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Whose Regulatory Interests? Outsourcing the Treaty Function

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Abstract

In this article I describe the status quo in the area of foreign judgment recognition, with attention to the tension between domestic interests and international cooperation. Precisely because the future of the status quo is in doubt, I then consider current proposals for change, particularly the effort to implement the Hague Choice of Court Convention in the United States. Prominent among the normative questions raised by my account is whose interests, in addition to the litigants' interests, are at stake – those of the United States, those of the several states, or those of interest groups waving a federal or state flag. A related question is whether, if the uniformity we seek is to be found in state rather than federal law, we can be, and be seen by other countries to be, serious about international cooperation. I describe in some detail the sequence of events that led to the Uniform Law Commissioners ("ULC") becoming involved in the process of drafting legislation to implement the Choice of Court Convention. I also explore reasons why the ULC has been successful in securing the lion's share of attention for its preferred approach to implementation, which the ULC calls "cooperative federalism," but which has come to resemble cooperative redundancy. Recounting how, and offering suggestions why, the ULC ultimately rejected a package of compromises proposed by the State Department's Legal Adviser, even though almost all compromises were in favor of the ULC, I conclude with observations about the ULC's ambitions in the international arena. My argument is that, if the ULC were successful in taking over the negotiation or implementation of private international law treaties, international cooperation would be if not a fortuity, then not a priority, because we would have regressed to a position of privileging not just federal but state law uniformity over international uniformity. And the state law we privileged would be anything but "indigenous."

I was asked to consider whether the status quo is working for the recognition and enforcement of internationally foreign judgments,[1] and to do so in such a way as to advance

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[1] I will refer to recognition and enforcement of judgments entered by the courts of other countries as "recognition of foreign judgments" or simply "foreign judgment recognition."

understanding of the issue that unified the symposium. That issue was "how U.S. courts balance our regulatory interest[s] against the need for international cooperation in the context of transnational litigation."[2]

In this article I first describe what the status quo is in the area of judgment recognition, with attention to the posited tension between domestic regulatory interests and international cooperation. Precisely because the future of the status quo in this area is in doubt, I then consider current proposals for change, particularly the effort to implement the Hague Choice of Court Convention[3] in the United States.

My account draws on prior work, now almost twenty years old, that identified in the historical record of U.S. lawmaking for international civil litigation three threads that had prevented or hindered the process of dialogue and mutual education necessary for international cooperation: unilateralism and a preference for national over international uniformity, impatience, and penuriousness.[4] Such an account is useful both to bring readers who are not conversant with this corner of transnational litigation up to speed, and to lay the groundwork for discussion of normative issues that permeate United States law in this area, whether one is speaking about the past or about the present.

Prominent among the normative questions arising in connection with the recognition of foreign judgments is whose interests, in addition to the litigants' interests, are at stake – those of the United States, those of the several states, or those of interest groups waving a federal or state flag. A related question is whether, if the uniformity we seek is to be found in state rather than federal law, we can be, and be seen by other countries to be, serious about international cooperation.

Even those readers who are new to the recognition of foreign judgments are likely to know that the Full Faith and Credit Clause of the U.S. Constitution[5] and the federal statute that has implemented it since 1790[6] govern the credit due to the judicial proceedings of the states of the United States, not those of other countries. Such readers are perhaps less likely to be familiar with the purposes of the constitutional provision, which grew from the belief that interstate judgment recognition was essential to the development of a well-functioning multi-state economy, an insight that almost two hundred years later also animated the Brussels Convention.[7]

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[2] Symposium Brochure.

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

[4] *See* Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Litigation*, 57 LAW & CONTEMP. PROBS. (No. 3) 104, 135-43 (Summer 1994).

[5] U. S. CONST. art. IV, § 1.

[6] Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified at 28 U.S.C. § 1738 (2006)).

[7] Those who framed the Brussels Convention realized, as did the framers of the Full Faith and Credit Clause of the United States Constitution, that

They are less likely still to be aware of the Founders' concern that, were the biased treatment that British creditors received from some state courts in the 1780s to continue, it might quickly lead us back into war -- with a different result -- concerns that undergirded Article III's grant of judicial power in alienage diversity cases.[8]

Presumably most readers know that the urge to classify law in the United States as state or federal is, as to law that reposes in judicial decisions, a relatively modern phenomenon.[9] Thus, since the Constitution does not speak to the recognition of foreign judgments, and neither Congress nor state legislatures sought to regulate such judgments in the 19th century, the issues were committed to the tender mercies of the common law. Accordingly, in federal courts exercising domestic or alienage diversity jurisdiction they became part of the general federal common law associated with *Swift v. Tyson*.[10]

For much of this period it appears that there was disagreement, within and across federal and state judicial systems, whether foreign judgments were entitled to recognition for purposes of according them preclusive effect as opposed to admissibility in evidence. The Supreme Court's 1895 decision in *Hilton v. Guyot*[11]settled that question in favor of very generous recognition standards. But even before the well-known revolution ushered in by *Erie Railroad v.*

> civil courts can be instruments of economic warfare and, conversely, that shared judgment recognition standards can be powerful facilitators of economic cooperation and integration.

Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention, and Progress in National Law*, 49 AM. J. COMP. L. 203, 204 (2001) (footnotes omitted).

[8] *See* The Federalist No. 80 (Alexander Hamilton); Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U.L. REV. 547 (1989); Stephen B. Burbank, *The Bitter with the Sweet; Tradition, History, and Limitations on Federal Judicial Power – A Case Stu*dy, 75 NOTRE DAME L. REV. 1291, 1323 (2000). The propensity of some states to favor debtors against creditors, domestic and foreign, prompted "concerns about the impact of such laws on contract and property rights and on the ability of the new country to progress to a developed commercial state." *Id.* at 1324.

[9]

> In overruling Swift v. Tyson … Erie R. Co. v. Tompkins did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare … Law was conceived as a "brooding omnipresence" of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State Law, even in cases where a legal right created as the basis for relief was created by State authority and could not be created by federal authority and the case got into federal court merely because it was "between Citizens of different States" under Art. III, § 2 of the Constitution of the United States.

