason” of section 403 (pp. 459-65) is a rule of customary international law.

When, as is usually the case, Congress has failed to specify whether or to what extent a statute applies to conduct or transactions having extraterritorial links, it falls to the courts to “interpret” the statute. Left to their own devices, U.S. courts predictably, but not invariably (pp. 462-63), choose an interpretation of the statute that advances its policies over one that frustrates those policies or subordinates them to the policies of another country. The devices that lead to such behavior are not confined to knee-jerk parochialism. Brainerd Currie’s interest analysis proceeded on the premise that courts in a democratic society

supra note 17, at 24-35; Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1592, 1598-99 (1978). *But see* Juenger, *Constitutional Control of Extraterritoriality?: A Comment on Professor Brilmayer’s Appraisal*, LAW & CONTEMP. PROBS., Summer 1987, at 39, 41 (domestic experience with constitutional control of state court jurisdiction and state choice of law do not inspire confidence about “the Court’s ability to fashion principles that would resolve problems created by the overlap of domestic and foreign legislation . . .”).

35. *See* Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733, 744-45 (1983).

36. *See* *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909). *International Civil Litigation* quotes from this portion of the opinion at p. 436.

37. *See* Wood, *International Jurisdiction in National Legal Systems: The Case of Antitrust*, 10 NW. J. INTL. L. & BUS. 56, 58, 72 (1989).

38. *See* Turley, “*When in Rome?*”: *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990). *But see* Wood, *supra* note 37, at 72 (advocating presumption against extraterritorial effect). The Supreme Court has recently declined an opportunity to break down distinctions, decried by Professor Turley, between the extraterritorial reach of market and nonmarket legislation. *See* *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991) (Title VII of 1964 Civil Rights Act not applicable to U.S. citizen employed abroad by U.S. employer).

should not balance the interests of two or more sovereign states,³⁹ and, in response to his critics, the most that Currie would allow was "room for restraint and enlightenment in the determination of what state policy is and where state interests lie."⁴⁰ Those who reject Currie's proposed solution to true conflicts (the law of an interested forum applies) are necessarily engaging, through a variety of techniques,⁴¹ in what might be called interstate comity.

Some courts and commentators see in section 403 nothing more than international comity (p. 461), what Professor Lowenfeld has called "unilateral interest analysis, although tempered by statesmanship."⁴² It was Lowenfeld's hope that the section would state a rule of international law.⁴³ If it did,⁴⁴ the presumption against interpreting a statute so as to bring it in conflict with international law would provide U.S. courts with a principled basis⁴⁵ upon which to refuse to apply domestic legislation that did not specify its reach to conduct or transactions the regulation of which would serve the statute's policies. My conditional specifies a "principled basis" rather than a "principled method." Because status as customary international law requires "consistent practice of states followed out of a sense of legal obligation" (p. 13), variations in practices regarding the exercise of judicial discretion can defeat claims to such status,⁴⁶ one of many reasons why

39. See B. CURRIE, *supra* note 13, at 182.

40. *Id.* at 186; *see also id.* at 604.

41. See, e.g., R. CRAMTON, D. CURRIE & H. KAY, *supra* note 33, at 241-46.

42. Lowenfeld, *supra* note 16, at 1984.

43. See *id.* at 1980-84; Lowenfeld, *supra* note 28, at 638; *see also* Maier, *supra* note 5, at 281-85 (distinguishing two meanings of comity).

44. Section 403 had a stormy history in the deliberative processes of the American Law Institute. See Kessedjian, *Le Restatement of the Foreign Relations Law of the United States. Un Nouveau Traité de Droit International?*, J. DU DROIT INTL., Jan.-Mar. 1990, at 56-58; Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 MICH. J. INTL. L. 450, 465-68 (1989). The "principle of reasonableness" in the exercise of legislative jurisdiction is said to be "a rule of international law." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 comment a (1987). No such statement is made in connection with § 403(3), involving conflicting exercises of jurisdiction, the result of disagreement on the point among members of the Institute. See Kessedjian, *supra*, at 62 n.104; Maier, *supra*, at 468.

45. This is a rule of legislative construction whose purpose is to ensure that courts do not accidentally, by exercising the judicial power, put the United States in violation of its international obligations when that result was not intended by the political branches. Under this rule of construction, however, the court's search of international authorities is carried out to serve the domestic constitutional principle of separation of powers, not to give effect to substantive international community policy for its own sake.

Maier, *supra* note 44, at 454-55 n.12; *see id.* at 466.

46. See Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INTL. L. 185, 208 (1984); *cf.* Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat, 902 F.2d 1275, 1283 (7th Cir. 1990) (Easterbrook, J., concurring) (criticizing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 because "a court's job is to reach judgments on the basis of rules of law rather than to use a different recipe for each meal.").

commentators deny it to section 403's provisions.⁴⁷

The aspirations and claims of the authors of the *Restatement* notwithstanding, the problem of legislative jurisdiction in international cases is, like its analogs in domestic law, chiefly one of self-restraint.⁴⁸ Whatever the force of political theory in favor of forum law in interstate cases,⁴⁹ we should take very seriously concerns about refusals to apply U.S. law (the policies of which would be served by its application) when they implicate this nation's interests in foreign policy or foreign trade.⁵⁰ Those who advocate a dichotomy between subject matter jurisdiction (what Congress intended) and prescriptive jurisdiction (what international law permits) broaden the scope of a domestic error.⁵¹ "Subject matter jurisdiction" is not the question,⁵² and the question of legislative jurisdiction is always one of statutory construction or, depending on where one draws the line between interpretation and supplementation, of federal common law.⁵³ In approaching that task, courts should be alert not only to the limited role of customary international law, but also to limitations on their role and competence and to the very real risk that "[j]udicial application of a restraint doctrine could . . . undercut attempts by the Executive to negotiate compromises over jurisdictional conflicts"⁵⁴ In many cases, the real problems are not those of legislative jurisdiction; they

47. See, e.g., Gerber, *supra* note 46; Meessen, *supra* note 32, at 59; Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 704-05 (1986); Comment, *Antitrust Suits Involving Foreign Commerce: Suggestions for Procedural Reform*, 135 U. PA. L. REV. 1003, 1031 (1987). For similar views on the *Restatement's* provisions regarding antitrust and securities transactions, see Meessen, *supra* note 32, at 54.

48. Cf. Oxman, *supra* note 35, at 747-48 (principles of self-restraint flowing from "absence of outside judicial control" and inability of courts to perform "negotiating and political functions").

49. See *supra* text accompanying notes 39-40. The influence that legislative jurisdiction cases with international elements had on Brainerd Currie's thinking about domestic choice of law, see *supra* note 13, may in fact have made him more sensitive to such matters.

50. See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-51 (D.C. Cir. 1984) (reprinted at pp. 463-64).

51. *But see* Turley, *supra* note 38, at 635-36 (making such a dichotomy).

52. See *supra* text accompanying notes 16-17.

53. See Brilmayer, *supra* note 17, at 35-36; Maier, *supra* note 44, at 464-76.

54. Trimble, *supra* note 47, at 706. Conversely, "[d]ecisions by national courts that purport to recognize foreign governmental interests while in fact adopting a parochial analysis do a greater disservice to the international system than would a straightforward approach that gives primacy to forum interests subject to international dispute resolution in the diplomatic forum at a later time." Maier, *Interest Balancing and International Jurisdiction*, 31 AM. J. COMP. L. 579, 594-95 (1983).

By "the limited role of customary international law," I mean primarily to refer to the scope of existing rules, acknowledged as such by the international community. I am also inclined, however, to agree with Professor Maier that customary international law is not itself an authoritative source of law. See Maier, *supra* note 44, *passim*; *infra* text accompanying notes 242-46. *But see*, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 2 Introductory Note (1987) ("customary international law . . . is a kind of federal law"); Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1566 (1984) (customary law is "self-executing").

In any event, there is scope for "restraint and enlightenment in the determination of what

are problems involving disagreement on matters of substantive law and state policy.⁵⁵

Having covered the history and current practice of legislative jurisdiction in broad scope and admirable detail, the authors of *International Civil Litigation* ask whether section "403's interest-balancing [is] any different from many approaches in the conflict of laws context" (p. 462). I have suggested a negative answer to that question, one that ultimately turns on the role and content of international law in this context. That the techniques should be so similar is no surprise given the provenance of section 403, and both the similarities and the lineage are evidence against the notion that legislative jurisdiction in international cases is part of a discrete field. At the same time, however, the similarities should not obscure the distinctive attributes of international cases that may call for special deference to choices made, or that might be made, by the political branches.

B. *International to Domestic*

To the extent that international cases in our courts raise questions of procedure, it would be surprising if they were treated differently than domestic cases. For the tendency of the modern federal law of procedure, whether created in court rules or in cases, has been toward uniform, transsubstantive rules that apply to all cases in all federal courts.⁵⁶ To be sure, today the rules are often only formally uniform and transsubstantive, and the whole notion is, as a normative matter, increasingly subject to attack.⁵⁷ But the pull toward applying the same rule to different substantive contexts has been so strong that substantive concerns originally animating a rule are forgotten,⁵⁸ and attempts to carve out an exception in a particular substantive context are vigorously resisted.⁵⁹ Moreover, some of the most prominent do-

state policy is and where state interests lie." B. CURRIE, *supra* note 13, at 186, *quoted supra* text accompanying note 40; *see* Maier, *supra* note 5, at 315.

55. *See* Juenger, *supra* note 34, at 46; Wood, *supra* note 37, at 73-74.

56. *See, e.g.*, Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1929-41 (1989).

57. *See id.*; Burbank, *supra* note 1, at 1473-75; Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 713-19 (1988); Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2018-26 (1989).

58. Thus, although the abrogation of mutuality of estoppel in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971), resulted from a consideration of both the policies of the patent law and considerations of efficiency, 402 U.S. at 328-50, nonmutual issue preclusion quickly became the rule in federal preclusion law. The same is true of the rule in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966), regarding the preclusive effect of administrative factfinding.

59. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 268-69 (1986) (Rehnquist, J., dissenting) (imputing to the Court a special summary judgment rule in libel cases); *Calder v. Jones*, 465 U.S. 783, 790 (1984) ("We . . . reject the suggestion that First Amendment concerns enter into the jurisdictional analysis"); *see also infra* text accompanying note 223 (presumption

mestic examples involve rules that are "procedural" only if that label is expansively applied, including constitutional rules regarding the limits of state court jurisdiction.⁶⁰ Those rules have also provided an opportunity for generalization to operate between international and domestic cases. But they are not the only examples of cross-fertilization from international to domestic cases, of adjusting the rules of the game for a larger playing field rather than playing by different rules.

1. *Jurisdiction to Adjudicate*

The authors of *International Civil Litigation* treat judicial jurisdiction exhaustively, perhaps too much so.⁶¹ Most undergraduate law students will have covered the territory thoroughly in their first year. For them, the important thing is to see how, if at all, the involvement of foreign parties changes the analysis.⁶² Graduate law students and practicing lawyers may be differently situated; however, the authors provide a good deal of textual introduction, which can be supplemented by lecture for students and by other texts for lawyers.

The authors' textual material, although typically helpful and thorough, might be improved in two respects. First, the discussion of Rule 4 of the *Federal Rules of Civil Procedure* should note potential distinctions between standards of amenability (jurisdiction) when service can be made within the state, and there may therefore be scope for a federal standard in federal question cases, and when it must be made outside the state under Rule 4(e).⁶³ Second, the authors may give insufficient attention to the intense debate about the respective roles of territoriality or federalism on the one hand, and of reasonableness on the other, in constitutional limitations on state court jurisdiction.⁶⁴

that a subsequently enacted federal statute does not displace the Federal Rules of Civil Procedure).

60. See *supra* notes 58-59.

61. Chapter 2, treating judicial jurisdiction, occupies 100 pages (pp. 19-118) in a book that, absent appendices, etc., is 646 pages long. Apart from the considerations mentioned in the text, experience indicates that, for a two-hour, one-term course, that is too much.

62. Even though most law students and litigators are likely to be familiar with *Shaffer v. Heitner*, 433 U.S. 186 (1977), the attention the authors devote to in rem and quasi in rem jurisdiction (pp. 90-103) is wholly appropriate because of the importance of securing property to satisfy a judgment. The authors were also wise in treating in some detail jurisdiction based on corporate affiliations or agency (pp. 104-17), a subject that may be neglected in domestic procedure courses. Indeed, those materials provide an excellent opportunity to explore an important question in jurisdictional jurisprudence, to wit, the extent to which a firm should be able to structure its business so as to insulate itself from suit. This question is of particular importance in the international context, where the constellation of laws and practices that an assertion of jurisdiction may entail can raise the stakes dramatically. Judge Breitel's dissenting opinion in *Frummer* (reprinted at pp. 114-15) gives a sense of the risks. For a penetrating analysis of the problems, see Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1 (1986).

