FORTHCOMING IN 18 SW. J. INT'L L.

A TEA PARTY AT THE HAGUE?

*Stephen B. Burbank**

Abstract

In this article, I consider the prospects for and impediments to judicial cooperation with the United States. I do so by describing a personal journey that began more than twenty years ago when I first taught and wrote about international civil litigation. An important part of my journey has involved studying the role that the United States has played, and can usefully play, in fostering judicial cooperation, including through judgment recognition and enforcement. The journey continues but, today, finds me a weary traveler, more worried than ever about the politics and practice of international procedural lawmaking in the United States. Disputes about the proper roles of federal and state law and institutions in the implementation of the Hague Choice of Court Convention suggest that this little corner of American foreign policy is at risk of capture by forces that, manifesting some of the worst characteristics of domestic politics, would have us host a tea party at The Hague.

Scholars of transnational litigation are familiar with the question whether a foreign judgment can or should be given greater preclusive effect in this country than it would be given at home, as for instance when the applicable U.S. law, but not that of the rendering court, would permit non-mutual issue preclusion. When first considering that question, I was struck not so much by the very different views that had been expressed, notably by Hans Smit[1] and Courtland Peterson,[2] but by how closely those views followed from their exponents' understanding of the policy goals

© Stephen B. Burbank 2012

* David Berger Professor for the Administration of Justice, University of Pennsylvania. An earlier version of this article was presented as the keynote address at a workshop on judicial cooperation for Italian judges, which was sponsored by the European University Institute in Florence on October 28-29, 2011.

underlying the law of preclusion when it operates internationally.[3] Mindful that the same question had arisen in wholly domestic interjurisdictional proceedings, I was also struck by the power of clear thinking about the purposes of the full faith and credit clause to influence the answer.[4]

Transnational judgment recognition and enforcement law and practice are, inescapably, aspects of a country's foreign policy. That is easy enough to see when they are the subject of international agreements. The United States is not party to any such agreement. Courts do not for that reason, however, stop being, and being seen by people in other countries as, expositors and formulators of national policy. This fact can be obscured by describing transnational judgment recognition and enforcement as a form of judicial cooperation, particularly if, as in the EU, it is lumped with other topics, only some of which have comparable salience for international relations.[5] Moreover, such salience is easier to miss in the United States than elsewhere because of the absence of federal statutory rules and the prominent default role that state law has been allowed to assume.

In this article, I consider the prospects for and impediments to judicial cooperation with the United States, a country whose courts have been called the light to which prospective foreign plaintiffs are drawn like moths,[6] and are a light that most prospective foreign defendants would like to turn out. I will do so by describing a personal journey that began more than twenty years ago when I first taught and wrote about international civil litigation. An important part of my journey has involved studying the role that the

1. *See* Hans Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 UCLA L. REV. 44, 56 (1962) (rejecting interstate perspective).

2. *See* Courtland H. Peterson, *Res Judicata and Foreign Country Judgments*, 24 OHIO ST. L.J. 291, 302-08 (1963) (embracing interstate perspective).

3. *See* Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1582-86 (1992); *id.* at 1584 ("[T]hose who would ignore foreign law and policy in the recognition area are in reality calling for a return to isolationism.").

4. "In international cases as in interstate cases, the answer to the question whether a recognizing court can or should give the rendering court's judgments greater preclusive effects than they would have at home depends upon policy focus." *Id.* at 1585.

5. The EU's civil justice website identifies the key components of the EU's approach to judicial cooperation as: service of documents, taking of evidence, recognition and enforcement of judgments, the free circulation of public documents, and the development of the European Judicial Network, which seeks to foster cooperation through the use of technology for the benefit of both the public and members of the Network. *See* European Comm'n, *Judicial Cooperation*, http://ec.europa.eu/justice/civil/judicial-cooperation/index_en.htm (last updated Feb. 3, 2012).

6. "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." Smith Kline & French Labs. v. Block, [1983] 2 All E.R. 72, 74 (Denning, J.).

United States has played, and can usefully play, in fostering judicial cooperation, including through judgment recognition and enforcement. The journey continues but, today, finds me a weary traveler, more worried than ever about the politics and practice of international procedural lawmaking in the United States. This little corner of American foreign policy is at risk of capture by forces that, manifesting some of the worst characteristics of domestic politics, would have us host a tea party at The Hague.