Guaranty Trust Co. v. York, 326 U.S. 99, 101-02 (1945) (citations omitted).

[10] 41 U.S. (16 Pet.) 1 (1842).

[11] 159 U.S. 113 (1895).

Tompkins,[12] *Hilton* was not uniformly regarded as binding under the Supremacy Clause, however persuasive its reasoning and rules might be.[13] Moreover, it took a less well-known revolution attributable to *Erie* to get us thinking about the legitimate lawmaking prerogatives of the federal courts.[14]

Although *Hilton* lost whatever status as a source of authority it had in 1938, it has continued to be a powerful source of rules, influencing state law, both judge-made and statutory, for more than a century.[15] Indeed, the primary reason why the National Conference of Commissioners on Uniform State Laws[16] undertook to draft a Uniform Act was *not* a perception of substantial disuniformity. It was, rather, the desire to promote greater recognition and enforcement of U.S. judgments abroad by easing inquiries into U.S. law that were driven by a requirement of reciprocity and that were conducted by judges accustomed to codified law.[17]

Thus, the state law for the recognition of foreign judgments -- judge-made or statutory -- that federal courts sitting in diversity applied after *Erie* was substantially uniform and had a federal source. Moreover, ever under the influence, if not the command, of *Hilton*, it has long been law that refuses to permit American regulatory interests to disrupt international cooperation, latitude that other countries long afforded through re-examination of the merits

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[12] 304 U.S. 64 (1938).

[13] *See* Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 386-87, 152 N.E. 121, 123 (1926) (reasoning that foreign judgment recognition involved questions of "private rather than public international law, of private right rather than public relations"). "For *Hilton* was decided in what Paul Freund called 'that spacious era before the *Erie* case, when federal judges were more than echoes of half-heard whispers of the state tribunals.'" Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1574 (1992) (quoting Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1212 (1946)).

[14] *See* Henry J. Friendly, *In Praise of Erie – And of Federal Common Law*, 39 N.Y.U. L. REV. 383, 422 (1962) ("The complementary concepts – that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow federal decisions on subjects within national legislative power where Congress has so directed – seems so beautifully simple, and so simply beautiful, that we must wonder why a century and a half were needed to discover them."); Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1574-75

[15] "[G]iven the widespread and abiding influence of *Hilton v. Guyot*, a realist would have to agree that, to a considerable extent, federal law continues to rule from the graveyard of the general common law." Stephen B. Burbank, *Federalism and Private International Law*, 2 J. PRIV. INT'L L. 287, 295 (2006) (footnotes omitted).

[16] I will refer to Uniform Law Commissioners collectively as the "ULC."

[17] *See* UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (1962); Burbank, *supra* note 15, at 295-96.

(*révision au fond*) and a choice of law test.[18] Assuming a foreign court has exercised jurisdiction and conducted proceedings consistently with our notions of due process,[19] essentially the only room that modern American foreign judgment recognition law affords for protecting domestic regulatory interests arises from that ubiquitous conflict of laws safety valve: public policy. In the area of foreign judgment recognition as elsewhere, however, the room is very small.[20]

There has been an obvious chink in the armor of uniformity with respect to the question whether recognition should turn on reciprocity. This was an aspect of the general federal common law announced in *Hilton*,[21] but it was the subject of a vigorous dissent by four Justices in that case[22] and had been rejected in the 1962 Uniform Act. Some states nonetheless opted to

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[18] *See* ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 856-63 (1965) (describing French and German law); *id.* at 856 ("The French system (and, though to a substantially lesser extent, the German as well) normally recognizes and enforces only those foreign judgments that rather closely approximate the results that would have been reached through domestic adjudication.").

[19]

> [W]e are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity or the effect of the judgment sued on.

Hilton, 159 U.S. at 202.

[20] "Subsection (a)(vi) is a residual grant of authority to deny recognition or enforcement to a foreign judgment otherwise entitled to recognition. A provision to this effect is contained in every statute or treaty the world over concerned with recognition and enforcement of foreign judgments or arbitral awards…. In all of these contexts, the threshold for establishing the public-policy exception is high" RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 5 cmt. h (2006).

[21] "The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiffs' claim." *Hilto*n, 159 U.S. at 227.

[22] "The application of the doctrine of res judicata does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary." *Id.* at 232 (Fuller, C.J., dissenting).

include a reciprocity requirement in the versions of the uniform act that they adopted,[23] proving that, as often observed, uniform acts are not uniform.[24]

Today, those whose view extends beyond our shores should agree that the law applied by United States courts to determine whether foreign judgments warrant recognition is an aspect of our foreign policy, a perspective that assimilating the phenomenon to judicial cooperation tends to obscure.[25] Whatever our internal lawmaking arrangements, as global economic activity has assumed ever greater prominence in international statecraft, other countries, particularly those whose courts lack institutional independence, are likely to see in a recognition decision only the work of the United States. This is not, or not entirely, a recent perspective. In the period following the ULC's promulgation of the 1962 Act, some took note that, as the dissent in *Hilton v. Guyot* argued, a reciprocity requirement is difficult to divorce from foreign policy. Thus, both the fact that state courts are not obviously appropriate instruments of foreign policy, and the fact that it is therefore a matter upon which the United States should speak with one voice, contributed to occasional articles arguing that the federal courts can and should develop and apply uniform federal law, binding on the States, as part of what their authors saw as a nascent federal common law of foreign relations.[26]

In my view those scholars were wrong, over-reading the Supreme Court's decision in *Banco Nacional de Cuba* v. *Sabbatino*,[27] and, particularly following the Supreme Court's reorientation of *Erie* jurisprudence in its 1965 decision in *Hanna v. Plumer*,[28] failing to give adequate attention to differences attributable to the sources of federal law. That said, however, there cannot be any serious question about the power of Congress comprehensively to legislate the rules for foreign judgment recognition for both the federal and state courts, or the power of the United States to enter into treaties on that subject that are supreme under the Supremacy

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[23] *See* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, *supra* note 20, at § 7 reporters' note 3 (describing treatment of reciprocity in state adoptions of uniform act).