63. See pp. 70-73; see also Lilly, *supra* note 11, at 137-38. But see *id.* at 138-39 (noting possibility of a federal amenability standard when service is made under Rule 4(d)(3)).

64. Pp. 48-49, 54-55. Perhaps as a result, the authors seem inappropriately agnostic on the

This debate has been directly fueled by Supreme Court opinions that sound now one theme and then the other, and it will surely continue to rage in the wake of the *Burnham* case,⁶⁵ upholding general jurisdiction based on the transitory presence of the defendant when served with process in the forum (pp. 35-42). It is, of course, a debate to which undergraduate law students at any good school will have been exposed in other courses. Yet, an international perspective may help to illuminate it.⁶⁶ More important for present purposes, attention to the debate and to the cases that have fueled it calls into question the authors' claim that the Court's 1987 decision in the *Asahi* case⁶⁷ represented a "modification of] domestic due process formulations in international cases" (p. 56), if by that claim they mean that different "due process formulations" are now applied in international and domestic cases.

The holding in *Asahi*, where the Court denied California's power to adjudicate an indemnity claim by a defendant against one of its component part manufacturers, will probably have limited significance because of its unusual facts, in particular the facts that the party invoking the court's jurisdiction was a Taiwanese corporation, that the claim involved was probably governed by foreign law, and that the putative party resisting jurisdiction was also a foreign corporation.⁶⁸ But the mode of constitutional analysis used to reach that holding was not intended to be, and has not been, restricted to international cases.

Beginning in 1977, when after a twenty-year hiatus the Court again became interested in federal constitutional control of state court

question whether, when a national amenability standard is prescribed or authorized, reasonableness plays a part in the fifth amendment analysis. See p. 77. But see Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 742 (1988) ("It seems also likely that the fifth amendment prevents a forum selection that is so unreasonably inconvenient to the defendant as to be a denial of 'fair play and substantial justice.'") (footnote omitted). One should distinguish between international law and the Constitution in deciding whether it makes a difference where in this country an internationally foreign defendant is sued. But see *Amusement Equip., Inc. v. Mordelt*, 779 F.2d 264, 271 (5th Cir. 1985); p. 39.

65. *Burnham v. Superior Court of Cal.*, 110 S. Ct. 2105 (1990); see *infra* text accompanying note 106; note 107.

66. In addition to promoting an understanding of international influences that shaped the history of territoriality, see *supra* text accompanying note 11, such a perspective would also provide a basis for evaluating continuing reliance on transient jurisdiction in light of developments abroad. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 comment e (1987); *id.* at Reporters' Note 5. There is irony in the fact that a rule once justified in terms of principles of international law "is no longer acceptable under international law if [presence] is the only basis for jurisdiction and the action in question is unrelated to the state." *Id.*; see also Hay, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 1990 U. ILL. L. REV. 593, 599-601.

67. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987). The case is excerpted and discussed at pp. 61-69.

68. See *Asahi*, 480 U.S. at 114-15. For international cases sustaining the exercise of jurisdiction after *Asahi*, see, e.g., *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911 (9th Cir. 1990); *Mason v. F. LLi Luigi & Franco dal Maschio Fu G.B.*, 832 F.2d 383 (7th Cir. 1987).

jurisdiction,⁶⁹ Justice Brennan had been trying to broaden the due process inquiry so that the attention paid to defendants did not pretermit consideration of the interests of plaintiffs or of the forums in which they sued.⁷⁰ Although the majorities in those cases paid lip service to the factors stressed by Brennan,⁷¹ in fact they decided the cases on the basis of an inquiry into the contacts among the defendant, the forum, and the litigation.⁷² As a result, the Court seemed unlikely to reverse an exercise of jurisdiction in which minimum contacts (narrowly viewed) were found to exist or, conversely, to sustain an exercise of jurisdiction in which minimum contacts (narrowly viewed) were lacking.⁷³ Moreover, the Court's cases provided little basis for formulating a sliding scale of minimum contacts.⁷⁴

Against this background, *Burger King Corp. v. Rudzewicz*,⁷⁵ gave Justice Brennan an opportunity to write his views into an opinion for the Court, if not yet into law. Although that opinion acknowledged that "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State,"⁷⁶ it went on to state that "these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" ⁷⁷ Moreover, the Court's opinion asserted that the same factors "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."⁷⁸

Asahi made law out of *Burger King's* dicta, but the law made was hard to discern. Given his conclusion that there were minimum contacts in *Asahi*, Justice Brennan (joined by three others) thought that "[t]his is one of those rare cases in which 'minimum requirements in-

69. The hiatus was from *Hanson v. Denckla*, 357 U.S. 235 (1958), to *Shaffer v. Heitner*, 433 U.S. 186 (1977).

70. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299-313 (1980) (Brennan, J., dissenting); *Shaffer v. Heitner*, 433 U.S. 186, 219-28 (1977) (Brennan, J., concurring and dissenting); Note, *Burger King v. Rudzewicz: Flexibility and Predictability in In Personam Jurisdiction*, 64 N.C. L. REV. 880 (1986); see also *infra* note 85 and accompanying text.

71. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 92 (1978).

72. See *World-Wide Volkswagen*, 444 U.S. at 294; see also *Shaffer*, 433 U.S. at 204; *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

73. See *Lilly*, *supra* note 11, at 107.

74. A possible exception to this generalization is *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). There, however, the Court (per Rehnquist, J.) was responding to the analysis of the Court of Appeals. See 465 U.S. at 773-81. In any event, Justice Brennan capitalized on the Court's opinion in *Keeton* when it came time for him to write for the Court in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). See 471 U.S. at 473-77.

75. 471 U.S. 462 (1985) (reprinted at pp. 50-54).

76. 471 U.S. at 474 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

77. 471 U.S. at 476 (quoting *International Shoe*, 326 U.S. at 320).

78. 471 U.S. at 477; see *supra* note 74.

herent in the concept of "fair play and substantial justice" . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.'"⁷⁹ But three members of the Court (including two who also joined Justice Brennan's opinion), led by Justice Stevens, expressed the view that "[a]n examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional."⁸⁰ Moreover, that part of Justice O'Connor's opinion that commanded a majority deployed a multifaceted analysis in which the place of minimum contacts was not at all clear.⁸¹

The worries arising from this cacophony were, at least for me, that (1) state (and federal) courts would discard minimum contacts analysis altogether, and (2) they would regard *Asahi* as an invitation to assert jurisdiction in the absence of minimum contacts (narrowly viewed). Neither development would, in my opinion, have been desirable. Minimum contacts is hardly a talisman, but, as developed and refined in recent years, the test has imparted some measure of predictability to an area of law where it is very important (p. 56). Moreover, the requirement of minimum contacts has served as a bulwark against states seeking not just to adjudicate but to apply forum law.⁸² Happily, the lower courts have not regarded *Asahi* as an invitation to abandon minimum contacts, but they have recognized that it is authority to consider something more.⁸³

Asahi was an international case, and its international dimensions

79. *Asahi*, 480 U.S. at 116 (Brennan, J., concurring in part and concurring in the judgment) (quoting *Burger King*, 471 U.S. at 477-78).

80. 480 U.S. at 121-22 (Stevens, J., concurring in part and concurring in the judgment) ("[T]his case fits within the rule that 'minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.'" (quoting *Burger King*, 471 U.S. at 477-78)).

81. See 480 U.S. at 113-16. The only reference to minimum contacts in Part II.B of Justice O'Connor's opinion, which was joined by all members of the Court except Justice Scalia, occurs in a sentence asserting that "[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." 480 U.S. at 114. It is likely, however, that references to other decisions giving primacy to minimum contacts, see 480 U.S. at 112-13, reflect the belief that it remains "the constitutional touchstone." *Burger King*, 471 U.S. at 474. See *infra* note 86.

82. See, e.g., *Rush v. Savchuk*, 444 U.S. 320, 325 n.8 (1980). The costs of a free-form due process inquiry would not be confined to litigants. The Supreme Court would be called on to clean up the mess it had created. When it did so, I expect we would find a majority of the Court reasserting the primacy of minimum contacts analysis and making it clear that multifaceted analysis is a one-way street, available to strike down an exercise of jurisdiction where the minimum contacts inquiry is indeterminate but not to bless jurisdiction where minimum contacts (narrowly viewed) are lacking. This seems to have been Justice Stevens' position in *Asahi*. See *supra* note 80. If not, the Court would soon find it necessary to revisit the question of federal constitutional control of state choice of law. Cf. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. Rev. 33, 97-98 (1978) (if forum law — then jurisdiction preference would require more adequate policing of choice of law).

83. See, e.g., cases cited *infra* note 87.

properly influenced the outcome.⁸⁴ But the case provided a vehicle for the reascension of a mode of constitutional analysis that had been repudiated in deeds if not in words.⁸⁵ The “modification” it initiated is not one that — judging from the opinions⁸⁶ — the Justices embracing it intended for application only in international cases, and it has not been so restricted in the lower courts in the years since the case was decided.⁸⁷

2. Arbitration

The perceived pressures of their dockets sooner or later would have caused the federal courts to reexamine rules that sought to protect their jurisdiction from efforts either to avoid judicial dispute resolution or to ensure that, if it was necessary, litigation proceed in a forum or forums agreed to in advance. In the case of agreements to arbitrate (pp. 605-46), Congress long ago set itself against the traditional judicial hostility. The potential of the Federal Arbitration Act⁸⁸ to override that hostility, however — particularly in state courts and state law cases in federal court — was not quickly realized.⁸⁹ More-

84. See *supra* text accompanying note 68; see also *Asahi*, 480 U.S. at 116 (“Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction . . . in this instance would be unreasonable and unfair.”).

The same may be true of the only two modern Supreme Court decisions that have involved assertions of general jurisdiction over corporations. See *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984) (reprinted and discussed at pp. 29-35); *Perkins v. Benguet Consol. Mining*, 342 U.S. 437 (1952). In neither case, however, did the Court suggest that a different mode of analysis applied in wholly domestic cases.

85. See *supra* notes 69-74 and accompanying text. Justice Brennan can be seen as merely taking over for Justice Black, who wrote a multifaceted opinion for the Court in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), and whose dissent in *Hanson v. Denckla*, 357 U.S. 235, 256-62 (1958) (Black, J. dissenting), he joined.

86. Note in particular the heavy reliance on *Burger King v. Rudzewicz*, 471 U.S. 462 (1985), a domestic case, in the two concurring opinions. See *supra* notes 79-80 and accompanying text. Note also the following passage in Part II.B of Justice O'Connor's opinion (joined by all other Justices except Justice Scalia):

We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination “the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.” *World-Wide Volkswagen*, 444 U.S. at 292 (citations omitted).
480 U.S. at 113.

87. See, e.g., *WNS, Inc. v. Farrow*, 884 F.2d 200, 204 (5th Cir. 1989); *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 284-85 (5th Cir. 1988); *Morris v. SSE, Inc.*, 843 F.2d 489, 494-95 (11th Cir. 1988).

Prior to *Asahi*, Professor Lilly criticized the tendency of our courts to treat international cases as if they were domestic for purposes of jurisdiction, but his point was that such treatment could lead to a “complete failure of domestic jurisdiction.” Lilly, *supra* note 11, at 125. *Asahi* may have exacerbated that problem. See Weintraub, *Asahi Sends Personal Jurisdiction Down the Tubes*, 23 TEXAS INTL. L.J. 55 (1988).

88. 9 U.S.C. §§ 1-14 (1988). See p. 618.

89. See Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on Shearson/*

over, even in cases to which the Act was unquestionably applicable, the federal courts carved out exceptions in particular substantive contexts.⁹⁰

International cases furnished occasions to reconsider the exceptions to the enforcement of agreements to arbitrate,⁹¹ and in those cases the Court placed weight on "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes."⁹² The authors of *International Civil Litigation* observe:

After *Mitsubishi*, the characterization of a contract as "international," rather than domestic, may be of importance in determining the arbitrability of at least some types of statutory claims, although recent Supreme Court decisions illustrate a readiness to enforce most arbitration agreements, even in the purely domestic context . . . [p. 630]

In fact, the *McMahon* case,⁹³ cited by the authors, suggests that international elements no longer have much salience when the question is arbitration, and I wonder whether they ever really did.⁹⁴ We see the same progression — indeed, the one influenced the other — in cases involving the enforceability of contractual forum selection clauses (pp. 172-208), with an international case, *The Bremen v. Zapata Off-Shore Co.*,⁹⁵ providing a vehicle for a change in the law that has been extended to domestic cases (p. 177).