In the early 1990s I was invited to participate in a symposium celebrating the one-hundredth anniversary of The Hague Conference on Private International Law. In rereading the article I wrote for that occasion[7] as preparation for this one, it occurred to me that I should assume the sobriquet given to Alden Whitman, formerly the obituary writer for *The New York Times*. Mr. Whitman liked to be prepared and thus would seek a pre-mortem interview with famous people he deemed ripe to shuffle off their mortal coil. As a result, among those receiving a request for an interview, Whitman became known as "Mr. Bad News."[8]

The news I bear today is bad news for those who believe in the importance of judicial cooperation to robust global, and not just national or regional, markets. Since mine is a bleak message, it is probably useful to make clear what might otherwise be left to inference, at least among those who have not read my 1994 article. Largely as a result of legislation enacted and court rules promulgated in the 1960s, the United States is prepared to provide very generous assistance, on a non-reciprocal basis, to foreign tribunals and to litigants in proceedings before them, both by serving process or other documents and by taking evidence in aid of those proceedings.[9] Moreover, the standards governing the recognition and enforcement of internationally foreign judgments under American law have been generous for more than a century.[10]

7. Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW. & CONTEMP. PROBS. 103 (1994).

8. *See* GAY TALESE, THE GAY TALESE READER: PORTRAITS AND ENCOUNTERS 172 (2003).

9. *See* Burbank, *supra* note 7, at 107-11 (describing work and work product of Commission and Advisory Committee on International Rules of Judicial Procedure).

10. *See* Hilton v. Guyot, 159 U.S. 113 (1895); Burbank, *supra* note 4, at 1574 (observing that, with exception of reciprocity, the Court in *Hilton* "essentially said that foreign judgments should be treated as if they issued from courts of neighboring states – as if they were entitled to full faith and credit"); *id*. at 1575 (noting that "whether in cases or statutes, the states have largely adopted the basic rules announced in *Hilton*").

If American law and legal institutions stand ready to provide such generous assistance, why the gloomy report? The key here is the fact that these steps have been taken unilaterally,[11] and unilateral generosity is not the equivalent of cooperation. In addition, not infrequently such unilateral generosity has been accompanied by unilateral claims of power—as for instance to serve process in violation of the law of other countries.[12] More deeply, the habit of taking action unilaterally makes it harder both to reach agreements that can be the foundation of cooperation and, once such agreements have been concluded, to interpret them in a cooperative spirit.[13]

More recent developments suggest that the prospects for transnational judicial cooperation with the United States are worse, not better. For, having poked its head out of international law and private international law cocoons on the field of civil litigation, the United States appears to be regressing to a posture of isolationism and xenophobia that is reminiscent of the second half of the nineteenth century. This should not be surprising to the extent that international and transnational legal arrangements in the United States reflect or move in tandem with domestic politics. The industrialists of the second half of the nineteenth century would recognize and applaud the enthusiasm for laissez faire capitalism that dominates one part of the American political landscape today, while those struggling to find work building the transcontinental rail lines would appreciate contemporary American xenophobia.[14] Moreover, although George W. Bush is no Theodore Roosevelt, the impulse to extend American economic influence through unilateral military action, while trumpeting the benefits of democracy, also unites the two periods.

11. *See* Burbank, *supra* note 7, at 110-11 (discussing legislation recommended by Commission and Advisory Committee on International Rules of Civil Procedure and enacted by Congress).

12. *See id.* at 112-14 (discussing 1963 amendments to Federal Rules of Civil Procedure); *id.* at 113 ("Rule 4(i) represented a unilateral assertion of power in aid of litigation in the federal courts, affording great flexibility but not requiring deference to foreign law or consideration of the international implications of service.").

13. *See id.* at 126-27 (discussing Supreme Court decisions interpreting Hague Service and Evidence Conventions); *id.* at 113 (noting Court's "determination to preserve as much domestic procedural law as possible" and "reluctance to interpret treaties so as to confer greater rights on foreign litigants than their domestic opponents").

14. *See* RICHARD WHITE, RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA (2011) (describing transcontinental railroads as "Gilded Age extravagance" and chronicling hostility of Knights of Labor to Chinese contract laborers).

My 1994 article was entitled "The Reluctant Partner: Making Procedural Law for International Civil Litigation."[15] In it, I reminded readers that, not having joined The Hague Conference for the first seventy years of that organization's existence, the United States had "missed many earlier birthday parties."[16] I also suggested that other members of the Conference—"particularly countries that are also parties to The Hague Service Convention and The Hague Evidence Convention—m[ight] doubt [the United States'] willingness to abide by [its] international obligations."[17] I then sought to advance understanding of the United States' ambivalence about international commitments in the domain of procedure and private international law by setting it in historical and institutional context.