[24] *See, e.g.*, Walsh v. Ford Motor Co., 807 F.2d 1000, 1016 (1986) (quoting J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 7 (2d ed. 1980)).

[25] *See* Stephen B. Burbank, *A Tea Party at The Hague?*, 18 SW. J. INT'L L. 629, 629 (2012).

[26] *See* Burbank, *supra* note 13, at 1573 n.147 (collecting authorities advocating federal common law).

[27] 376 U.S. 398 (1964). *See, e.g.*, John N. Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 269-70, 273-75. "*Sabbatino* is best regarded not as authority for an expansive federal common law of foreign relations but rather for the power of the federal judiciary to make uniformly applicable rules (the act-of-state doctrine) designed to protect courts from entanglements in, and interbranch conflicts about, matters for which they are not institutionally suited." Burbank, *supra* note 13, at 1577 (footnote omitted).

[28] 380 U.S. 460 (1965) (focusing on the importance of the source of federal law to answering questions about its validity).

Clause.[29] Prior to 1990, and unlike the countries of Europe, whose practices have been so well chronicled by Professor Walter and Baumgartner,[30] the United States had never entered into such a treaty, bilateral or multilateral. Our one sustained effort to do so – with the United Kingdom, presumably our most promising treaty partner – ran aground in the 1970s.[31]

In the 1990s, led by the great scholar, Arthur von Mehren, the United States persuaded the Hague Conference on Private International Law, to undertake a project aimed at developing a comprehensive (or global, a word that is in this context ambiguous) convention on jurisdiction and judgments.[32] The impetus for the effort was the perception that, although American courts are very generous in recognizing foreign judgments, the judgments of United States courts are not similarly treated abroad. The potential for such disparate treatment was highlighted by provisions of the Brussels Convention that permit member states to continue to apply to U.S. litigants grounds for jurisdiction that the Convention barred as to those domiciled in member states, and that require the recognition by other member states of judgments predicated on such exorbitant jurisdictional grounds. Moreover, the scope for such discriminatory treatment expanded with the conclusion of the Lugano Convention,[33] and it has expanded further after the Brussels Convention was absorbed in a European Union regulation for a larger EU community.[34]

The failure to conclude a comprehensive jurisdiction and judgments convention at The Hague can be attributed to a number of causes. One of them surely was the fact that the unilateral generosity of American law on foreign judgment recognition skewed bargaining incentives, ensuring that representatives of other countries, who had little if anything to gain on the recognition side of the equation, sought most of their gains on the jurisdiction side, focusing on jurisdictional grounds that they deemed exorbitant but that American negotiators, influenced by the private sector, were unwilling to give up.[35] From that perspective, the Supreme Court's

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[29] U. S. CONST. art. VI. *See* Burbank, *supra* note 13, at 293-95 (discussing congressional power with and without reference to the treaty power).

[30] *See* THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS (Gerhard Walter & Samuel P. Baumgartner eds., 2000). Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GW. U. L. REV. 173 (2008).

[31] *See* Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for The Hague Conference?*, 57 LAW & CONTEMP. PROBS. (No. 3) 271, 273-74 (Summer 1994); Burbank, *supra* note 13, at 1572-73.

[32] *See* von Mehren, *supra* note 31.

[33] *See id.* at 278; Burbank, *supra* note 7, at 232.

[34] *See* Council Regulation No. 44/2001, 2001 O.J. (L012); Samuel P. Baumgartner, *Changes in the European Union's Regime of Recognizing and Enforcing Foreign Judgments and Transnational Litigation in the United States*, 18 SW. J. INT'L L. 567, 573-74 (2012).

[35] *See* Burbank, s*upra* note 15, at 288 (noting that the effort to reach a global convention "foundered, in part, on the lack of a credible *quid pro q*uo").

decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[36] which appears substantially to curtail the constitutionality of general doing business jurisdiction,[37] came ten years too late.

Fortunately, after it became clear in 2001 that the negotiations for a comprehensive convention had stalled, the negotiators sought to salvage something that might be of value on its own merits and, if successful, prove a springboard for another attempt to reach agreement throughout the landscape as a whole. In 2005 their efforts yielded a multilateral treaty that is designed to govern the enforcement of choice of court clauses in commercial contracts and the recognition of judgments entered in litigation by parties who have agreed to such a clause. The Hague Choice of Court Convention[38] has the potential to make the market for international dispute resolution more competitive by making litigation a much more attractive alternative to arbitration than it has been since the New York Convention[39] entered into force. On January 19, 2009, as he was leaving office as the State Department's Legal Adviser, Mr. Bellinger signed the Convention on behalf of the United States.[40]

After the effort to reach a comprehensive jurisdiction and judgments convention at The Hague began, the American Law Institute approved a project to draft federal implementing legislation. Professors Lowenfeld and Silberman were Co-Reporters, and I was one of the Advisers.[41] Once it became clear that the effort at The Hague was unlikely to succeed – which had always been recognized as a possibility by the ALI -- the project changed shape to become a draft free-standing federal statute prescribing uniform federal law on most questions of foreign judgment recognition but deferring to state law where appropriate, as for instance when state public policy is implicated as a defense to recognition.[42] The ALI approved the draft statute in 2005, thereby signaling the Institute's view not only that there was federal legislative power to

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[36] 131 S. Ct. 2846 (2011).

[37] *See id.* at 2850-51; Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT'L L. 663, 670 (2012) (noting that Court's test "may require that a corporation either be incorporated or have its principal place of business in the forum").

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

[39] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

[40] *See* Testimony of John B. Bellinger III, Hearing on Recognition and Enforcement of Foreign Judgments, Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary 1 (Nov. 15, 2011) (available from author); http://www.hcch.net/index_en.php?act=conventions.status&cid=98.

[41] *See* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, *supra* note 20, at vii. For the evolution of the ALI project, see *id*. at 3-4.