International cases in our courts may present occasions for the application of rules of law that are not pertinent in wholly domestic

American Express, Inc. v. McMahon, 26 AM. BUS. L.J. 397, 401 (1988). For subsequent developments, federalizing the law of arbitration agreements subject to the Act, see *Perry v. Thomas*, 482 U.S. 483 (1987); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Hirshman, The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985). *But see* *Volt Information Sciences, Inc. v. Board of Trustees of Stanford Univ.*, 109 S. Ct. 1248 (1989) (state statutory provision permitting stay of arbitration applicable pursuant to choice of law clause).

90. *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427 (1953) (claims under Securities Act of 1933 nonarbitrable); *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968) (federal antitrust claims nonarbitrable); *Shell, supra* note 89, at 402-04.

91. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (federal antitrust claims arbitrable in international business context); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (claims under Securities Exchange Act of 1934 arbitrable in international business context).

92. *Mitsubishi*, 473 U.S. at 629, *quoted at* p. 629; *see also Scherk*, 417 U.S. at 515-19.

93. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (claims under Securities Exchange Act of 1934 and RICO arbitrable in domestic business context).

94. *See* 482 U.S. at 229, 232, 239-41; *Shell, supra* note 89, at 409; *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989) (holding claims under Securities Act of 1933 arbitrable, thus overruling *Wilko v. Swan*, 346 U.S. 427 (1953)).

95. 407 U.S. 1 (1972). The Court relied on *Bremen* in both *Scherk*, 417 U.S. at 518-19, and *Mitsubishi*, 473 U.S. at 629-31. For a prediction that the rule in *Bremen* would be extended, see *Maier, The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 VAND. J. TRANSNATL. L. 387, 397-98 (1973).

cases. Act of state⁹⁶ and foreign sovereign immunity (pp. 335-402) are two prominent examples. Yet, as the authors of *International Civil Litigation* recognize, even in these areas the rules have not been immune to domestic influences.⁹⁷ In any event, a few pockets of doctrine do not make a field of "a functional kind,"⁹⁸ although their existence enhances the value of materials designed to serve the needs of the legal profession.

III. SHOULD THERE BE A FIELD IN THIS CLASS?

All of this begs the normative questions whether, apart from what the courts and the American Law Institute have done or are doing, international civil litigation should be a field and what it should contain. As I have already suggested,⁹⁹ the answers to those questions may depend on the part that international law can and should usefully

96. Pp. 489-560. Although typically careful to expose nooks and crannies, these materials suffer from oversimplification and, at the same time, overcomplication. The former problem results from the authors' attempt to portray the act of state doctrine as a "principle of judicial abstention." P. 489; see also pp. 491, 493, 503, 506. But see p. 508. The latter results from a reading of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (reprinted at pp. 493-508) that, as the authors recognize (see p. 514), is not compelled. Both reflect a commendable desire to fit this chaos into the broader field that the authors have identified, if only through the identification of themes.

If, as is usual, the act of state doctrine prevents a court from adjudicating a claim brought by a plaintiff, it may be appropriate to label the doctrine one of judicial abstention, although even then, one should attend to the nature and form of the judgment entered, as well as to its preclusive consequences. But, as the authors well know, the doctrine also operates to defeat defenses, and in that context abstention hardly seems an adequate description. See *Sabbatino*, 376 U.S. at 438 (reprinted at p. 501).

The authors' reading of *Sabbatino* as reflecting "a more flexible doctrine of abstention, apparently calling for case-by-case consideration of a variety of factors" (p. 491) is supported by a quotation wrenched from context. In any event, that reading seems to confuse reasoning with holding. See pp. 503, 505.

What the materials do well to provide a sense of the evolution of the doctrine and of the problem of fitting it to the needs of an age in which territoriality has lost much, but by no means all, of its holding power. The authors' apparent preference for a functional approach is certainly understandable. It is not, however, the approach taken by the Supreme Court in its latest opinion on the subject. See *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Intl.*, 110 S. Ct. 701, 705 (1990) ("The act of state doctrine is not some vague doctrine of abstention. . . ."). That opinion will require revisions in the next edition. See pp. 513, 515, 546.

97. The authors recognize that the act of state doctrine has, at least historically, been based in part on "choice of law considerations." P. 489. The domestic perspective may have again assumed prominence with the Court's decision in *Environmental Tectonics*. See 110 S. Ct. at 704-07. Yet, a choice of law rationale for the doctrine is problematic. See Dellapenna, *Deciphering the Act of State Doctrine*, 35 VILL. L. REV. 1, 41-45 (1990).

Foreign sovereign immunity is an area where domestic analogs are obvious, and some of them have been incorporated in federal legislation that, since 1976, has controlled in the area. See, e.g., pp. 387-97 (discretionary functions exception in 28 U.S.C. § 1605 (a)(5)(A) (1988) drawn from Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1988)). Yet, it should not be assumed that the doctrines of foreign sovereign immunity and of sovereign immunity have common parentage, although today they appear to be shaped and justified by common rationales. See Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 FORDHAM L. REV. 155 (1981).

98. See *supra* text accompanying notes 6-9.

99. See *supra* text accompanying notes 39-55.

play, for it is in international law that one would expect to find an attempt "to realize some underlying kind of justice."¹⁰⁰ Perhaps, that is, international civil litigation should be a subfield within public international law. If so, *International Civil Litigation*, quite uncharacteristically, does not offer much help.¹⁰¹ The authors may have assumed that teachers and students would already be versed in public international law. Alternatively and more likely, they may simply have yielded to a sense of practical limits on what a course can cover, relying on their readers' initiative to overcome ignorance in the book's exhaustive literature references. Having made that effort I will approach the question through attention to two topics treated at length and with sophistication in *International Civil Litigation*: service of process and taking evidence abroad.

I conclude that one form of international law, custom, has only a limited role to play in these areas and that most U.S. courts and commentators, as well as law reformers, have denied to it even that potential. Although I see a much greater role for treaties, even here the potential has not been realized, and I argue that one need not look to international law for a cure. The same disease afflicts us in international as in wholly domestic cases and law reform efforts: an unwillingness to surrender power, including by taking separation of powers seriously, both when judges are deciding cases and when they are exercising delegated legislative power to make court rules.

A. *Service of Process Abroad*

Many law students learn little about service of process in their law school procedure courses, where notwithstanding — or maybe because of — Rule 4 of the Federal Rules of Civil Procedure, "service" is likely to be subordinated in discussion to the problem of jurisdiction.¹⁰² Litigators, of course, must learn the mechanics of service, but as the authors point out (p. 120), what they learn in domestic cases may ill equip them for the intricacies of international cases. Those intricacies consequentially increase two risks associated with service of process: (1) that effective service cannot be made within the time required by an applicable statute of limitations, and (2) that whatever service is made will be deemed ineffective when the time comes to en-

100. See *supra* text accompanying note 9.

101. Chapter 1 includes three pages on the "Role of Public International Law." Pp. 12-14. For students, I supplement that material with the *Judicial Education on International Law Committee of the Section of International Law of the American Bar Association: Final Report*, 24 INTL. LAW. 903 (1990).

102. FED. R. CIV. P. 4. Because Congress has so infrequently provided or authorized the development of federal jurisdictional standards by statute, Rule 4 has played a major role in defining the jurisdiction of federal courts, even in federal question cases. See *Omni Capital Intl. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987) (state law governs, subject to due process restrictions of fourteenth amendment, when service is made out of state under Rule 4(e) in federal question case).

force a domestic judgment abroad. The intricacies of service in international cases also increase its value to those who regard litigation as a war of attrition. The authors pay little attention to the first risk (p. 148), perhaps because of their emphasis on service in federal actions and the recent transmogrification of Rule 3 into a uniform tolling rule in federal question cases.¹⁰³ They are, however, alert to problems of expense and delay and to the risk that the temptation to mitigate them may lead to the use of means of service unacceptable to a foreign court in the enforcement context.¹⁰⁴

What is missing here is a framework to ground both an understanding of the reasons why service of process continues to cause so many problems in international cases and an understanding of approaches, whether in domestic or international law, that have promise to resolve those problems. For these purposes, domestic learning may not be simply inadequate; it may impede proper understanding.

Developments in the domestic law of service of process, spurred by the needs of a highly mobile society and by the evolving jurisprudence of federal constitutional controls on state court jurisdiction, have led us to conceive of the function performed by process in terms of the interests of the defendant in adequate notice and opportunity to defend.¹⁰⁵ We have lost sight of the historic function of asserting the state's power, indeed to such an extent that the Supreme Court's recent decision in the *Burnham* case,¹⁰⁶ arguably reflecting that historic function and little more, may seem incoherent.¹⁰⁷ Concern for ex-

103. *West v. Conrail*, 481 U.S. 35 (1987); see *Burbank*, *supra* note 57, at 698-709. A "second chance to comply with the Convention" (p. 148) will not save a litigant from the bar of a statute of limitations that requires service rather than filing to stop the period. See *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980).

104. Counsel must carefully consider the advantages and risks of different service mechanisms and select the mode of service (or combination thereof) best suited to the client's case. This requires weighing the relative importance in particular cases of the often conflicting goals of minimizing costs, ensuring foreign enforceability of any U.S. judgment, and accomplishing service promptly.

P. 127.

105. Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*, 95 U.S. 714, 733. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken v. Meyer*, 311 U.S. 457, 463.

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); see *Carrington*, *supra* note 64, at 733-34.

106. *Burnham v. Superior Court of Cal.*, 110 S. Ct. 2105 (1990) (upholding general jurisdiction based on transitory presence of defendant in forum).

107. "The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'" *Burnham*, 110 S. Ct. at 2115. Unfortunately, Justice Brennan's opinion concurring in the judgment is no more

pense has led us further away from involvement of the state in the process,¹⁰⁸ and impatience with what is seen as the strategic insistence on formalities knows no international boundaries.¹⁰⁹

Not all countries share the American view of the limited role of service of process (p. 131). Nor should this be surprising when one recalls that elsewhere active involvement of the state (through the judge) may reflect a normative view of litigation that is deeper than a perceived caseload crisis,¹¹⁰ that elsewhere a "foreign" defendant usually means one affiliated with another nation-state (and not one whose courts are bound by the full faith and credit clause or an equivalent), and that elsewhere people may not yet have come to regard litigation as a fact, however unpleasant, of everyday life.¹¹¹

The authors of *International Civil Litigation* note that, even in the recent past, service of process abroad in connection with U.S. civil

persuasive in arguing that the assertion of jurisdiction in *Burnham* was constitutionally reasonable. See 110 S. Ct. at 2120-26 (Brennan, J., concurring in the judgment).

Presumably not even the Justices who voted to uphold transient jurisdiction in *Burnham* because of its "pedigree" alone, 110 S. Ct. at 2116, would sustain on that basis an exercise of general jurisdiction over a foreign (including internationally foreign) corporate defendant based only on service of an officer within the state. *But see* p. 42 (noting division among the few courts that have considered the question). The Supreme Court long ago held that "[j]urisdiction over a corporation of one State cannot be acquired in another State or district in which it has no place of business and is not found, merely by serving process upon an executive officer temporarily therein, even if he is there on business of the company." *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119, 122 (1927).

108. Rule 4 was amended in 1983 largely to remove U.S. marshals from the role of process servers and to permit greater use of service by mail. Pub. L. No. 97-462, § 2, 96 Stat. 2527 (codified as amended at FED. R. CIV. P. 4(c)(2)(A), (B); 4(c)(2)(C)(ii), (D), (E)).

109. See *infra* text accompanying notes 168-70.

110. Whether or not it is still "the view of most civil law countries[]" that principal authority for all judicial acts is and should be in the hands of public officials," Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube*, 49 MINN. L. REV. 1069, 1132 n.203 (1965), the "public character of civil procedure," as a result of which "the judge had to become an active participant, directing and controlling the unfolding of the proceeding," has long been a characteristic of European civil law systems. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 471 comment b (1987) ("Civil law states generally regard service of judicial process as a sovereign act that may be performed in their territory only by the state's own officials and in accordance with its own law."); Cappelletti & Garth, *Introduction—Policies, Trends and Ideas in Civil Procedure*, in XVI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW § 1-19 (M. Cappelletti ed. 1984). See *id.* at § 1-68. For descriptions of service in other countries, see, e.g., Kohl, *Romanist Legal Systems*, in *id.* at § 6-94 ("service" of the act is governed by a formalism just as strict as that governing its drafting. . . . The law assigns this task to a messenger of justice. . . ."); Schima & Hoyer, *Central European Countries*, in *id.* at § 6-139 ("Service of process is an act of state and may, therefore, take place abroad only through the foreign authorities."); Wengerek, *Socialist Countries*, in *id.* at § 6-215 ("In Socialist states it is axiomatic that procedural documents shall be served by an officer of the court, and not by the parties.") (footnote omitted); see also *infra* note 111.