Thus, I suggested that the shortness of the history of U.S. engagement with procedural problems in international civil litigation was related to the length of the list of relevant institutional actors, noting that "[f]or years, the supposed requirements of U.S. federalism hindered international lawmaking through private international law treaties as effectively as they did a federal law of procedure for the federal courts."[18] Although the federal courts were finally empowered to apply federal procedural law in the 1930s, I observed that "federalism objections die hard in the international arena."[19]

The core of my 1994 article was an attempt to identify common threads that ran throughout the United States' lawmaking efforts in the domain of international civil litigation and that had "in the past prevented or hindered the process of dialogue and mutual education necessary for international cooperation."[20] Most important among those threads, I argued, were, first, unilateralism; second, a preference for national over international uniformity; and, third, penuriousness, that is, unwillingness to spend money. I argued "that unilateralism deserves to be buried, not reborn, that international uniformity is increasingly more important than national uniformity, and that both international education and education about international and comparative law require more patience and more public resources than [the United States had] previously been willing to commit."[21]

15. Burbank, *supra* note 7.
16. *Id.* at 103.
17. *Id.*
18. *Id.* at 104.
19. *Id.*
20. *Id*. at 105.
21. *Id*.

Although the U.S. Supreme Court's decision interpreting The Hague Service Convention in the *Schlunk* case,[22]and its decision interpreting and Hague Evidence Convention in the *Aerospatiale* case,[23] well illustrated the baneful influences of unilateralism, preference for domestic uniformity and impatience,[24] I thought that we might learn some useful lessons.

One of the lessons to be learned was that, although treaty making in the field of transnational judicial cooperation need not require a marathon, it is unlikely to yield something worthwhile if it is a sprint. In the case of The Hague Evidence Convention, which was first proposed in 1967 and concluded in 1968,[25] I now believe that we would be better off starting over from scratch. That is because work on a new evidence convention would proceed in a very different environment—one in which there may be more enthusiasm for what, as a concession to the shortness of life, I will call discovery in countries that are turning toward private enforcement of statutory and administrative law, and distinctly less enthusiasm for discovery in the United States, which is turning away from private enforcement.[26] Starting over from scratch would also make sense given the much greater level of shared knowledge and understanding about taking evidence that exists today than when representatives of some member states believed that "pretrial discovery" occurs before a case has been filed.[27] We should be able to benefit from this process of mutual education, to which the efforts made in developing the American Law Institute/Unidroit

22. *See* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) (holding that it is a matter of internal law whether service needs to be made abroad, thus triggering that Convention).

23. *See* Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. District of Iowa, 482 U.S. 522 (1987) (holding that use of that Convention is optional).

24. *See* Burbank, *supra* note 7, at 126-27, 131-33.

25. *See id.* at 133-34 (arguing that misunderstanding and disagreements about interpretation of Evidence Convention were "attributable to inadequate education as much as to bad draftsmanship").

26. *See* Stephen B. Burbank, Sean Farhang, and Herbert M. Kritzer, *Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)*, in _____ (Burkhard Hess, ed. 2012); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559, 560 n.6 (2007) (citing Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638-39 (1989)).

27. *See* Burbank, *supra* note 7, at 134; J.H.A. van Loon, *The Hague Conventions on Private International Law*, in THE EFFECT OF TREATIES ON DOMESTIC LAW 221, 225 (Francis G. Jacobs & Shelley Roberts, eds. 1987); *Hague Conference on Private International Law: Special Commission Report on the Operation of the Hague Service Convention and the Hague Evidence Convention*, 28 I.L.M. 1556, 1563-64 (1989).

Principles of Transnational Civil Procedure[28] have made a substantial contribution.

It is harder to know what lessons to take from the *Schlunk* decision other than that a treaty of the United States deserves to be accorded the generative (judicial) lawmaking power of an ordinary federal statute.[29] It is also harder to know whether in this area as well we would be better off starting over from scratch. A reason for uncertainty as to both is that the Supreme Court has never again interpreted The Hague Service Convention. Of course, in the intervening decades the Court's appetite for work has become notably anorexic. To the extent that this startling decline in decided cases reflects the desire of some justices to advance understanding of U.S. legal arrangements by writing books, giving speeches, and attending international conferences, perhaps we should applaud. Before doing so, however, we should recognize that cases raising other international civil litigation issues have prospered even under the Court's new low-volume diet and that on issues such as whether Article 10(a) of the Service Convention authorizes service by mail,[30] the long-standing conflict among federal courts of appeals and state courts is not going to go away,[31] and it continues to impose unnecessary expense and risk on prospective plaintiffs.