[42] *See id.*, § 5 (a)(vi) ("repugnant to the public policy of the United States or of a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law").

govern in the area, but that the time had come for Congress to exercise that power.[43] That is apparently a view shared by Mr. Bellinger, who testified at a House Subcommittee hearing on foreign judgments recognition a year ago that "the business community is concerned about the potential for abuse in the existing state law framework,"[44] and that "a purely federal statute would have certain advantages."[45]

The most controversial issue during Institute debates and deliberations that spanned many years was precisely the question of reciprocity.[46] For participants who succeeded in separating the question of what it is appropriate for Congress and the President to do from what is appropriate for courts, let alone state courts, the lesson of the failed negotiations at The Hague was clear. Moreover, the choice of the United States to make a reciprocity reservation under the New York Convention[47] seemed to signal likely congressional preferences. The ALI's draft statute includes an explicit reciprocity requirement.[48] The lesson of the costs of unilateralism in this area seems also to have influenced the EU. That is the inference I draw from its action deferring any decision on a proposal to extend the Brussels regime to those domiciled in non-member States, which would eliminate the discriminatory treatment to which I have referred.[49] The deferral seems to be linked to news that the Hague Conference might relaunch the project to reach a comprehensive judgments convention, a decision that has now been made, although, at least initially, the convention contemplated by the experts advising the Conference would not directly prescribe acceptable jurisdictional grounds.[50]

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[43] *See id.* at 6 ("In sum, a coherent federal statute is the best solution to this important set of questions.").

[44] *See* Bellinger Testimony, *supra* note 40, at 3.

[45] *Id.* at 8.

[46] *See, e.g.*, 81 A.L.I. PROC. 11340 (2004) (discussion and vote on motion to strike reciprocity provision)*; see also* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, *supra* note 20, § 7 cmt. b (noting that issue of reciprocity "has been a matter of substantial controversy in the United States and elsewhere").

[47] *See* 9 U.S.C. A, § 201 (providing that the United States will "apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State").

[48] *See* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, *supra* note 20, § 7.

[49] The proposal is described in Baumgartner, *supra* note 34, at 588-89. According to Professor Brand, "[t]he European Parliament has adopted a revised version of the Commission's Brussels I Recast that omits the language that would have extended the jurisdictional provisions to non-domiciliaries. The Parliament's record (and the revised text) is available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0412+0+DOC+XML+V0//EN." E-mail from Ronald Brand to Stephen Burbank (Dec. 2, 2012) (available from author).

[50] See http://www.hcch.net/upload/wop/genaff_concl2011e.pdf; http://www.hcch.net/upload/gaf2012wd2e.pdf (contemplating only "jurisdictional filters").

In the aftermath of the failed negotiations for a comprehensive jurisdiction and judgments convention at The Hague, the ULC devoted most of their attention in this area to the ALI project, which they recognized as a threat to the 1962 Act and said that they regarded as a threat to the appropriate balance of state and federal law. Their response was two-fold. First, their representatives on the floor of the ALI sought to derail that project by arguing that federal legislation was neither necessary nor appropriate.[51] That effort was not successful.[52] Second, borrowing liberally from ALI drafts, the ULC sought to bolster the case for lack of need by revising the 1962 Act. That effort yielded a 2005 Uniform Act, which, like the 1962 Act, does not include a reciprocity requirement.[53] I said "like the 1962 Act" rather than "like its predecessor," because although some states that had adopted the 1962 Act replaced it with the 2005 Act, many states have not done so.[54] Moreover, of course, there remain many states where foreign judgment recognition is governed by state common law.

Once the ULC had responded directly to the ALI effort with the 2005 Uniform Act, they turned their attention to opportunities that the impending Choice of Court Convention might afford both to advance the program of what they aptly call their International Legal Development Committee and, as a side benefit, to seize the normative high ground from the ALI. Accordingly, a ULC representative joined the U.S. delegation for part of a Diplomatic Conference at The Hague just before the Choice of Court Convention was concluded.[55] Discussions during that brief sojourn and other communications between the ULC and representatives of the State Department were apparently enough to persuade the State Department to invite or permit the ULC to participate in drafting the implementing legislation.

Which party initiated those communications, their precise nature, the extent of any commitments they contained, and who was speaking with authority for the government remain unclear. Here is what I know: representatives of the ULC have asserted on many occasions that

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[51] *See, e.g.*, 80 A.L.I. PROC. 156 (2003) (comments of ULC President); Burbank, *supra* note 25, at 640 & note 56.

[52] *See* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, *supra* note 20, at 4 ("The proposed Act would preempt state legislation, and in particular the Uniform Foreign-Judgments Recognition Act (1962) adopted by some 30 states as well as the revised version of that Act").

[53] *See* UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (rev. 2005); 80 A.L.I. PROC. 156 (2003) (comments of ULC President acknowledging the debt).

[54] For the nineteen states that have adopted the 2005 Act, see http://uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act
This list includes seventeen of the thirty-two states that adopted the 1962 Act, plus Alabama and Indiana. *See* http://uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act

[55] *See* e-mail from Peter Trooboff to Stephen Burbank (Oct.23, 2011) (recollecting that ULC representative "attended the 2005 Diplomatic Conference for a very short time") (available from author).

the State Department requested the ULC to undertake the work;[56] for the establishment of a drafting committee for legislation implementing treaties, ULC Guidelines require "the written support of an appropriate official in the State Department,"[57] and in a March 2012 memorandum to a committee of the Judicial Conference of the United States and the Conference of Chief Justices, ULC representatives asserted that "[t]he ULC undertook the drafting of a uniform law to implement the Convention with the written agreement of the U.S. State Department Office of Private International Law that the Convention would be implemented through cooperative federalism if possible."[58] The person who presumably made that commitment was David Stewart, who, after he left office, has been listed as a consultant to the ULC on the project.[59] One does not have to be interested in the enforcement of federal revolving-door legislation[60] to believe that the "written agreement" to which the ULC referred should be made public.