111. One reflection of this may be the requirement in some systems that a judge review the complaint before it can be served. See Ekelof, *Scandinavian Countries*, in XVI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, *supra* note 110, at § 6-342; Schima & Hoyer, *supra* note 110, at § 6-137; Wengerek, *supra* note 110, at §§ 6-230 to 6-231; Vescovi, *Iberian Peninsula and Latin America*, in *id.* at § 6-396.

litigation has evoked diplomatic protests (p. 129). Moreover, although the materials might suggest that the problem has been confined to the context of administrative subpoenas and implicates only the question of "enforcement jurisdiction" (pp. 128-31), the authors provide hints that such is not the case (p. 125) and question any distinction between "notice" and "compulsion" (p. 131). They do not provide, however, sufficient information or perspective for evaluating the "[m]ajority view of [the] effect on U.S. proceedings of service abroad in violation of foreign law" (p. 128), which is that the violation is not grounds to quash. The chapter would be well served by a section, necessarily general and comparative, that explores the service rules of foreign states and the implications of customary international law.¹¹²

As the authors implicitly recognize, the best strategy to resolve the conflicts undoubtedly consists in international service conventions, two of which are included in appendices to the book (pp. 651-84), and one of which, the Hague Service Convention, is explored in detail (pp. 136-60). Such conventions are a substitute for our full faith and credit clause, mooting both choice of law and customary international law questions (which may not be independent) that can arise with respect to service. They are not, of course, a perfect substitute. As the materials in *International Civil Litigation* make clear, problems of interpretation remain, about which there can be a difference of opinion within one signatory state (pp. 156-60). Differences of opinion are more likely between signatory states, because mutually agreed upon language masks fundamental assumptions about law and society that may not derive from a shared tradition,¹¹³ and no tribunal can impose a uniform interpretation. But, as the materials also suggest (p. 142 n.97), not every conflicting interpretation requires litigation, and the framework for dialogue that an international convention establishes — perhaps its most enduring contribution — may help to resolve conflicts that stem not so much from ambiguous language as from differences in those fundamental assumptions.

Interpretation and discussion, two forms of dialogue, do not exhaust the opportunities for accommodation either when a subject is explicitly covered by an international convention or when it is not. The conventions themselves inevitably present questions as to the scope of their coverage, and even when their specific provisions are not strictly applicable, they may still bear on the solution to the problem. Domestic law may not be clear; customary international law often is not. A convention may light the way to bringing the former in line

112. Compare the material on taking evidence abroad, discussed *infra* text accompanying note 201.

113. This may be a problem even when there are shared traditions in general. See Collins, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, 35 INTL. & COMP. L.Q. 765 (1986).

with the latter.¹¹⁴

In the *Schlunk* case,¹¹⁵ the Supreme Court held that, although the Hague Service Convention is mandatory when service of process must be effected abroad in another signatory state, the internal law of the forum (state or federal) alone determines whether in fact service must be made abroad in order to be effective. Rejecting the view of three concurring Justices that the Convention itself imposes a check on internal forum law,¹¹⁶ the Court expressed doubt "that this country, or any other country, will draft its internal laws deliberately so as to circumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad."¹¹⁷ The Court also found comfort in due process protection of foreign nationals and noted practical considerations that are likely to prompt resort to the Convention even when it is not mandatory.¹¹⁸

What the Court in *Schlunk* failed to appreciate, and what the concurring Justices imperfectly articulated, is that the Hague Service Convention, as (self-executing) federal law supreme under the Constitution,¹¹⁹ is deserving of no less respect than a federal statute.¹²⁰ It thus requires interpretation sympathetic to the language, history, and goals of the lawmaking enterprise,¹²¹ and laws which are not of equal

114. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-40 & n.21 (1985) (reprinted and discussed at pp. 623-34); *infra* text accompanying notes 245-46. Treaties may also provide evidence of "agreed upon principles of international law." *Kalamazoo Spice Extraction Co. v. Provisional Military Govt. of Socialist Ethiopia*, 729 F.2d 422, 427 (6th Cir. 1984) (reprinted and discussed at pp. 547-54). But see Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNATL. L. 1 (1988) (existence of treaties does not justify ignoring state practice).

115. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988); pp. 152-54.

116. See 486 U.S. at 708-16 (Brennan, J., concurring in the judgment).

117. 486 U.S. at 705.

118. See 486 U.S. at 705-06.

119. U.S. CONST. art. VI, cl. 2. On treaties in general, see L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 129-71 (1972); Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INTL. L. 406 (1989). On the history of their inclusion in the Supremacy Clause, see Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547, 551-52 (1989). Professor Gallant is intent to show that the interpretive position represented by the so-called Biden condition (see 134 CONG. REC. S6937 (daily ed. May 27, 1988)) — executive representations to the Senate are binding — is not, *pace* Senator Biden and others, constitutionally compelled. See Gallant, *American Treaties, International Law: Treaty Interpretation After the Biden Condition*, 21 ARIZ. ST. L.J. 1067 (1989). That may be a small point at which to stick. Historical research by Jerome Marcus demonstrates that, in the early years of this country, the Senate had, or had access to, the negotiating records of treaties. Marcus argues that senators could have such access today and that recognition of a duty to review the negotiating record before advising and consenting is preferable to the position taken in the Biden condition, a position that invites dishonor of our international obligations. Indeed, the Biden condition may be deemed inconsistent with the Supremacy Clause, insofar as treaties were included to ensure that we honor those obligations. See J. Marcus, *Some Historical Evidence on the Treaty Interpretation Debate* (unpublished manuscript) (copy on file with author).

120. See, e.g., *Edye v. Robertson* (Head Money Cases), 112 U.S. 580, 598-99 (1884); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

121. See, e.g., *Air France v. Saks*, 470 U.S. 392, 400-05 (1985); *Nielsen v. Johnson*, 279 U.S.

dignity, state¹²² or federal,¹²³ should not be permitted to frustrate either the meaning or the goals so identified. Whether the preferred label is preemption or federal common law,¹²⁴ the idea should be clear. The supremacy of federal law requires protection as much from evasion and distortion as it does from overt conflict, and the Constitution is not the only federal law to be protected.¹²⁵ That, indeed, is the message of the Rules of Decision Act,¹²⁶ which, we may forget, contemplates displacement of the "laws of the several states" not only by "the Constitution" and "Acts of Congress," but also by "treaties of the United States," and not only when those sources so "provide," but when they so "require."

Of course, care must be taken both to ensure that state law is not displaced lightly and that judges do not overstep their proper roles. The latter concern explains the judicial preference for the preemption label,¹²⁷ but neither concern is unique to the international context. Indeed, federalism concerns seem diminished in that context, because in matters implicating this nation's foreign policy and foreign commerce, the states act, if at all, only by federal sufferance.¹²⁸

47, 51-58 (1929). For an amusing and convincing demonstration that Justice Scalia needs help in his campaign to ban resort to "pre-ratification Senate materials for the interpretation of a treaty," *United States v. Stuart*, 489 U.S. 353, 376 (1989) (Scalia, J., concurring), see Vagts, *Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court*, 83 AM. J. INTL. L. 546 (1989).

122. See, e.g., *Nielsen v. Johnson*, 279 U.S. 47 (1929); *Asakura v. Seattle*, 265 U.S. 332 (1924); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); L. HENKIN, *supra* note 119, at 165-67.

123. See *Cook v. United States*, 288 U.S. 102, 118-19 (1933); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); L. HENKIN, *supra* note 119, at 163-64. For an argument that international law and treaties should have greater status than statutes, see L. HENKIN, *supra* note 119, at 425-26.

124. See *Burbank*, *supra* note 18, at 807-10; Monaghan, *The Supreme Court, 1974 Term - Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 12-13 n.69 (1975).

125. See *Felder v. Casey*, 487 U.S. 131, 138 (1988); *United States v. Pink*, 315 U.S. 203, 230-31 (1942) ("state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty"); *Burbank*, *supra* note 18, at 805-29.

126. "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1988). For a fully developed statement of my views about the role of the Rules of Decision Act in authorizing and limiting federal common law, see *Burbank*, *supra* note 18, at 753-62, 764-71, 773-74, 787-97, 808-10, 816-17; see also *Burbank*, *supra* note 57, at 703-05. Professor Redish now agrees with me. See Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process. An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989). However, he continues to try to except "issues which are, in some sense, procedural," *id.* at 787 n.104, substituting one untenable evasion tactic for another. See *Burbank*, *supra* note 18, at 759 n.111.

127. See *Burbank*, *supra* note 18, at 807-10.

128. See L. HENKIN, *supra* note 119, at 227-48. This is not to say that federalism concerns have been absent from the conduct of our foreign relations. See *id.* at 143-48. To the contrary, historically they were prominent roadblocks, whether real or imagined, in our ability to enter into treaties. See Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 561-62 (1953); Nadelmann, *The United States Joins the Hague Conference on Private International Law*, 30 LAW & CONTEMP. PROBS. 291, 291 (1965).

Treaties may present a discrete set of concerns for preemption or federal common law analysis from the perspective of separation of powers.¹²⁹ Whatever their status in domestic law, treaties partake of the nature of contracts. Although there need not be a *quid pro quo* or consideration, typically there is.¹³⁰ If a court were to engage in a give-away — to expand the scope of a treaty beyond that contemplated by the treatymakers or to require the displacement of laws (state or federal) not reasonably deemed inconsistent with it — that action could compromise the ability of those primarily charged with the conduct of foreign relations effectively to implement our national interests through dialogue with other nations.¹³¹ This concern is not, however, an excuse for abdication, particularly given the language of the Rules of Decision Act and the reasons for including treaties in that statute and in article VI.¹³² Rather, courts should take special care in determining what treaties “provide” and what they “require.” If, contrary to the Court’s assurance in *Schlunk*, a state (versus “this country”) were to “draft its internal laws deliberately so as to circumvent the Convention,”¹³³ there is both the power and the duty in the courts, federal and state, to displace those laws.

Schlunk involved *state* law on service of process and law that, all the Justices agreed,¹³⁴ was not fairly deemed hostile to or inconsistent with the Hague Service Convention. When *federal* law is in direct conflict with, or otherwise derogates from the obligations of, a treaty, a different analysis applies. Subject to the mediating influences of judicial interpretation, a subsequently enacted federal statute controls.¹³⁵ Conversely, judge-made federal law is constrained by, and must be

129. For some this is not a difficulty peculiar to treaties. See, e.g., Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540-44 (1983) (statutes as compromises).

130. See L. HENKIN, *supra* note 119, at 142-43; Oxman, *supra* note 35, at 760-61.

131. Cf. *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903, 907 (3d Cir. 1990) (rejecting argument that United States-Canada Free Trade Agreement preempts state law and noting that such an interpretation would be anomalous in light of Congress' "concern with achieving reciprocal trade barrier reduction"); *supra* text accompanying note 54 (potential of judicial restraint in interpreting extraterritorial application of domestic legislation to undercut Executive).

132. See *supra* note 119. Today, the costs of dishonoring our treaty obligations may not be as obvious as they were in the late eighteenth century. See Holt, *supra* note 119. They are nonetheless to be reckoned with. For example, although aliens are protected by due process and thus insulated to a very great extent from evasions of the Hague Service Convention, similar domestic law protections may not be available to our nationals when sued in the courts of other signatory states that follow the interpretation of the Convention given in *Schlunk*.

133. *Schlunk*, 486 U.S. at 705; see *supra* text accompanying note 117; cf. *Brilmayer & Paisley*, *supra* note 62, at 26-27 (discriminatory treatment of federal rights through alteration of state law).

134. See *Schlunk*, 486 U.S. at 708 (Brennan, J., concurring in the judgment).

135. See *Edye v. Robinson* (Head Money Cases), 112 U.S. 580, 597-99 (1884); L. HENKIN, *supra* note 119, at 163-64; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1987). However well-established, the later-in-time rule is not without its critics. See *supra* note 123.

consistent with, applicable treaties.¹³⁶ What of other federal law, in particular supervisory court rules promulgated by the Supreme Court under the Rules Enabling Act?¹³⁷ Federal Rules have been at the center of the stage of procedural reform since 1938. Their impact on international cases is, therefore, critical to the inquiry.