Reasons for optimism that the United States might become a less reluctant partner had to do with what I took to be implications of the United States' declining power in an increasingly global marketplace, coupled with robust evidence of the costs of unilateralism in making law for international civil litigation. These two strands converged in an effort by the United States, which in 1994 was just underway, to develop a global jurisdiction and judgments convention under the auspices of The Hague Conference. An important stimulus to the effort was concern that unilaterally generous domestic law governing the recognition and enforcement of internationally

28. *See* PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 36-38 (2006) (Access to Information and Evidence).

29. *See* Stephen B. Burbank, *The World in Our Courts* 89 MICH. L. REV. 1456, 1493 (1991); Burbank, *supra* note 7, at 126-27.

30. "Provided the State of destination does not object, the present Convention shall not interfere with – (a) the freedom to send judicial documents, by postal channels, directly to persons abroad . . . ." Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *approved* Oct. 28, 1964, art. 2; 20 U.S.T. 361, 658 U.N.T.S. 163, art. 10(a).

31. *See, e.g.*, Rojas v. Hitachi Koki Co., Ltd., 2009 WL 3924762 (Mass. Super. Sept. 29, 2009); Honda Motor Co. v. Superior Court, 12 Cal. Rptr.2d 861 (Cal. Ct. App. 1992); Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986).

foreign judgments not only had *not* elicited emulation by other countries.[32] Rather, it stood in stark contrast to provisions of the Brussels Convention (and the successor European Council Regulation) that discriminated against American defendants by permitting the use of exorbitant jurisdictional standards and requiring other member states to recognize such judgments.[33] Moreover, because the United States had already given away the store by being unilaterally generous as to judgments, it had lost a good deal of bargaining power and might therefore have to yield in the area where those negotiating for other countries would seek advantage, in particular standards for the assertion of adjudicatory jurisdiction.

Indeed, as the negotiations at The Hague proceeded, the prospect of a global jurisdiction and judgments convention caused me to reflect on the various respects in which international procedural lawmaking might enable improvements in both European and United States law.[34] Those reflections resulted in a 2001 article on jurisdictional equilibration devices, in particular forum non conveniens, lis pendens and anti-suit injunctions.[35] The function of these devices is, as the name I gave them suggests, to achieve balance—think of the French word for a tightrope walker: *un équilibriste*.[36] They are devices "easing the agony of foresight by which jurisdiction is protected or declined and its potential to yield an enforceable judgment fructified or frustrated."[37]

32. Canada is an exception. *See* Vaughan Black, *A Canada-United States Full Faith and Credit Clause?*, 18 SW. J. INT'L L.__ (2012) (discussing Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077).

33. *See* Samuel P. Baumgartner, *The Proposed Changes to the European Union's Regime of Recognizing and Enforcing Foreign Judgments*, 18 SW. J. INT'L L. , (2012) [Draft at 5-6]; *id.* at [Draft at 6] ("Not only can the courts of the EU-member states take jurisdiction over such defendants on the basis of exorbitant jurisdictional rules that are outlawed in the inter-community context, but the emanating judgment must be recognized and enforced in all of the other member states without further examination of the originating court's jurisdiction."); Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271 (1994) (describing and analyzing U.S. proposal); Burbank, *supra* note 3, at 1572-73.

34. *See* Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT'L & COMP. L. 111, 116 (1999) ("[T]he current project at the Hague can be seen as an opportunity to use international lawmaking to bring about change [in domestic law]…").

35. *See* Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203 (2001).

36. *See id*. at 205-06 n.12.

37. *Id.* at 206.

Study of this part of the procedural landscape led me to argue that the draft Hague Convention's lis pendens provisions were superior to the Brussels regime. I so concluded both because they recognized the potential mischief of giving strict precedence to actions for negative declarations—captured in the marvelous image of an Italian torpedo[38]—and, more generally, because they would include both a forum non conveniens check, albeit one that did not use that dreaded Latin phrase, and a check enabling the second filed action to proceed if a judgment issuing from the first filed forum would not be capable of recognition.[39]

I also concluded that domestic United States law could be improved through study of both the Brussels regime and the draft Hague provisions. First, the latter made clear the extent to which forum non conveniens doctrine that distinguishes between plaintiffs solely by reason of nationality is offensive to other countries.[40] Second, both the importance of lis pendens in the Brussels regime and the potential modifications of a strict lis pendens system proposed in the Hague draft set in relief the long-standing incoherence of American federal law, which in some circuits treats the courts of Italy as if they were other federal courts and in others as if they were courts of the one of the states of the United States. Of course, they should be assimilated to neither.[41] Third, the reasons for refusal to permit anti-suit injunctions under the Brussels regime and awareness of the useful function they could perform, albeit in carefully defined circumstances, could help to rationalize and make uniform another area of federal procedure where competing models had created—and continue to foster—incoherence.[42]