As noted, there were personnel changes in the State Department as in the White House, and the new head of PIL distanced himself and the office from a strong commitment of the sort asserted by the ULC. When he convened a group to advise PIL on implementation strategies, a number of such strategies were on the table, including implementation through a federal statute that would be binding in federal and state courts alike, and implementation through "cooperative federalism."[61] Various influences converged to ensure that, although there has been no final State Department or U.S. Government decision on which implementing strategy to adopt, cooperative federalism received the lion's share of attention in the intervening three years.[62]

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[56] *See, e.g.*, Transcript, Fifth Session, Uniform International Choice of Court Agreements Act 4 (July 9, 2011) (Commissioner Rex Blackburn) ("As I have noted in past remarks to the Conference, this project was undertaken by the Conference at the request of the Department of State") (available from author).

[57] Uniform Law Commission Guidelines for Uniform Commission Participation in the Negotiation and Implementation of Private International Law Conventions 5 (July 2011) (hereinafter "ULC Guidelines") (available from author).

[58] Memorandum to Committee on Federal-State Jurisdiction of the Judicial Conference of the United States and the Conference of Chief Justices from ULC Members of the ASIL Working group (Michael Houghton, Harriet Lansing, Rex Blackburn, Kathy Patchel, and John Sebert) 2 (March 1, 2012) (hereinafter "ULC Memorandum") (available from author).

[59] *See* Burbank, *supra* note 25, at 641 n.58.

[60] *See, e.g.*, 18 U.S.C. § 207 (2006) (restrictions on former officers, employees and elected officials of the executive and legislative branches); CONGRESSIONAL RESEARCH SERVICE, POST-EMPLOYMENT, "REVOLVING DOOR," LAWS FOR FEDERAL PERSONNEL (May 12, 2010).

[61] *See* Department of State, Implementation of the Hague Convention on Choice of Court Agreements in the United States 1 (April 2012) (noting that Secretary of State directed the Legal Adviser "to explore all avenues for securing implementation" of the treaty) (hereinafter "White Paper") (available from author).

[62] "That cooperative federalism approach has been, for the past couple of years, the basis of discussions on implementation." *Id.* at 3.

First, in a political climate that historically has rarely been, and is not today, friendly to international commitments, the State Department's long-standing normative posture that private international law treaties are domestically viable only if they satisfy private interests sufficiently to yield a consensus[63] presented an immediate problem. Ironically, however, it was not a problem attributable to private interests. Indeed, the State Department can be criticized for insufficient attention to the preferences of U.S. international lawyers and their clients who are concerned about foreign judgments,[64] those whom a representative of the ULC referred to as "self-interested litigators."[65] No, the domestic interests that the ULC has invoked and deployed are, first, those of the Conference of Chief Justices, some of whose correspondence strongly suggests ULC draftsmanship,[66] second, those of the Committee on Federal-State Jurisdiction of

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[63] *See* Burbank, *supra* note 25, at 645 (urging State 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"); Burbank, *supra* note 4, at 150 ("Assuming that the United States's interests are more than the sum of the collective preferences of U.S. legal consumers, it should be willing to ratify a treaty, even in the face of domestic opposition, if that treaty represents, on the whole, a net improvement."); *infra* text accompanying note 67.

[64] *See, e.g.*, letter from Patrick J. Bonner, President of The Maritime Law Association, to Glenn P. Hendrix, Esq. (Nov. 30, 2011) (opposing cooperative federalism approach to implementation) (available from author); e-mail from Robert P. Parrish to Keith Loken, Assistant Legal Adviser, Department of State (May 14, 2102) (reiterating opposition) (available from author); letter from Louis B. Kimmelman, Chair of the International Commercial Disputes Committee of the Association of the Bar of the City of New York to Glenn P. Hendrix 3 (Oct. 21, 2011) (arguing that "the successful model established by the New York Convention should be followed to provide the same effective federal enforcement regime for Choice-of-Court Convention judgments") (available from author); letter from Louis B. Kimmelman to Keith N. Loken 2 (May 21, 2012) ("We remain convinced that the United States will be reducing the usefulness and effectiveness of the Convention to commercial [parties by departing from the New York Convention model.") (available from author). Mr. Hendrix had solicited comments from practicing lawyers "as one of the liaisons of the International Litigation Committee of the American Bar Association to the U.S. State Department." *Id.* at 1.

[65] E-mail from Peter Trooboff to Stephen Burbank (and others) (Dec. 15, 2011) (available from author).

[66] *See, e.g.*, letter from Eric T. Washington, President, The Conference of Chief Justices to Harold Koh, Legal Adviser, Department of State 2 (Aug. 24, 20122) ("It is my sense that most CCJ members would see the uniform state act as the most appropriate reference point for preemption") (available from author); *infra* text accompanying note 81.

> 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." … 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.

Burbank, *supra* note 25, at 643-44 (footnotes omitted).

the Judicial Conference, which is usually a reliable opponent of any change in the law that would increase federal court subject matter jurisdiction, and third but only when cornered, the ULC's own interests. Ultimately, of course, the ULC could and did hint that any approach other than "cooperative federalism" would doom the Choice of Court Convention in the Senate.

Second, the ULC was more than willing to do the not insubstantial work required to draft implementing legislation. I have previously described and decried the penuriousness of the United States Government in the area of private international lawmaking. The PIL office in State is understaffed and underfunded and can accomplish the impressive amount of work it does only because others, usually those in the private sector, are willing to devote their time and resources to the tasks at hand. The extent of the reliance thereby necessitated has caused me to question whether the normative posture described above, which appears to deny any interest of the United States that is greater than or different from the collective preferences of the private sector, is a cover for our unwillingness to spend more money on this increasingly important function.[67]

In this case, again, the assistance came not from the private sector directly, but from a domestic NGO.[68] There is a joke the punch line of which has Winston Churchill saying to Clement Attlee, "God damn it, Clement, every time you see something big, you want to take it over." The ULC evidently had that ambition for the legislation implementing the Choice of Court Convention, where the workload was unusually heavy because the enterprise of cooperative federalism required two statutes rather than one,[69] and keeping an appropriate division of labor required (and received) a firm hand by the State Department.