Notwithstanding more than fifty years of cases and scholarly commentary to the contrary, the primary concern of those responsible for drafting the Rules Enabling Act of 1934¹³⁸ was finding appropriate limits for the allocation of federal lawmaking power between the Supreme Court as rulemaker and Congress. The procedure/substance dichotomy in the 1934 Act¹³⁹ was thus designed to serve separation of powers values and only incidentally and derivatively to protect federalism values. It was designed to preserve for Congress certain prospective lawmaking choices and only incidentally and derivatively to protect lawmaking choices, federal or state, already made.¹⁴⁰

Congress pulled together and amended the various statutory grants of supervisory rulemaking power to the Supreme Court in 1988.¹⁴¹ Although most attention to the legislation has focused on an unsuccessful attempt to repeal the so-called supersession clause, pursuant to which Federal Rules trump previously enacted statutes with which they are in conflict,¹⁴² the legislative history reveals a determined effort to bring the rulemakers closer to the original understanding.¹⁴³

Whether under the original Enabling Act or its most recently amended successor, Federal Rules relating to the manner of service do not usually present problems of validity. Indeed, for precisely that reason, the Supreme Court has twice used Rule 4 to extend the influence of the Rules into areas where they could not have influence di-

136. See Henkin, *supra* note 54, at 1563-64; Maier, *supra* note 44, at 473-76.

137. 28 U.S.C. §§ 2072-2074 (1988).

138. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064.

139. The Act provided in pertinent part:

Be it enacted, etc., That the Supreme Court of the United States shall have the power to prescribe by general rules, for the district courts of the United States . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant

Id.

140. See Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106-12 (1982).

141. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401, 102 Stat. 4642, 4648-50 (1988).

142. Compare Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281 ("Supersession lives! Long live supersession!") with Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1014 n.6 ("I had thought of entitling this Comment, after Cato the Elder, 'Supersession Must Be Destroyed.'"). According to 28 U.S.C. § 2072(b) (1988), "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

143. See Burbank, *supra* note 142, at 1029-36.

rectly, both times involving limitations law, once in a diversity case¹⁴⁴ and once in a federal question case.¹⁴⁵

Service of process abroad is not the usual case, or at least it was not when Rule 4(i)¹⁴⁶ was added to the *Federal Rules of Civil Procedure* in 1963. The amendment was part of a comprehensive package of proposals developed by, or in close consultation with, the Commission on International Rules of Judicial Procedure, which led not only to changes in the Federal Rules but to federal legislation and a Uniform Act.¹⁴⁷ The academics chiefly responsible for the work of the Commission¹⁴⁸ were impatient with foreign claims that service of process is an official act and that unilateral service abroad abridges territorial sovereignty, and even with objections to service made in violation of local law.¹⁴⁹ In opting for a program of unilateral American reform, these individuals were following, while attempting to justify,¹⁵⁰ the time-honored American course of "leading" by example as a prelude, if not in preference, to attempting to reach mutual understanding.¹⁵¹

144. *Hanna v. Plumer*, 380 U.S. 460 (1965); see Burbank, *supra* note 140, at 1173-76.

145. *West v. Conrail*, 481 U.S. 35, 38-39, 40 n.7 (1987); see Burbank, *supra* note 57, at 707-08; Burbank, *supra* note 142, at 1022-26.

146. Pp. 123-27. Rule 4(i) - Alternative Provisions for Service in a Foreign Country.

(1) *Manner*. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) *Return*. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

FED. R. CIV. P. 4(i).

147. See S. REP. NO. 1580, 88th Cong., 2d Sess. 12-13 (1964); Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-63 (I)*, 77 HARV. L. REV. 601, 635-37 (1964); Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015 (1965).

148. See Nadelmann, *supra* note 128, at 323.

149. See Kaplan, *supra* note 147, at 636-37; Smit, *supra* note 147, at 1017-19; Smit, *International Co-Operation in Civil Litigation: Some Observations on the Roles of International Law and Reciprocity*, 9 NETH. INTL. L. REV. 137 (1962). But see Miller, *supra* note 110, at 1072, 1075-86 (1965) (more sympathetic analysis of Swiss views).

150. See Kaplan, *supra* note 147, at 636; Miller, *supra* note 110, at 1131-32; Smit, *supra* note 147, at 1015-16, 1018-19, 1046.

151. Compare Jones, *supra* note 128, at 517, 556-62 (noting history of "judicial isolationism," often dressed up in federalism excuses, and need for dialogue) with Smit, *supra* note 147, at 1016 (unilateral domestic reform undertaken "on the view that internal reforms could obviate the need for international regulation, but also on the notion that regulation by treaty might invade areas

Framed so as "to allow accommodation to the policies and procedures of the foreign country,"¹⁵² Rule 4(i) nonetheless contemplates service abroad that is valid "even if [made in a manner] forbidden by the foreign country in which it was made."¹⁵³ Although the Reporter thought that would be "an unhappy result,"¹⁵⁴ the problem was deemed primarily one of recognition of judgments.¹⁵⁵ Yet, as was pointed out at the time, "[p]roblems of service of process raise questions of sovereignty in many foreign countries. They cannot be solved unilaterally with disregard of the views of the local sovereign. Those who speak of 'tenderness to the sensibilities of foreign nations' . . . should study the long list of diplomatic incidents."¹⁵⁶

Whether or not Rule 4(i) permits service in violation of customary international law, it treats a matter that, in 1963 and today, implicates the foreign policy and foreign trade interests of the United States. The responsibility for such interests lies with the Executive and Congress.¹⁵⁷ Federal Rules do not require the approval of Congress (*but see* pp. 124, 129, 331), and even if the report and wait requirement of the Enabling Act could theoretically or practically be equated with approval,¹⁵⁸ the process by which Federal Rules become effective does not involve the President. The rulemakers have no expertise in international law, and even if they did, they have no business making policy choices in an area of international sensitivity, whether or not the policy choices actually made are consistent with customary interna-

traditionally covered by state law and thus was a subject to be approached with caution"). Smit thus proved Jones a poor prophet. *See* Jones, *supra* note 128, at 562 ("It is doubtful that it would be argued today that the benefits of procedural reform must be denied the state courts in the international field, where the states themselves are powerless to act.") (footnote omitted).

152. FED. R. CIV. P. 4(i) advisory committee note.

153. Kaplan, *supra* note 147, at 637. For recent advocacy of such an approach, see Westbrook, *Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business*, 25 TEXAS INT'L L.J. 71, 96 (1990). For an extreme example of a mindset that would ignore foreign law and the appropriate locus of power to make policy choices implicating this country's interests in foreign policy, see Smit, *The Foreign Sovereign Immunities Act of 1976: A Plea for Drastic Surgery*, 1980 AM. SOC. INTL. L. 49, 66 (1980) (criticizing as "improper" provision for service of process in 28 U.S.C. § 1608(b)(3)(E), because of "the introduction . . . of foreign law as governing our methods of service, deliberately avoided by the makers of Rule 4(i)").

154. Kaplan, *supra* note 147, at 637.

155. *See id.*

156. Nadelmann, *supra* note 128, at 310-11 n.141 (citing Kaplan, *supra* note 147, at 637); *see also* Smit, *supra* note 147, at 1018 ("due regard for the sensibilities of foreign governments").

157. *See generally* L. HENKIN, *supra* note 119. For the role of the courts, *see id.* at 205-24. "[W]hen the Supreme Court makes law through supervisory court rules, it is engaged in an enterprise that, both practically and normatively, is different in important respects from the enterprise in which the Court, or any federal court, is engaged when it makes federal common law." Burbank, *supra* note 142, at 1021.

158. Pursuant to 28 U.S.C. § 2074 (1988), Federal Rules must be transmitted to Congress not later than May 1 of the year in which they are to become effective and can take effect no earlier than December 1. For a theoretical and practical critique of the view that this mechanism is the equivalent of legislation, or at least of congressional "approval," *see* Burbank, *supra* note 140, at 1102, 1177-79, 1196 n.779.

tional law. The best defense of Rule 4(i), other than the nontest of *Sibbach v. Wilson & Co.*,¹⁵⁹ is that it was part of an integrated package, some of which was passed by Congress and signed by the President, and all of which was specifically brought to Congress' attention.¹⁶⁰

The same defense is not available for proposed amendments to Rule 4 that were published for comment in the fall of 1989¹⁶¹ and revised without public notice in the summer of 1990,¹⁶² and that are currently pending before the Supreme Court for possible promulgation and reporting to Congress.¹⁶³ These proposals do not fall under the auspices of a broadly representative Commission, and they are not part of a larger, including legislative, whole.¹⁶⁴ Moreover, not only has this country entered into two international service conventions since 1963,¹⁶⁵ but diplomatic protests have continued.¹⁶⁶ Both confirm the sensitivity of service abroad and the inappropriateness of law-making in the area at the instance of a self-described "committee of

159. 312 U.S. 1, 14 (1941) ("The test must be whether a rule really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."); see Burbank, *supra* note 140, at 1028-1032, 1176-81.

160. See Smit, *supra* note 147. Indeed, provisions in the legislation passed as part of the package included references to service under the Federal Rules. See 28 U.S.C. §§ 1783, 1784 (1988); Smit, *supra* note 147, at 1037-38.

161. See *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure*, 127 F.R.D. 237 (1989) [hereinafter *Preliminary Draft*].

162. See *Editor's Introduction*, Intl. Lit. Newsletter, Aug. 1990, at 1; *infra* note 237.

163. See letter from L. Ralph Mecham to the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States (Nov. 19, 1990) (copy on file with author).

164. For a time it appeared that doubts about the Court's powers under the Enabling Act would lead to submission of one of the proposals, providing in Rule 4 a federal amenability standard for federal questions cases, for legislative action. See Carrington, *supra* note 64, at 744. This notion was abandoned in the preliminary draft put out for comment, although a prefatory note to the preliminary draft of amendments to Rule 4 made alternative recommendations in the event Congress "disapproved" the proposed revision or did not disapprove it. *Preliminary Draft*, *supra* note 161, 127 F.R.D. at 266. The author criticized the provision as beyond the Court's powers under the Enabling Act. See letter from Stephen B. Burbank to Committee on Rules of Practice and Procedure at 2-3 (Mar. 14, 1990) (copy on file with author) [hereinafter Burbank letter]. The proposed amendment to Rule 4 was drastically cut back, without public notice, to provide a federal amenability standard in federal question cases only "over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state." *Proposed Amendments to the Federal Rules of Civil Procedure 20* (copy on file with author) [hereinafter *Proposed Amendments*]. This does not solve the problem of rulemaking power, and it raises a host of practical questions that are not answered in the Advisory Committee's Note. See *id.* at 39-40. A "Special Note" contemplates that Congress may disapprove the provision and recommends in any event that the rest of the rule be approved. See *id.* at 1.

165. See *supra* text accompanying notes 112-13. Besides the Hague Service Convention, *International Civil Litigation* includes the Inter-American Convention on Letters Rogatory. Pp. 670-84.

166. See 1 B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) 69-71, 80-82 n.10 (1984).

technicians."¹⁶⁷

One set of proposed amendments to Rule 4 involves a system for waiver of service, implemented "through first-class mail or other reliable means" and backed up by cost-shifting if a defendant "fails to comply with the request [for waiver] . . . unless good cause for the failure be shown." The proposed waiver would not apply to objections to venue or to personal jurisdiction, but the mechanism would be available with respect to all defendants (other than the United States, a corporation of the United States, and infants or incompetents), wherever they may be found.¹⁶⁸

In a country where "the *capias ad respondendum* has given way to personal service or other form of notice,"¹⁶⁹ this mechanism would make a great deal of sense, reducing incentives to impose unnecessary expense and delay.¹⁷⁰ Its proposed extension from domestic cases to cases where service would have to be effected abroad is, however, problematic. The Advisory Committee reasons that "[b]ecause the transmission of the waiver does not purport to effect service except by consent, the transmission of a request for consent sent to a foreign country gives no reasonable offense to foreign sovereignty, even to foreign governments that have withheld their assent to service by mail."¹⁷¹ This reasoning is not persuasive.

As the Advisory Committee recognizes, the proposed waiver of service mechanism is in fact a mechanism for defeasible service. With Rule 4(i) on the books, it is no surprise that this aspect gave no pause. One may question, however, whether a waiver is consensual if it was executed with the awareness that sanctions¹⁷² would be imposed if it was refused without "good cause" according to the notions of a foreign legal system. One may also question whether, in any event, a private litigant has the power to consent to what her country regards as an abrogation of territorial sovereignty.¹⁷³ Perhaps the Advisory

167. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2076 (1989); see Burbank, *supra* note 56, at 1939 n.81.