In both the 1994 and 2001 articles I underestimated the power of the private sector to drive United States policy in the field of international procedural law making. One might have thought that the geopolitical ramifications of international commerce would induce attention to the possibility that wise national policy in this domain is not always dictated by private preferences. If "the chief business of the American people [was]

38. Stephen B. Burbank, *International Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT'L L. 663, 663 (2012) ("That colorful metaphor conceives a would-be plaintiff's case as a ship and suggests the effect on it of conferring the benefits of the EU's strict lis pendens rule on actions for a negative declaration (declaratory judgment) when filed first in Italy's sclerotic judicial system, which is badly in need of angioplasty.").

39. *See* Burbank, *supra* note 35, at 219-23.

40. *See id*. at 242.

41. *See id.* at 227-34.

42. *See id.* at 235.

business"[43] in 1925, how much more important is international business today? And perhaps what I have called "the geopolitical ramifications of international commerce" might have done so had the State Department not chosen to use the supposed preeminence of private preferences as a normative shield for its decision—from the time when an office was created for private international law—to starve that office of resources.[44]

This is a major manifestation of the penuriousness to which I earlier referred. It forces the State Department to rely on the kindness, if not of strangers, then of rent-seekers advancing interests whose congruity with the national interest may be a matter of chance. The argument that private preferences must be honored (or at least mollified through compromise) in order to secure domestic ratification of a treaty is a capitulation to a particular view of government that, when translated to the international stage, hardly bodes well for mutual respect and cooperation.[45] It is also an invitation to extortion.

Thus, the effort to craft a global jurisdiction and judgments convention at The Hague failed in part because elements of the American private bar vigorously opposed, and persuaded the American delegation to oppose, the effort of negotiators from other countries to cut back on grounds of adjudicatory jurisdiction that they deemed exorbitant, including in particular general doing business jurisdiction.[46] Yet, some of us whose only interest was progress in judicial cooperation had welcomed this opportunity to civilize domestic American law through an international lawmaking

43. Cyndy Bittinger, *The Business of America is Business?*, CALVIN-COOLIDGE.ORG, http://www.calvin-coolidge.org/html/the_business_of_america_is_bus.html (last visited March 6, 2012).

44. *See* Burbank, *supra* note 7, at 141-43.

45.

The United States has interests in private international law that transcend, and may even conflict with, the collective preferences of U.S. legal consumers. Federal and state governments devote substantial resources to the establishment and maintenance of court systems. In addition, the resolution of international disputes and the establishment of behavioral norms for international actors are increasingly critical to our economic and social well-being as a nation. There is no bright line between public and private law, a fact that both complicates the work of reaching international agreements on matters of private international law and highlights the importance of adequate public support for the enterprise.

Id. at 143 (footnotes omitted).

46. *See* Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L REV. 319 (2002); Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327 (2004).

initiative.[47] For people so inclined, the Supreme Court's recent decision in the *Goodyear Dunlop Tires* case,[48] strictly limiting the scope of application of general doing business jurisdiction, although satisfying, comes a decade too late. Unfortunately, Justice Ginsburg's largely well–reasoned opinion demonstrates the riskiness of forays into comparative law by confusing the question whether the plaintiff's domicile is an acceptable basis for adjudicatory jurisdiction with the question whether the fact of a plaintiff's domicile in the forum grounds interests that might legitimately be considered in the all-things-considered analysis that I believe the Due Process Clause of the Fourteenth Amendment requires.[49]

As suggested by my comments on the Supreme Court's neglect of The Hague Service Convention after the *Schlunk* decision in 1988, I also underestimated what I have called that court's "anorexic appetite for work." I am happy that the Court has paid more attention to the problems of international civil litigation in the past decade than it had in many previous decades. But there is so much more work to be done and no credible excuse for not doing it. The Court has never addressed (at least in modern memory) the standards that govern the questions whether a federal court should (or even can) dismiss (or stay) a pending action in deference to an action pending in another country.

The conflict among, and incoherence resulting from, lower court cases that answer those questions by resort to competing domestic models, neither of which is appropriate and one of which is itself incoherent in its original setting, continues.[50] Those courts that have fashioned special *lis pendens* rules for transnational cases have not satisfactorily reconciled the resulting doctrine with domestic law that *is* relevant, namely that which concerns the power of federal courts to decline to exercise jurisdiction granted by Congress.[51] Time and money are being wasted. The same inapt domestic models taint, and the same confusion and waste attend, litigation in the

47. *See* Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT'L L. 385, 386-92 (2004).

48. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).

49. *See Goodyear*, 131 S. Ct. at 2857 n.5; Burbank, *supra* note 38, at 670-71. For the due process analysis that is appropriate for general doing business jurisdiction, see Burbank, *supra* note 34, at 749-53.

50. *See* Burbank, *supra* note 35, at 213-15.

51. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996) (federal court lacks power to implement abstention in favor of state court litigation by dismissal in action seeking common law damage remedy); Posner v. Essex Ins. Co., 178 F.3d 1209, 1223 (11th Cir. 1999) *(Quackenbush* not binding in international context).

lower federal courts with respect to the law that governs the issuance of anti-suit injunctions against litigation abroad.[52]

A decade of effort at The Hague did not go completely to waste. To their credit, the negotiators recognized that progress might be made incrementally. In particular, again encouraged by the United States, they recognized that a convention governing jurisdiction based on exclusive choice of court agreements between businesses and the recognition and enforcement of judgments entered by courts exercising such jurisdiction might be useful in its own right by making litigation a more attractive alternative to arbitration. If successful, a limited convention might also be useful as a springboard to renewed efforts toward a comprehensive convention.[53]

The Hague Choice of Court Convention was concluded in 2005.[54] It has not come into force. The primary reason, I believe, is that most other countries are waiting to see whether and how the United States ratifies and implements the convention. They may be waiting a very long time. For, at about the time the global jurisdiction and judgments project collapsed, there were two related developments that caused the landscape of United States' participation in international private lawmaking to appear antediluvian, developments having to do with political ideology and institutional turf. They demonstrate that federalism objections die even harder in the international arena than I recognized in 1994.

According to its website, the "Uniform Law Commission [ULC] provides states with non-partisan, well conceived, and well drafted legislation that brings clarity and stability to critical areas of state statutory law."[55] Before the administration of George W. Bush showed the world that the most expeditious way to overcome obstacles presented by international law was systematically to ignore or dismantle their source, the Uniform Law Commissioners had reason to worry about remaining relevant in a world where the laws of the several states of the United States seemed increasingly marginal—a world where the United Nations Convention on

52. *See* Burbank, *supra* note 35, at 214.

53. *See* Stephen B. Burbank, *Federalism and Private International Law*, 2 J. PRIV. INT'L L. 287, 288-89 (2006) (discussing the goals of those who advocated the Choice of Court Convention).

54. Convention on Choice of Court Agreements, concluded 30 June 2005, http://www.hcch.net/index_en.php.act=conventions.pdf&cid=98.

55. UNIFORM LAW COMMISSION, http://www.nccusl.org/ (last visited March 10, 2012).

Contracts for the Sale of Goods and similar treaties might one day be more important than the Uniform Commercial Code in the courts of Kansas.

Having failed to derail a project of the American Law Institute that proposed a draft federal statute to govern the recognition and enforcement of internationally foreign judgments,[56] the ULC may have seen in the change of administrations in 2001 and the resuscitation of negotiations at The Hague an opportunity to deploy conservative American ideology, or that part of it that worships states' rights when it is convenient to do so, in the service of the ULC's own institutional interests. Certainly, it is convenient for the ULC's claim of non-partisanship that its agents can obscure in the bosom of service to the states very different, often highly contestable and partisan, views about the appropriate domains of state and federal law. Capitalizing on the opportunity, however, required (1) the development of theoretical foundations for ULC participation in international lawmaking and (2) the development of practical political alliances that would help the ULC to build on those foundations.

My colleague, Curtis Reitz, himself a Uniform Commissioner and (at the time) chair of the ULC's (aptly named) International Legal Development Committee laid some theoretical foundations in a 2005 article.[57] Forging practical political alliances was not difficult. The ULC secured a position on the United States delegation negotiating the Choice of Court Convention at The Hague at the tail end of that process, and, when the Bush administration left office, they retained the former head of the private international law office in the State Department as a consultant.[58] The claim to protect the legitimate lawmaking prerogatives of the states makes it easy for the ULC to enlist the support of the Conference of State Chief Justices. Whether the ULC's efforts in fact do so, as opposed to securing turf for the ULC, may be hard for those not expert in an area,

56. AMERICAN LAW INSTITUTE, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE: (2005). As an Adviser to this project, s*ee id.* at vii, I witnessed attempts by those associated with the ULC to derail the project or restrict its scope. Indeed, it seems likely that the ULC undertook revisions to a 1962 uniform act on foreign-country judgment recognition either for those purposes or to prevent the enactment of any proposed legislation that the ALI project might produce. *See* UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (2005), available at http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005final.htm.