Third, the ULC has been remarkably successful in leading its various audiences, even those who are not hard-wired to follow its party line and who are otherwise legally sophisticated, to believe that an implementation regime relying exclusively on a federal statute would inevitably sacrifice legitimate state lawmaking prerogatives. They have obscured in a fog of misleading rhetoric the fact 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."[70] It is true that the Choice of Court Convention is different for these purposes from a simple judgment recognition treaty, both because it prescribes jurisdictional rules and, more to the point, because those rules implicate issues of contract law that have traditionally been governed by the States. Although my personal view is that some of those issues warrant a federal solution in this

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[67] *See* Burbank, *supra* note 4, 141-43, 150; *supra* text accompanying note 63.
[68] Alternatively, one may view the ULC as a private legislature. *See* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).
[69] *See* Burbank, *supra* note 25, at 643 ("To date, the process has yielded proposed federal and uniform statutes that are in all pertinent respects identical."). Note that bringing the two draft statutes to that point required substantial effort. *See infra* text accompanying notes 81-82.
[70] Burbank, *supra* note 15, at 301.

context,[71] since early in the process of drafting implementing legislation, it has been clear that all of them would be addressed by borrowing or incorporating state law in the federal statute.

The ULC's allergy to the concept of borrowed state law apparently explains its representative's strange references to "indigenous" law when championing the supposed interests of the States.[72] Of course, such references appear passing strange when one considers the origins of any uniform act,[73] and even more so when one attends to the vanishingly slight degree of lawmaking autonomy that states would possess in the regime of cooperative federalism that has evolved in the drafting process.

Fourth, the meaning of "cooperative federalism" has changed over time as it has become convenient for the ULC to turn what was initially acknowledged to be an experiment to determine whether a domestic regulatory approach could be transplanted to the international stage[74] into a well-defined concept in which are embedded a host of subsidiary propositions that it does not obviously entail.[75] It has been fascinating, albeit exasperating, to witness the use of this idea, for which the ULC typically invokes the Supreme Court's 1992 decision in *New York* v. *United States*[76] as the bible,[77] in implementation discussions. In hindsight, insufficient attention was given at the outset to the fundamental question whether the particular species of

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[71] *See id.* at 301-05 (arguing for a uniform federal standard to govern when a choice of court clause is "null and void").

[72] "Implementation at both the state and federal level also allows states to direct through indigenous state law the internal administration of their courts." Excerpt from ULC Official Transcript, Sixth Session, Uniform Choice of Court Agreements Convention Implementation Act 3 (July 16, 2012) (Commissioner Blackburn) (hereinafter July 2012 Transcript) (available from author).

[73] *See* Schwartz & Scott, *supra* note 68, at 596 ("The states often reject NCCUSL recommendations, but when they do accept them, they commonly enact the NCCUSL statutes as written."); *id.* at 604 (noting official ULC view that proposed uniform laws should be enacted "as written").

[74] *See, e.g.,* Kathleen Patchel, Report: State Law Implementation of Private International Law Treaties 2 (undated) (discussing "various techniques that might be utilized to achieve state law implementation of private international law treaties," including "two techniques developed in the domestic context for implementation of federal policy – conditional spending and conditional preemption – that seem readily adaptable to the treaty implementation process") (available from author); *infra* text accompanying note 78.

[75] *See, e.g.*, ULC Memorandum, *supra* note 58, at 4 ("Cooperative federalism is a doctrine whose elements are well-defined"); *id.* at 2 (arguing that having federal court apply federal implementing statute rather than materially identical state statute would "abandon cooperative federalism"); letter from Michael Houghton, President, ULC, to Harold Koh, Legal Adviser, United States Department of State 2 (Sept. 4, 2012) ("As I pointed out in my letter of May 22, 'cooperative federalism' is a well-defined doctrine, set out by the Supreme Court in New York v. United States … .") (hereinafter Houghton September letter) (available from author)

[76] 505 U.S. 144 (1992).

[77] *See, e.g.*, Patchel, *supra* note 74, at 41; 32-34; ULC Memorandum, *supra* note 58, at 4.

cooperative federalism advocated by the ULC, conditional preemption, can be transplanted to this particular international context -- whether, as the ULC's basic document on cooperative federalism asserts, it "would work equally well when the federal policy was the international policy embodied in a treaty."[78]

According to this approach, states have a choice between accepting direct federal regulation or themselves regulating under (that is, subject to possible preemption by) federal standards. Passing the point that, as I have discussed,[79] direct federal regulation in this instance would incorporate state law on issues of contract formation and validity, among others, my question is intended to focus attention not just on the existence of a treaty but on the fact that *this* treaty is so filled with provisions demanding autonomous interpretation that, if domestic politics would permit, it might well be regarded as self-executing.[80] The former inconvenience undoubtedly explains the ULC's refrain that the existence of a treaty does not provide an independent federal interest,[81] while the latter shows just how silly that proposition is with respect to the Hague Choice of Court Convention. Yet, the ULC insistently sought to preserve leeway for state law departures from language that carries an autonomous interpretation, and they failed as long as they could get away with it to acknowledge that materially variant state court interpretations are, with materially variant statutory language, ripe for federal preemption. Moreover, in remarks to the Secretary of State's Advisory Committee on Private International Law in October 2012, a ULC representative simply ignored the extent to which the treaty itself must dictate domestic lawmaking if we wish to honor our international commitments.[82]

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[78] Patchel, *supra* note 74, at 32.

[79] *See supra* text accompanying note 70.

[80] *See* Burbank, *supra* note 25, at 299-300 (quoted *infra* note 80).

[81] *See, e.g.*, Patchel, *supra* note 74, at 2 ("International agreements governing private law areas, however, raise the prospect that these areas will become, at least in part, governed by federal law, not because there is any national interest in federalizing the area as a matter of domestic policy, but merely because these areas have become the subject matter of a treaty at the international level.").