168. *Proposed Amendments, supra* note 164, at 6-10.

169. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); see *supra* note 105 and accompanying text.

170. See Carrington, *supra* note 64, at 736; *Proposed Amendments, supra* note 164, at 29-33.

171. *Proposed Amendments, supra* note 164, at 30.

172. "Openly stated, the principle is kin to that underlying recent changes in Rules 11 and 16." Carrington, *supra* note 64, at 736 (footnote omitted); see *id.* at 737 (noting that "costs of formal service . . . can be substantial"); *infra* note 183.

173. "Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982). If Switzerland regards return receipt mail service as a violation of article 271 of the Swiss Penal Code, "which prohibits anyone from committing an act in Switzerland on behalf of a foreign country 'that is a matter of authority' without first obtaining the permission of the Swiss government," Miller, *supra* note 110, at 1077; see *id.* at 1080 n.20, 1111, is it likely to take a different view of "a

Committee is correct as a matter of customary international law, but consideration of such questions suggests that both the Committee's premise and its conclusion are debatable, especially if we imagine a defendant who does not understand English.¹⁷⁴ We know that the rulemakers have misjudged "foreign sensibilities"¹⁷⁵ in the past and that judgments about "reasonable offense" are culturally contingent.¹⁷⁶ Apart from existing service conventions, these judgments should be made by Congress with participation by the President. Moreover, the existence of service conventions not only suggests the inappropriateness of the subject for court rulemaking, it raises a discrete and very troublesome question of rulemaking power. One of the benefits of treaties, as we have seen, is that they can moot questions of choice of law and of customary international law.¹⁷⁷ Does the Enabling Act vest the Supreme Court with the power to override a treaty in court rules?

Some countries adhering to the Hague Service Convention do not permit service by mail (pp. 155-60, 655-69). Indeed, whether a failure to make a reservation with respect to article 10(a)¹⁷⁸ of the Convention

procedure that effects economic service with cooperation of the defendant"? *Proposed Amendments*, *supra* note 164, at 26. See *Report of the United States Delegation to the Special Commission on the Operation of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 17 INTL. L. MAT. 317 (1978) ("The Swiss and German observers indicated that no objection would be raised in their countries if a copy of a legal document were mailed *strictly for informational purposes*, as long as no legal consequences flow in the sending state from such mailing.").

In comments on the proposed waiver of service mechanism, one of the authors of *International Civil Litigation* predicted that "some civil law nations will object, perhaps vigorously, to the waiver mechanism." Statement of Gary B. Born before the Advisory Committee on Civil Rules, Chicago, Illinois, Feb. 2, 1990, at 24 (copy on file with author) [hereinafter Born Statement]. He noted that some countries forbid "purely consensual, noncoercive foreign discovery (e.g., depositions) on their territory, except under the supervision of their authorities," *id.* at 25 (footnote omitted), and that they would likely also regard waivers "as violations of local judicial sovereignty." *Id.*; cf. Oxman, *supra* note 35, at 740 n.16, 781 n.134 (private party may not waive rights of a foreign state).

174. There is no requirement that the documents sent abroad be translated, but "[i]t would . . . be sufficient cause not to shift the cost of service if the defendant did not receive the request or was insufficiently literate in English to understand it." *Proposed Amendments*, *supra* note 164, at 30. See *infra* notes 182-83.

175. See *supra* text accompanying note 156.

176. *Supra* text accompanying notes 169-70; see Miller, *supra* note 110, at 1131-32; *supra* text accompanying note 113.

177. See *supra* text accompanying notes 112-13. Professor Smit argued that [t]he absence of an interest worthy of protection is demonstrated most clearly by the willingness of the very same nations that object to the performance of foreign procedural acts within their borders in the absence of a treaty to permit such acts as soon as they are covered by an international agreement.

Smit, *supra* note 147, at 1018 (footnote omitted). He seems to have neglected both the possibility that an "international agreement" may contain a *quid pro quo*, see *supra* text accompanying note 130, and that, even if not, it may contain conditions, requirements, and procedures sufficient to distinguish an exercise of power pursuant to its authority from a unilateral exercise of power. More fundamentally, Professor Smit seems to have neglected the importance of consent in international law. See Weisburd, *supra* note 114, at 45-46.

178. "Provided the State of destination does not object, the present Convention shall not

constitutes consent to service by mail is a matter on which U.S. courts are divided.¹⁷⁹ We know from dictum in *Schlunk* that the Convention is mandatory when service must, as a matter of internal law, be effected abroad.¹⁸⁰ The Court also asserted that we need not worry about attempts to “draft . . . internal laws deliberately so as to circumvent the Convention.”¹⁸¹ Professor Carrington has assured us that the extension of the proposed waiver of service mechanism to countries that adhere to the Convention “is not intended to circumvent [it], but to take *proper account of the sensitivities of foreign sovereigns* which are properly expressed in that treaty.”¹⁸² Accepting his assurance, intentions are nonetheless irrelevant if the proposal is, as it appears to be, inconsistent with the Convention.¹⁸³ If it is and if it were implemented for service in signatory countries as a matter of state law, waiver of service would be invalid because “state law must yield when it is in-

interfere with — (a) the freedom to send judicial documents, by postal channels, directly to persons abroad . . .” P. 652.

179. See pp. 155-60. Compare *Ackermann v. Levine*, 788 F.2d 830, 839 (2d Cir. 1986) (failure to make reservation under article 10(a) constitutes consent to service by mail) with *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989) (article 10(a) does not authorize service of process, as opposed to transmittal of other documents). For a discussion of the diplomatic protests involving this issue, see 1 B. RISTAU, *supra* note 166, at 67-68, 148, 151.

180. See *supra* text accompanying note 115.

181. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988); see *supra* text accompanying note 117.

182. Carrington, *supra* note 64, at 749 n.108 (emphasis added). He thus recognized the risk that it would be so regarded. See also *id.* at 737. Moreover, the use of the italicized language recalls similar arguments by Professor Carrington's predecessors. See *supra* text accompanying notes 156, 175.

In his comments on the proposed waiver mechanism, one of the authors of *International Civil Litigation* predicted “that at least some states that are party to the Hague Service Convention will view the waiver mechanism as a circumvention of the treaty,” particularly because there is no translation requirement. Born Statement, *supra* note 173, at 25 n.33.

183. Whether or not article 10(a) includes service of process, see *supra* note 179 and accompanying text, an article 10(a) reservation includes objection to the sending of “judicial documents, by postal channels, directly to persons abroad.” P. 652. Do the rulemakers contend that the proposed notice and request and/or the copy of the complaint which must accompany it are not “judicial documents”? What of the information “by means of a text prescribed in an official form promulgated pursuant to Rule 84”?

More generally, the cost-shifting mechanism in the proposed amendment may be deemed inconsistent with article 12 of the Convention, pursuant to which “[t]he applicant shall pay or reimburse the costs occasioned by — (a) the employment of a judicial officer or of a person competent under the law of the state of destination, (b) the use of a particular method of service.” Pp. 652-53; see 1 B. RISTAU, *supra* note 166, at 146-47.

Finally, the waiver proposal, including its cost-shifting mechanism, may be deemed inconsistent with the provision in article 5 of the Convention that “[s]ubject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.” P. 652. Like the waiver proposal, “this method of service dispenses with the translation requirements under Article 5(a) and does not give rise to any costs.” 1 B. RISTAU, *supra* 166, at 145. But unlike the waiver proposal, under article 5(a) the addressee “can decline acceptance for any reason, including, of course, that the document is not in a language which [she] understands,” *id.* at 138, without fear of sanctions. See *id.* at 145 (criticizing this country's practice of disregarding requests for “informal delivery,” thereby “denying the addressee the opportunity of refusing to accept the document” afforded by foreign law).

consistent with, or impairs the policy or provisions of, a treaty.”¹⁸⁴ If promulgated by the Supreme Court, and unless blocked by legislation, however, the proposed waiver of service mechanism would become part of federal law, and, under the Enabling Act, “[a]ll laws in conflict with [it] shall be of no further force or effect after [it] ha[s] taken effect.”¹⁸⁵

I will not here replay the debate about the wisdom and validity of the supersession clause.¹⁸⁶ Suffice it to say that the prospect of a *Federal Rule of Civil Procedure*, not approved by Congress let alone by the President, abrogating or subverting a treaty obligation of this country, should give pause to even the staunchest defender of supersession. Note, moreover, that the common avoidance technique of classifying problems of supersession as problems of validity (of Federal Rules)¹⁸⁷ will not work given existing Rule 4(i), although the Supreme Court’s unwillingness to find any Federal Rule invalid reveals the technique as pure rhetoric.¹⁸⁸ Note also that imputing a discrete procedure/substance dichotomy to the supersession clause, thereby preserving from its purview laws that are “arguably substantive,”¹⁸⁹ will not work either, because presumably nobody thinks laws regulating the manner of service fall within that category. The Hague Service Convention may deal with matters of procedure, but they are hardly “procedural marginalia”¹⁹⁰ of the sort that some claim are the object of the supersession clause. It manifests no disrespect for the federal courts as a “‘coequal’ branch[] of the government”¹⁹¹ to believe that they have no more business subverting a treaty acting in a legislative mode than they do when deciding cases or controversies.¹⁹²

The Chief Justice has asserted to Congress that the “advisory committees should undertake to be circumspect in superseding procedural statutes” and has assured Congress that the rulemakers “will undertake to identify such situations when they arise.”¹⁹³ One would think that treaties called for special circumspection, including in prejudging the question of inconsistency and thus avoiding notice to Congress.

184. *United States v. Pink*, 315 U.S. 203, 230-31 (1942); see *supra* text accompanying notes 119-33.

185. 28 U.S.C. § 2072(b) (1988); see *supra* note 142 and accompanying text.

186. See Burbank, *supra* note 142; Carrington, *supra* note 142.

187. See Burbank, *supra* note 142, at 1038.

188. See *supra* note 159 and accompanying text.

189. Carrington, *supra* note 142, at 325. For criticism of this ingenious effort, see Burbank, *supra* note 142, at 1036-39.

190. Carrington, *supra* note 142, at 324. *But see* Burbank, *supra* note 142, at 1043-45 (supersession was not originally nor is it today limited to such matters).

191. Carrington, *supra* note 142, at 324. *But see* Burbank, *supra* note 142, at 1045-46.

192. See Burbank, *supra* note 142, at 1046.

193. Letter from Hon. William H. Rehnquist to Hon. Peter W. Rodino, Jr. (Oct. 19, 1988), reprinted in 134 CONG. REC. H10,441 (daily ed. Oct. 19, 1988); see Burbank, *supra* note 142, at 1038 n.163, 1040-41.

Indeed, assuming the validity of the Enabling Act's supersession clause, and hence the equivalence of Federal Rules and statutes, the Chief Justice's promise is, with respect to treaties, a *condition* for supersession. Abrogation or modification of a treaty by a subsequently enacted statute requires a clear expression of congressional purpose.¹⁹⁴ No superseding effect can properly be given to a Federal Rule that is inconsistent with a treaty where such a purpose is not brought to the attention of Congress, let alone denied by the rulemakers.

If the proposed use abroad of the waiver of service mechanism is not a deliberate attempt "to circumvent the Convention,"¹⁹⁵ it is difficult otherwise to regard another proposed amendment to Rule 4 that is part of the same package. As originally put out for comment, the provision would have permitted a district court, in a case governed by the Convention (or other treaty), to direct service in a manner contrary to the Convention if service had not been effected within six months of a request for assistance to a foreign government.¹⁹⁶ In comments submitted to the Advisory Committee, one of the authors of *International Civil Litigation* suggested that the provision might conflict with the Hague Service Convention.¹⁹⁷ The provision has been deleted. The proposed amendments before the Supreme Court, however, contain a provision that would authorize service

by whatever means may be directed by the court, including service by means not authorized by international agreement or not consistent with the law of a foreign country, if the court finds that internationally agreed means or the law of a foreign country (A) will not provide a lawful means by which service can be effected, or (B) in cases of urgency, will not permit service within the time required by the circumstances.¹⁹⁸

The Advisory Committee Note reveals that the deletion was cosmetic only, that the new provision, like the old, is intended to authorize service "by means not authorized by international agreement or not consistent with the law of a foreign country" when a Central Authority has failed "to effect service within the six month period provided by the Convention."¹⁹⁹ The new provision finds no greater support for this proposition in article 15 of the Convention than did the old.²⁰⁰ We see again impatience with delay and an assertion by

194. See *Transworld Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252-53 (1984); *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968); *Cook v. United States*, 288 U.S. 102, 120 (1933).