57. *See* Curtis R. Reitz, *Globalization, International Legal Development, and Uniform State Laws*, 51 LOYOLA L. REV. 301 (2005).

58. David P. Stewart is listed as a consultant to the ULC drafting committee for the Choice of Court Convention Implementation Act. *See* http://www.nccusl.org/Committee.aspx?title=Choice%20of%20Court%20Agreements%20Convention%20Implementation%20Act.

particularly an area with international dimensions, to determine. Finally, since the implementation of The Hague Choice of Court Convention requires decisions about the allocation of judicial business between the federal and state courts, on those issues at least, the ULC may look for the support of the institutional federal judiciary, particularly in a time of budgetary distress.

Indeed, it is not clear that political alliances are necessary for the ULC to have its way on issues where the federal-state equilibrium and international law can be packaged. The Hague Service and Evidence Conventions were ratified as self-executing treaties, a legal form that, after *Medellin v. Texas*,[59] is on the cutting edge of obsolescence in the United States. In *Medellin* the Court concluded that the International Court of Justice's judgment holding that the United States had violated the Vienna Convention on Consular Relations by failing to inform 51 Mexican nationals, including Medellin, of their Vienna Convention rights, is not binding domestic law because none of the relevant treaty sources creates binding federal law in the absence of implementing legislation, and no such legislation had been enacted.

Since implementing legislation is not only politically necessary but also objectively appropriate, and given that The Hague Choice of Court Convention presents the federal-state equilibrium and international law package, one can easily imagine, or imagine the stimulation of, a partisan reception in some quarters. At least when legislators in those quarters have either a majority in one house of Congress or forty-one votes in the Senate, the ULC's opposition to implementation solely through a federal statute would likely be fatal. The fact that such a "my way or the highway" approach might be inimical to the national interest again suggests the downside of the State Department's long-standing dependence on the private sector in the area of private international law.

I was ignorant of much of this background when I addressed Professor Reitz's proposal for the use of uniform state law to implement treaties in a 2006 article.[60] Acknowledging that there might be a role for uniform state law in the development and implementation of treaties concerning *international private law*, I argued that the same reasons did not obtain with respect to *private international law* treaties or at least with respect to The

59. 552 U.S. 491 (2008).

60. *See* Burbank, *supra* note 53.

Hague Choice of Court Convention.[61] Agreeing that federalism is important in the United States, I pointed out that it is "also important that the United States be able to participate effectively in a global economy and that those charged with the conduct of the country's foreign affairs be able to make, and that the country abide by, international agreements that are designed to facilitate transnational commercial activity."[62]

The Hague Choice of Court Convention, I noted, "leaves little room for variation or departure in standards for asserting jurisdiction or recognizing and enforcing judgments."[63] Moreover, where it does leave room, "the history of domestic regulation does not provide strong normative support for state law to furnish the rules."[64] I concluded that "federal implementation through legislation prescribing federal law that is mostly uniform, but a few provisions of which may borrow designated state law, would impose lower transaction and administrability costs, with no loss of accessibility, than would state implementation."[65]

The six years since this article was published have been surreal. As a participant in a study group of the Secretary of State's Advisory Committee on Private International Law and a smaller ad hoc group that has tried to find common ground, I have been repeatedly exposed to the ULC's theory of "cooperative federalism." I use the word "exposed" advisedly, because whatever its merits in a wholly domestic context, in the international context the theory has the destructive potential of a communicable disease. It has often seemed to me that some representatives of the ULC do not

61. *See id*. at 299-308.

62. *Id.* at 308-09.

63. *Id.* at 309. *See id.* at 300 ("It is no surprise that the Hague Convention looks like a self-executing treaty. The quest for uniformity and certainty - for reciprocity – that animated the treaty left little room for variation or departure.").

64. *Id.* at 309.

> Whether in response to the Hague Convention or to the ALI's proposed federal foreign-country recognition and enforcement statute, one hears claims that, because state law has dominated the American jurisdiction and judgments landscape in international cases to date, it should continue to do so. The relationship between federal and state law in both parts of this jurisprudential landscape is, however, more complex than these claims acknowledge. Indeed, in neither part of the landscape does a consideration of past practice yield a persuasive normative argument for state law to continue playing a dominant role.

Id. at 295.