[82] The author attended the meeting and heard the remarks, which the rules of the meeting prevent from being specifically attributed. The problem is that reflected in my earlier response to Professor Reitz's "lump[ing] the Hague Convention with other putative treaties in arguing that the prospect of state involvement in implementation could help to shape the negotiations, perhaps permitting a choice of 'soft law' over 'hard law,' and in any event of a treaty that would not be deemed self-executing." Burbank, *supra* note 15, at 299 (responding to Curtis R. Reitz *Globalization, International Legal Developments, and Uniform State Laws*, 51 LOYOLA L. REV. 301, 326-27 (2005)).

> In fact, however, the Hague Convention had taken almost final shape when he wrote his article, and both the subject matter and the history of the negotiations suggest that a quest for "soft law" would have been a non-starter. 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.

Of course, the State Department understands this, which is why the Department has repeatedly rejected ULC's remarkable proposal that the uniform act, as promulgated by the ULC, should be the standard for assessing federal preemption, a proposal that seems no less remarkable because it was endorsed by the Conference of Chief Justices.[83] It is also why the drafting process became what I have elsewhere called an exercise in "cooperative redundancy,"[84] one that would yield an implementation regime so complex that it "would drive transactional lawyers to arbitration, and drive litigators to drink."[85]

Apart from the impossibility of squaring such a regime with basic goals of the Choice of Court Convention – transparency and predictability come to mind -- one who has read *New York v. United States* might well wonder why giving States a choice between a federal implementing statute and a state version of a uniform act that is in every material respect identical, with federal preemption waiting in the wings for any material departure, is different from the coercion on which a majority of the Court relied in that case to invalidate one of three means by which Congress sought to encourage state regulation of low-level radioactive waste.[86] I will not pursue the question other than to note that Justice O'Connor's opinion for the Court is at least consistently wooden when discussing how and why courts are different from the other branches of state government for purposes of coercion or commandeering analysis.[87] At the least, the situation is far removed from that described by the Court, which tells us that "[w]here Congress encourages state regulation rather than compelling it, state government remains responsive to the local electorate's preferences: state officials remain accountable to the people."[88]

One whose interests are more practical might wonder why any State would bother spending the time and money necessary to enact a uniform act that was materially identical to the federal statute that would otherwise govern. That consideration, I believe, helps to explain a good deal of behavior in the negotiations, including the ULC's retreat into idiosyncratic essentialism about the concept of cooperative federalism.

Burbank, *supra* note 15, at 299-300.

[83] *See supra* note 66 and accompanying text.

[84] Burbank, *supra* note 25, at 643.

[85] *Id.*

[86] *See New York*, 505 U.S. at 176 ("In this provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction.").

[87] *See id*. at 178-79 (distinguishing federal statutes enforceable in state courts and power of federal courts to order state officials to comply with state law).

[88] *Id*. at 168. *See* Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*. 78 MINN. L. REV. 83, 153 (1993) ("The passage of a uniform law has a decided dampening effect on further innovation by the states. The pressure for uniformity that biases the enactment process against amendment also places pressure on the state legislatures not to freely amend the law after its enactment.").

It was not clear to me why the ULC worked so hard -- against the preferences of the great majority of lawyers who actually practice in this area -- to prevent implementing legislation from following the New York Convention model of federal court jurisdiction, particularly when it was agreed early on that federal question jurisdiction would extend only to judgment recognition and not to enforcement of choice of court agreements – the latter one of a series of compromises virtually all of which favored the ULC. Nor, with attention focused on cases in federal court because of diversity jurisdiction, was it clear to me why the ULC opposed having the federal statute include a limitations period identical to that proposed for the uniform act. My confusion in that regard was no doubt compounded by legal analysis from the ULC that would fare poorly in a law school examination because it ignores precedent in the FAA for prescribing federal law without extending federal question jurisdiction,[89] and treats *Erie* as a supra-constitutional brooding omnipresence[90] that survived the Supreme Court's 1965 reorientation in *Hanna v. Plumer*.[91]

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[89] *See* Moses H. Cone Mem'l Hospital v. Mercury Const. Corp., 460 U.S. 1, 25 n. 32 (1983) (referring to the FAA as "something of an anomaly in the field of federal-court jurisdiction").

[90] The ULC would have done well to heed Professor Patchel's 1993 advice:

> The rationale for using the uniform laws process rather than allowing uniformity to occur through federal legislation should be explicitly articulated as part of the decision to undertake a drafting project. A vague reference to states rights is an insufficient justification - the states never were intended to be the source of law on all subjects. The fact that the area has been addressed through a uniform law in the past should not, of itself, be sufficient either.

Patchel, *supra* note 88, at 160. So also a "vague reference" to *Erie*.

[91] 380 U.S. 460 (1965). *See supra* text accompanying note 28. As the Legal Adviser explained to Mr. Houghton:

> Third, we think your letter raises incorrect legal objections, based on traditional *Erie* analysis, about applying federal law in federal court in implementing the COCA. As noted in our paper, the Office of Legal Counsel at the Justice Department reviewed the proposal and concluded that the proposed approach is consistent with E*rie* and the requirements of Equal Protection. First, this is not a standard situation involving citizens of different states litigating over a private state law matter. We are implementing a national treaty, negotiated, concluded, and (we hope) ratified in accordance with the Federal Government's treaty powers under the Constitution. Second, the cooperative federalism approach being followed for the COCA is premised upon the necessity of the federal implementing law and the uniform state act being substantively the same – in fact, identical insofar as possible. For this method of treaty implementation to work properly, the results under either state or federal implementing law should be the same. Third, insofar as any material difference would arise in interpretation between the federal implementing law and a state enactment of the uniform act, the federal implementing law would preempt.

The ULC's ulterior motives only became clear in February of this year, in connection with a discussion of the limitations issue, when ULC representatives announced for the first time their arresting view that the law to be applied *in federal court* in a state that has adopted the uniform act should be the uniform act, not the federal statute, and represented that this view was an irrefragable element of cooperative federalism.[92] It appears that the ULC was worried about a disincentive to state enactment additional to the fundamental disincentive presented by a regime of cooperative redundancy.