195. *Supra* note 182 and accompanying text.

196. See *Preliminary Draft*, *supra* note 161, 127 F.R.D. at 274.

197. See Born Statement, *supra* note 173, at 18-19.

198. *Proposed Amendments*, *supra* note 164, at 12-13.

199. *Id.* at 36.

200. See p. 653. According to the Advisory Committee, "Article 15 . . . provide[s] that alternate methods may be used if a Central Authority does not respond within six months." *Proposed Amendments*, *supra* note 164, at 35. I find no such authorization in the language of article 15 and agree with Mr. Born that "[the six-month] period was probably intended to be

technicians of the power, if not to override this country's treaty obligations, then to create a situation where conflict in interpretations is inevitable, all through a policy choice buried in drafting history.

B. *Taking Evidence Abroad*

The materials on taking evidence abroad in *International Civil Litigation* (pp. 261-334) are very complete and very well organized. Moreover, here the authors independently provide more information and perspective for one interested in the comparative and international law aspects of the problem.²⁰¹

The reader is alerted early to the fact that discovery abroad has "produced some of the most contentious disputes that have arisen in international civil litigation" (p. 261; *see also* pp. 265-66). The comparative information provided includes the insight that "[t]he comparatively restrictive scope of foreign discovery generally reflects important foreign public policies, such as protection against unreasonable intrusion into personal privacy,"²⁰² as well as the very practical explanation that the inability to recover the costs of discovery in this country, as possible in many foreign systems, "aggravates displeasure about intrusive and expensive U.S.-style discovery" (p. 265 n.22).

Although the authors refer to the possibility that unilateral extra-territorial discovery may violate customary international law (pp. 265, 278) and raise questions of power to proceed in violation of foreign law (pp. 291-92), they do not clearly distinguish between the two. Perhaps that is because the foreign diplomatic protests reported by the authors (p. 279) have not made such distinctions,²⁰³ and because to a considerable extent the questions merge, as for example where discovery must be conducted under the supervision of a judge under foreign law.

Still, it would be useful to know how it is that our courts came to

confined to cases involving default judgments against defendants who evade service." Born Statement, *supra* note 173, at 19. Article 15 seems exclusively directed toward default judgments and not to authorize "alternative non-treaty methods of service," Carrington, *supra* note 64, at 749, unless, as is most unlikely, "any provisional or protective measure" includes service. *See* 1 B. RISTAU, *supra* note 166, at 173 ("Thus, the Convention does not intend to change the internal laws of the contracting states to the extent that they may permit the entry of temporary restraining orders, sequestration orders, or attachments of property *ex parte*."); *cf.* FED. R. CIV. P. 64 (seizure of person or property); 65 (injunctions).

Because the rulemakers have denied any inconsistency and hence any purpose to supersede the Hague Service Convention, if a court subsequently disagrees, the Convention controls. *See supra* text accompanying note 194.

201. *See supra* text accompanying note 112.

202. P. 265; *cf.* Hazard, *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2242-44 (1989) (social costs in violation of principle of privacy).

203. *See* Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 NW. U. L. REV. 487, 499-500 (1969) (protests not clearly distinguishing between prescriptive and enforcement jurisdiction).

“prefer[] the more familiar expeditious avenue of direct discovery” (p. 266) from foreigners over whom they have jurisdiction, and whence their authority to implement that preference derives.²⁰⁴ Are there pertinent Supreme Court decisions involving foreign parties before the *Rogers* case²⁰⁵ and decisions, moreover, that did not involve blocking statutes (pp. 282-83)? To what extent are the authorities relied on for the existence of power cases involving statutes that authorize the issuance of subpoenas or, more generally, public law cases? In that regard, *Rogers* is instinct with concern for “the policies underlying the Trading with the Enemy Act” (p. 286), and the Court made clear that it was affirming the production order in that case as a legitimate “accommodation of the Rule [Rule 34] . . . to the policies underlying the Trading with the Enemy Act.”²⁰⁶

I suspect (but do not know) that full investigation of these questions might reveal something at work that we have already seen in domestic and international civil litigation: the generalization of a rule from specific substantive contexts to all substantive contexts.²⁰⁷ In any event, the materials in *International Civil Litigation* reveal other phenomena that we have seen elsewhere. First, as with service of process, our approach to taking evidence abroad has been one of coming to the international bargaining table only after staking out an aggressively self-regarding position.²⁰⁸ Second, as with legislative jurisdiction,²⁰⁹ in the absence of agreement about the requirements of

204. The authors point out:

U.S. law had historically showed greater deference to the laws of the place where discovery was to be ordered. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 94 (1934) (“[a] state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed”); *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960) (refusing to order production of documents located in Canada because this would arguably violate Quebec law); *SEC v. Minas De Artemesia, S.A.*, 150 F.2d 215 (9th Cir. 1945) (refusing to enforce subpoena for production of documents located in Mexico when this would violate Mexican law).

P. 291.

205. *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958) (reprinted at pp. 284-89).

206. P. 287; see Onkelinx, *supra* note 203, at 510-13.

207. If so, the culprits are likely to be the Federal Rules themselves, see *supra* text accompanying notes 56-60; *infra* text accompanying note 223, and RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 53 (1971) (judicial jurisdiction over a person entails power to order that person “to do an act, or to refrain from doing an act, in another state”). For criticism of this provision, see Onkelinx, *supra* note 203, at 495-96.

208. See pp. 309-10; *supra* text accompanying notes 146-56; Smit, *supra* note 149; Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1056-58 (1961). It comes as no surprise that Professor Smit has recently called on the United States to renounce adherence to the Hague Service and Hague Evidence Conventions, objecting to both as more cumbersome than domestic law and attempting to persuade his audience that they do not offer much if anything to a foreigner that internal U.S. law does not afford. See Smit, *Les Conflicts de Jurisdiction au Procédure Civile*, 1990 REVUE INTERNATIONALE DE DROIT COMPARE, No. 3, 872.

209. See *supra* text accompanying notes 14-55.

customary international law, it has fallen to the courts to exercise self-restraint, and the techniques they have been encouraged to use are borrowed from domestic conflicts law.²¹⁰ Third and most important, both the Supreme Court and its advisers on Federal Rules have demonstrated inadequate respect for the only form of international lawmaking that has real promise in international civil litigation.²¹¹

This is not the occasion for a lengthy critique of the Supreme Court's opinions in the *Aerospatiale* case, interpreting the Hague Evidence Convention.²¹² A question that has occupied many commentators and that interests the authors of *International Civil Litigation* is whether a rule requiring first resort to the Convention for pretrial discovery, advocated by four members of the Court,²¹³ is a preferable interpretation of the Convention, and better serves the interests of the international community, than the *ad hoc* comity analysis blessed by the majority.²¹⁴ That is the wrong question if, as Lawrence Collins has concluded:

First, the Hague Evidence Convention was intended primarily to apply to "evidence" in the sense of material required to prove or disprove allegations at trial. It was not intended to apply to discovery in the sense of the search for material which might lead to the discovery of admissible evidence. Second, there was some concern at the Hague Conference that United States litigants might endeavour to use the Convention for third party discovery, and Article 23 was inserted as an attempt (perhaps only partially successful in drafting terms) to make it clear that there was no obligation on Contracting States to allow the Convention to be used for third party discovery. This is so whether the discovery is of documents or by way of oral deposition. Third, there is no reason whatsoever to believe that the Convention was ever intended to apply to normal *inter partes* discovery, and not even the attempts of successive US delegations from 1978 onwards to encourage the use of the Convention for discovery appear to have envisaged anything other than third party discovery.²¹⁵

If Collins is right, it would appear that the U.S. has refined the art of unilateral international lawmaking.²¹⁶ And if he is right, then so was the Supreme Court in its conclusion that the Hague Evidence Convention does not limit the power of a United States court to order

210. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) (p. 299); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 (1987) (pp. 303-04); Onkelinx, *supra* note 203, at 500-01; *supra* note 46.

211. See *supra* text accompanying notes 119-33, 175-200.

212. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522 (1987) (reprinted at pp. 320-28). The Convention itself is set forth at pp. 685-94, and the declarations concerning it at pp. 695-713.

213. *Aerospatiale*, 482 U.S. at 547-68 (Blackmun, J., concurring and dissenting).

214. See pp. 319, 328-34; Born & Hoing, *Comity and the Lower Courts: Post-Aerospatiale Applications of the Hague Evidence Convention*, 24 INTL. LAW. 393 (1990).

215. Collins, *supra* note 113, at 783.

216. See *id.* at 781-82.

discovery from a foreign party over whom it has jurisdiction.²¹⁷ That would, however, be a fortuity. In rejecting a first resort rule,²¹⁸ the majority again failed to give a treaty the respect due an ordinary federal statute. Rather, having concluded that the Convention does not explicitly provide such a rule, the majority declined to analyze its power to create one.²¹⁹ Moreover, having considered the policies animating the *Federal Rules of Civil Procedure*,²²⁰ the majority focused only on what the Convention provides and on the requirements of international comity rather than those of the Convention.²²¹

There is a risk of misunderstanding my claim that the Court in *Aerospatiale* "failed to give a treaty the respect due an ordinary federal statute." That is, I believe, true in the sense that the Court failed, as it did in *Schlunk*, seriously to engage the policies animating the Convention and to consider the interpretive or federal common law rules they might reasonably be thought to require.²²² In fact, however, the Court

217. See *id.* at 784-85.

218. See *Aerospatiale*, 482 U.S. at 533-40.

219. See 482 U.S. at 542.

220. "A rule of first resort in all cases would . . . be inconsistent with the overriding interest in the 'just, speedy, and inexpensive determination' of litigation in our courts. See FED. RULE CIV. P. 1." *Aerospatiale*, 482 U.S. at 542-43; see also 482 U.S. at 534 n.16 (noting existence of FED. R. CIV. P. 28(b) at time Convention was drafted).

221. See 482 U.S. at 543-46. "If such a duty were to be inferred from the adoption of the Convention itself, we believe it would have been described in the text of that document." 482 U.S. at 543. But see Oxman, *supra* note 35, at 761 & n.77, 787-90 n.150 (suggesting a federal common law rule of first resort).

In an interesting article that explores the application of *Aerospatiale* in state courts, the authors of *International Civil Litigation* recognize that the Court "rested its decision [not] on an interpretation of the Convention . . . [but] on the broader doctrine of 'international comity.'" Westin & Born, *supra* note 4, at 297; see *id.* at 301 n.20. If that is true, however, how can the federal common law they see emerging from the decision be explained in terms "of ensuring that concessions made by the federal government to foreign sovereign interests are honored"? *Id.* at 307. The problem may derive, in part, from the authors' failure firmly to grasp the dual nature of the inquiry under traditional federal common law analysis, see Burbank, *supra* note 18, at 758, which by the way fully supports their conclusion. State discovery procedures govern in state court unless they are "preempted." Preemption can take two forms — displacement by uniform federal rules or displacement only of state rules that are hostile to or inconsistent with federal interests. See *id.* 808-10; Westin & Born, *supra* note 4, at 308.

The problem identified here also occurs in the authors' treatment of federal common law in *International Civil Litigation*. Their conception of federal common law tends to be black and white — either state law applies or uniform federal law governs. See pp. 589-90. By failing to recognize that under traditional federal common law analysis, as under a Rules of Decision Act approach, see *supra* note 126, there is another possibility, the authors do not capitalize on their observation, with respect to recognition of judgments, that "there are surprisingly few fundamental differences in the approaches taken by the various states." P. 565. If that is true, it offers one argument against the need for "a uniform nationwide standard." P. 564. There is, however, federal power, including perhaps federal judicial power, to displace any state rule that is hostile to or inconsistent with federal interests. See also pp. 185-88 (forum selection agreements); pp. 216-17 & 227-30 (forum non conveniens); p. 504 (act of state doctrine).