65. *Id.* at 309. "To require implementation by state law in these circumstances might well seem 'a mere token gesture achieved at the expense of … economy.' Alternatively, or in addition, it might be regarded as another manifestation of the United States' willingness to undermine treaties by preferring domestic to international uniformity." *Id.* at 300 (footnotes omitted).

understand the issues, and that some feign lack of understanding in order to protect ideology, turf, or both.

What, after all, is so difficult to understand about the proposition that legitimate state lawmaking prerogatives can be adequately protected by provisions in a federal implementing statute that borrow state law?[66] Or the proposition that "there is no necessary connection between the process used to implement the treaty and the source of the rules to which resort is made for that purpose?"[67] Or the proposition that the complexity of an implementation regime which required consulting and figuring out the relationships among a federal statute, a state version of a uniform act, and case law interpreting the state statute would drive transactional lawyers to arbitration and drive litigators to drink? That is if the treaty ever became effective, which it probably would not because other countries would conclude that someone had slipped Kool Aid into our tea, causing us to regress from reluctant to recalcitrant partner.

The Legal Adviser to the State Department has devoted a substantial amount of time to the implementation of the Choice of Court Convention in an effort to find acceptable compromise positions. Compromise has usually been one-sided, and that side is not the ULC. To date, the process has yielded proposed federal and uniform statutes that are in all pertinent respects identical. I repeat, *the process has yielded proposed federal and uniform statutes that are in all pertinent respects identical*. Now I understand. "Cooperative federalism" means cooperative redundancy. Or perhaps not. One important remaining issue concerns the circumstances in which the law of states that adopted the proposed uniform act would be preempted and the standards for determining preemption.

To picture my reaction upon first hearing a ULC proposal that the uniform act—as adopted by the ULC, not as actually made law by any state –be the standard for assessing preemption, think of the Aflac duck listening to Yogi Berra's observation, "and they give you cash, which is just as good as money."[68] Ignoring the well-known fact that uniform laws are not

66. *See id.* at 298-99.

67. *Id.* at 301.

68. *See* YOU TUBE, http://www.youtube.com/watch?v=O-EZf56AfYc (last visited March 10, 2012).

uniform[69] requires one to be either obtuse or disingenuous. Believing that the work product of unelected private citizens should be the standard for determining whether the United States is honoring its international commitments requires an impressive capacity for institutional aggrandizement.

The fact that, given the goals of the Choice of Court Convention,[70] it makes no sense to implement that treaty through a combination of a federal statute and a uniform act, which would not be enacted by all states and some of the language of which, even if faithfully enacted at the state level, would predictably be interpreted in different ways, is water under the bridge of "compromise." I suspect that the ULC cares less about the success of The Hague Choice of Court Convention than it does about setting a favorable precedent that would help to advance the ULC's international legal program.

The entire experience, at least to this point, does not suggest that the United States has made progress in private international lawmaking – quite the contrary. If the ULC were successful, our long-standing preference for national uniformity over international uniformity would be expressed in terms of state rather than federal law, taking us back to a time—the 1950s—when federalism objections prevented United States participation in the framing of the New York Convention on arbitration agreements and arbitral awards.[71] My one source of solace is a Legal Adviser to the State

69. "'The Uniform Commercial Code is not uniform.'" Walsh v. Ford Motor Co., 807 F.2d 1000, 1016 (D.C. Cir. 1986) (quoting J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 7 (2d ed. 1980)).

70. *See supra* note 63.

71. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 494 U.N.T.S. 321; Pub. L. 91-368, § 1, 84 Stat. 692 (codified at 9 U.S.C. §§ 1-14 (2000)).

> We maintained an isolationist position in the field of private international law long after we had abandoned the ostrich posture in the public law area. For example, as late as 1958 the United States delegation to the United Nations Conference on International Commercial Arbitration, because of the traditional concern regarding federal-state relations, was under instructions not to participate actively in formulating a convention for the recognition of foreign arbitral awards. After the conference adopted such a convention, the delegation recommended against our adherence thereto on the ground, among others, that the United States lacked a sufficient domestic legal basis for acceptance of an advanced international convention on the subject of arbitration. This always struck me as making us out even more backward than we were.

Richard D. Kearney, *The United States and International Cooperation to Unify Private Law*, 5 CORNELL INT'L L.J.1, 2 (1972).

Department who understands that compromise is a two-way street. More important, he understands that international lawmaking – even as to private international law — cannot simply be ceded to private interests. Whatever the ultimate result for The Hague Choice of Court Convention, one can hope that the experience will cause the Department to reconsider its budgetary priorities, aware of the costs not just of excessive reliance on the private sector but of the normative cloak used to justify it.