It is public knowledge that this Spring, after unprecedented efforts to broker a compromise on implementing legislation that followed a cooperative federalism approach, the State Department proposed a package of compromises, again almost entirely in favor of positions taken by the ULC.[93] It is also public knowledge that the ULC rejected that proposal because the State Department did not wholly capitulate and in particular proposed to preserve the power of a federal court to apply the federal statute instead of the materially identical uniform act.[94] I encourage you to read the State Department's White Paper and the correspondence between the Legal Adviser and the ULC. Judge for yourselves who has the better of the legal analysis, who is attentive to the goals of the Hague Choice of Court Convention, and who is seeking to advance the interests of the United States. It is regrettable that individual Uniform Commissioners could not make such judgments before they voted to adopt the uniform act in July of this year, because they were not given copies of the White Paper or the existing correspondence.[95] One sees why "debates about whether a subject is best regulated by a uniform act or a federal act should be influenced by a perception of how uniform laws are actually made."[96]

One matter that becomes clear in the correspondence between the ULC and the Legal Adviser is that, as some had previously suggested,[97] at the end of the day the ULC is concerned

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Letter from Harold Hongju Koh, Legal Adviser, Department of State, to Michael Houghton, President, ULC 2 July 2, 2012) (hereinafter "Koh letter") (available from author).

[92] *See supra* note 75 and accompanying text.

[93] *See* White Paper, *supra* note 60.

[94] *See* Houghton September letter, *supra* note 75 (rejecting compromises proposed in White Paper, *supra* note 60). For the earlier correspondence, see letter from Michael Houghton, President, ULC, to Harold Koh, Legal Adviser, United States Department of State (May 22, 2012) (available from author); Koh letter, *supra* note 91.

[95] *See* July 2012 Transcript, *supra* note 72, at 8 (Commissioner Blackburn stating that decision whether to make White Paper available not his to make). Without the White Paper, the correspondence cited in footnote 90 would not have been comprehensible.

[96] Schwartz & Scott, *supra* note 68, at 652. *See id.* at 598 (assumption that politics do not influence the ULC "often is false."); *id.* at 629 ("reformers have a weaker incentive than interest group members to tell the truth because they incur lower penalties from lying.").

[97] *See, e.g.*, Burbank, *supra* note 25, at 644 ("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.").

about, well, the ULC and its program of international legal development.[98] I have referred to the ULC as an NGO that, like Clement Atlee, has takeover plans. The ULC's example of problems that compromise might present for their other treaty implementation projects was not well chosen.[99] The key insight here, however, is that the ULC privileges its own interests over both those of the States and those of the United States, to say nothing of the interests of "self-interested litigators" and their clients. Consider also in that regard the following provision in the ULC Guidelines, a provision that has led me to label those Guidelines a "manifesto" in conversation and to refer in this article to the ULC's "party line."

> A ULC Commissioner who is appointed to participate in the negotiation of [a] private international law convention, and a ULC Commissioner who is selected to work with the State Department in connection with the negotiation of a private international law convention, will be committed to the ULC policy concerning the implementation of conventions and to the ULC's objective to advocate for provisions in conventions that will result in the least disruption possible to state law if the convention were to be implemented in the U.S. Those Commissioners will regularly report back to the ULC concerning convention negotiations and whether it will be feasible to implement the convention by uniform state law.[100]

Prior to the ULC's recent actions, I found its performance in this exercise sufficiently out of the mainstream of modern American federalism to summon images of the Tea Party.[101] In assessing the ULC's subsequent refusal to compromise, we may profit from columnist David Brooks' blunt conclusion when writing about the Republicans' rejection of a budget deal offered by President Obama, as reported by Jonathan Chait, who characterized that deal as "far more

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[98] *See* Houghton September letter, *supra* note 75, at 2 (stating that "the proposed compromise would set an unacceptable precedent for the future implementation of any convention for which implementation by coordinated federal and state substantive legislation is contemplated"). "Indeed, the Commissioners' allegiance is not to the states, but rather to the Conference. Their obligation is to assist its efforts by encouraging state legislation supporting the Conference and fostering consideration of uniform laws in their respective states." Patchel, *supra* note 88, at 89; *id*. at 91 ("[T]he primary defining characteristic of [ULC] is that it is neither a democratically elected representative body, nor one owing allegiance, or having any accountability, to any political body")

[99] *See* Houghton September letter, *supra* note 75, at 2 (citing potential problems that could be created for the Hague Convention on the Protection of Children). I am assured by Professor Silberman that no such concern is justified. She writes: "[T]he concerns expressed by ULC about the 1996 Protection Convention are completely unfounded. Cases covered by that Convention will only be heard in state court… Under the 1996 Protection Convention, there is no reason for a federal court to have to look to any implementing statute, whether federal or a Uniform Act." E-mail from Linda Silberman to Stephen Burbank (and others) (Oct. 10, 2012) (available from author).

[100] ULC Guidelines, *supra* note 57, at 5.

[101] *See* Burbank, *supra* note 25.

favorable than even the various bipartisan agreements wafting around the Capitol."[102] We may conclude that the ULC is "not fit to govern."[103] Regardless, if the ULC were successful in taking over the negotiation or implementation of private international law treaties, international cooperation would be if not a fortuity, then not a priority, because we would have regressed to a position of privileging not just federal but state law uniformity over international uniformity.[104] And the state law we privileged would be anything but "indigenous."[105]

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[102] Jonathan Chait, *The Revolution Eats its Own*, THE NEW REPUBLIC, Oct. 25, 2012, at 32, 35.
[103] *Id.*
[104] *See* Burbank, *supra* note 25 ("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").
[105] *Cf.* Patchel, *supra* note 88, at 155 ("For, by delaying the formation of national policy in an area, the uniform laws process delays consideration of that area at the level of government most likely to take into account the interests of all affected groups.").