222. See *supra* text accompanying notes 119-33; cf. Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 VAND. J. TRANSNATL. L. 239, 260 (1986) ("the Convention's terms, arrived at through the negotiation process, are necessarily the best evidence of the balanced interests of the signatories").

treated the Convention very much like "an ordinary federal statute" with respect to its relationship to the *Federal Rules of Civil Procedure*. In domestic cases, the Court strains to avoid any inconsistency between the *Federal Rules* and subsequently enacted statutes, reasoning that Congress legislates against the background of those rules and requiring clear evidence of an intent to displace any one of them in a specific substantive context.²²³ Whatever the factual basis for, or normative soundness of, this interpretive rule in domestic cases,²²⁴ it is inimical to international law reform in procedure through bilateral or multilateral conventions.²²⁵

In light of the doubts harbored by the majority in *Aerospatiale* about the Court's power to fashion a common law rule of first resort under the Hague Evidence Convention²²⁶ — doubts that I believe are misplaced²²⁷ — it may come as a surprise that the Advisory Committee on Civil Rules published for comment a proposed amendment to Rule 26 that would have accomplished the same thing. The proposal would have required resort to an "applicable treaty or convention" in the case of discovery abroad, preserving discovery under the Federal Rules "if discovery conducted by such methods [was] inadequate or inequitable and additional discovery [was] not prohibited by the treaty or convention."²²⁸

On the merits, there is much to be said for this proposal, which preferred Justice Blackmun's separate opinion in *Aerospatiale*²²⁹ to the opinion for the Court, although the comity it trumpeted might have been more apparent than real.²³⁰ As Justice Blackmun pointed out, however, "foreign legal systems and foreign interests are implicated,"²³¹ and the Hague "Convention represents a political determination — one that, consistent with the principle of separation of powers, courts should not attempt to second-guess."²³² A Federal Rule promulgated under the Enabling Act is not a statute, both be-

223. See, e.g., *Califano v. Yamaski*, 442 U.S. 682, 698-701 (1979); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1006-11 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *Burbank*, *supra* note 142, at 1044-45. The authors of *International Civil Litigation* observe that "in the area of judicial cooperation, the Supreme Court has narrowly interpreted treaties providing mechanisms for extraterritorial discovery and service to avoid displacing existing U.S. discovery and service rules." P. 14 n.72.

224. See *supra* text accompanying notes 56-60.

225. The notion that domestic interests expressed in court rules are "overriding" in the context of interpreting a treaty, see *supra* note 220, could also cripple the process of concluding international agreements.

226. See *supra* text accompanying note 219.

227. See *supra* text accompanying notes 119-33; note 222.

228. See *Preliminary Draft*, *supra* note 161, 127 F.R.D. at 318.

229. See *supra* note 213 and accompanying text.

230. See *Preliminary Draft*, *supra* note 161, 127 F.R.D. at 320-21.

231. *Aerospatiale*, 482 U.S. at 551-52 (Blackmun, J., concurring and dissenting).

232. 482 U.S. at 552.

cause it is not passed by Congress and because it is not signed by the President.²³³ It makes no difference whether the vehicle of "second-guessing" is common law or court rule. Moreover, it makes no difference that the content of a proposed rule is deemed to advance international comity. Once the Supreme Court has authoritatively interpreted a treaty, the matter is for Congress and the President.

These objections were made to the Advisory Committee,²³⁴ and, for whatever reason, the proposed amendment to Rule 26 that is before the Supreme Court is not the proposed amendment that was published for comment. Unfortunately, the current text²³⁵ and its associated Advisory Committee Note²³⁶ are not a model of clarity. As has been noted by one of the authors of *International Civil Litigation*, they suggest power to authorize "discovery on foreign territory in violation of foreign law."²³⁷ Even if not contrary to customary international law,²³⁸ the exercise of such power could cause an international incident. In addition, the proposed amendment might be interpreted to supersede *Aerospatiale*, and hence the interpretation of the Hague Evidence Convention therein, by making a comity analysis wholly discretionary in the case of discovery from parties and persons controlled by parties.²³⁹ The new proposal is no more valid than the one it replaced, and the drafting history can only enhance suspicion that the rulemakers are out of their depth when dealing with international civil procedure. At the least, the experience should confirm the wisdom of

233. See *supra* text accompanying note 158.

234. See Burbank letter, *supra* note 164, at 4-5.

235. In the current text, Rule 26(a) includes the following proposed amendment: "Discovery at a place within a country having a treaty with the United States applicable to such discovery shall be conducted by methods authorized by the treaty unless the court determines that those methods are inadequate or inequitable and authorizes other discovery methods not prohibited by the treaty." *Proposed Amendments, supra* note 164, at 56 (emphasis added).

236. See *id.* at 57-58.

237. In a remarkable and unpublicized reversal, the Committee now plans to propose a wholly different amendment to Rule 26(a). The new amendment would require use of the Convention (subject to an "inequity or inadequacy" exception) only where discovery would physically occur on foreign territory — such as plant inspection or deposition. This amendment wholly abandons the concurring opinion in *Aerospatiale*, and indeed appears to contemplate U.S.-ordered depositions on foreign territory in violation of foreign law. While district judges generally can be counted on to avoid such a result, as they have unanimously done so to date, the Committee's latest proposal is an unfortunate development.

Editor's Introduction, Intl. Litig. Newsletter, Aug. 1990, at 1.

238. But see Onkelinx, *supra* note 203, at 496-500; Gerber, *International Discovery After Aerospatiale: The Quest for an Analytical Framework*, 82 AM. J. INTL. L. 521, 534-39 (1988). In a recent article on the proposed amendment, one of the authors of *International Civil Litigation* argues that "[w]hat the Committee has proposed would be an unequivocal violation of international law." Born, *Fishing For Trouble in Foreign Depths*, Legal Times, Apr. 8, 1991, at 30.

239. Compare *Proposed Amendments, supra* note 164, at 57 ("However, comity may be employed in matters to which the requirement of the rule does not apply. Cf. *Societe Nationale . . .*") with *Aerospatiale*, 482 U.S. at 544 ("prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective") (footnote omitted).

following rulemaking procedures that would have brought the substantive problems to light.²⁴⁰

The recent history of federal regulation of service of process and taking evidence abroad is thus one of unilateral efforts to bring the rest of the world to see it our way, with attempts to reach mutual understanding coming only after we staked out our positions. Those positions included a refusal to take seriously appeals to customary international law that did not accord with our views regarding the role of courts and litigation, and regarding territorial sovereignty. Moreover, the primary attempts to reach mutual understanding that we have made in these areas, the Hague Service and Evidence Conventions, have been treated with less dignity than a garden variety federal statute by the Supreme Court, and they now are being treated with no more dignity by those responsible for proposing amendments to the *Federal Rules of Civil Procedure*.

The history alone suggests that customary international law can have only a walk-on part in this play. Given the controversy that has attended recent attempts to impute consequential restraining force to customary international law when sovereign interests, and therefore the traditional concerns of public international law, are much more apparent,²⁴¹ that is not surprising.

Indeed, to a newcomer who approaches these matters from a domestic perspective, it may not be clear whether customary international law should have a significant (*i.e.*, nonsupporting) role *in our courts*, in this or any other play.²⁴² Recent historical scholarship may cause her to question hoary statements about the "law of nations" as part of our law,²⁴³ at least to question how it is that one branch of the "law of nations"²⁴⁴ and one alone escaped the domesticating discipline

240. Part I, § 5(a) of the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure provides that "[i]f the Advisory Committee makes any substantial change, an additional period for public notice and comment may be provided." *Preliminary Draft*, *supra* note 161, 127 F.R.D. at 244. Part II, § 8(c) of the Procedures provides that "[i]f a modification [made by the Standing Committee] effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions." *Id.* at 246.

241. *See supra* text accompanying notes 42-55.

242. *See* Trimble, *supra* note 47, *passim*; *supra* note 54. One could, of course, conclude that, although customary international law has no directly binding force in our courts, it may inform the content of federal law that the courts are authorized to make or apply.

243. *See* Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989); Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988). Recent developments in the Middle East give special pungency to Professor Jay's conclusion that "[f]rom the very first years of the country, the law of nations has served more as a source of executive power than as a limitation on it." Jay, *supra*, at 848.

244. *See* Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984); Jay, *supra* note 243, at 832-33.

of the positivist revolution.²⁴⁵ Other recent scholarship adds to these historical inquiries questions about legitimacy and competence.²⁴⁶ But these are questions for another day.

Treaties, on the other hand, have a potentially significant role to play in international civil litigation. I have tried to demonstrate, however, that in interpreting treaties our courts need not resort to principles of "some underlying kind of justice"²⁴⁷ characteristic of a discrete field, and in particular that they do not need to resort to international law to interpret this kind of international lawmaking.²⁴⁸ On the contrary, in the process of interpretation treaties require the same sympathetic respect, including respect for lawmaking compromises, that is due a federal statute. Whether subsequent lawmaking takes the form of federal common law or federal court rulemaking, the respect due is for lawmaking choices made through a process specially prescribed by our Constitution, one in which the President plays a special role. Notwithstanding *Schlunk* and *Aerospatiale*, there may be reason for hope. In another recent decision interpreting a treaty on matters of international civil procedure (agreements to arbitrate), the Court manifested both unwillingness "to subvert the spirit of the United States' accession"²⁴⁹ and willingness "to subordinate domestic notions."²⁵⁰ Perhaps, however, the Court's schizophrenic approach to treaties is simply a function of calculations about when it is in the judiciary's interest to share power.

IV. CONCLUSION

My doubts that there is or soon can be "a distinct, cohesive body of law" (p. 1) in international civil litigation or that the themes identified by the authors of *International Civil Litigation* warrant treatment of the topics they cover as a discrete field²⁵¹ should not be permitted to obscure the great strengths of this book. The increasing importance of

245. See Burbank, *supra* note 18, at 761 n.121; Jay, *supra* note 243, at 830-33; Maier, *supra* note 44, at 460-63.

246. See Maier, *supra* note 44, at 468-76; Trimble, *supra* note 47, at 707-32.

247. See *supra* text accompanying note 9.

248. The United States is not a party to the 1969 Vienna Convention on the Law of Treaties. See J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 237 n.a (3d ed. Doc. Supp. 1988).

249. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639-40 n.21 (1985); see Maier, *supra* note 222, at 257.

250. 473 U.S. at 639.

251. Nor am I persuaded that we would be well served by following Professor Westbrook's prescription to abandon personal jurisdiction, international conflict of laws, act of state and sovereign immunity and recast them "within the framework of common policies and goals directed to fair, humane, and efficient regulation of business." Westbrook, *supra* note 153, at 76. Criticizing domestic doctrine as insufficiently attentive to international dimensions neglects the fact that much of that doctrine was first drawn from, or influenced by, international cases and treatises. See *supra* text accompanying notes 11-13, 56-95. Current doctrine in the five areas may be a mess, but it is inconceivable to me that obliterating the lines among them and subjecting all to a

international trade to our economy and the consequent increase in international litigation in our courts require lawyers who are equipped to meet the special demands that such litigation imposes. *International Civil Litigation* exposes those special demands with a degree of clarity, thoroughness, and sophistication that is unusual, let alone at the hands of those whose primary concern is the practice of law. Moreover, as this review may suggest, the materials challenge students, scholars, and practitioners to reflect upon opportunities for international cooperation and accommodation that have been missed in the past and on means to enhance cooperation and accommodation in the future.

The study of procedure is, or should be, a study in power.²⁵² *International Civil Litigation* demonstrates that issues of power are no less important in the international than in the domestic sphere and that they are not confined to areas with obvious substantive implications.²⁵³ Moreover, the history of domestic regulation of international procedure demonstrates that, however far from the surface the substantive implications lie, the major concern is, or should be, separation of powers, rather than federalism.²⁵⁴ But there is nothing new in that or in the refusal of the federal courts to acknowledge it.²⁵⁵

multifaceted analysis would be an improvement. Compare *supra* text accompanying note 82 (personal jurisdiction).

252. See, e.g., Burbank, *supra* note 1, at 1471-76.

253. For one such area, see *supra* text accompanying notes 14-55 (legislative jurisdiction); see also Burbank, *supra* note 57, at 714 ("‘real procedure’ is hard to find”).

254. See *supra* text accompanying notes 102-200 (service of process abroad), 201-240 (taking evidence abroad).

255. See Burbank, *supra* note 18, at 755-62; Burbank, *supra* note 140, at 1185-97. Although the Supreme Court’s recent decision upholding a Rule 11 sanction imposed on a represented client against a challenge under the Rules Enabling Act might be viewed as a simple reaffirmation of past cases gutting that statute, see *Business Guides, Inc. v. Chromatic Communication Enterprises, Inc.*, 111 S. Ct. 922, 933-34 (1991), two aspects of the decision are noteworthy. First, the Court was at pains to reiterate that Rule 11 is not a fee-shifting provision. See 111 S. Ct. at 934. Second, three members of the Court saw serious problems under the Enabling Act, and they voiced “concerns with respect to both separation of powers and federalism.” 111 S. Ct. at 940 (Kennedy, J., dissenting). This is progress.