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# Is Transnational Litigation a Distinct Field? The Persistence of American Exceptionalism in Procedural Law

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# IS TRANSNATIONAL LITIGATION A DISTINCT FIELD? THE PERSISTENCE OF EXCEPTIONALISM IN AMERICAN PROCEDURAL LAW

PAUL R. DUBINSKY\*

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## I. INTRODUCTION: THE QUESTION

Is transnational litigation a distinct field in need of its own distinct procedural law? Or are the U.S. procedural rules, largely written many decades ago and mainly with domestic litigation in mind, appropriate for today's civil disputes that are international in scope? The question is of growing importance; in the coming years, the American legal system likely will continue to confront steady growth in the volume of litigation with an international dimension. This transnationalization of court dockets across the United States appropriately brings the return of a recurrent debate among civil procedure scholars—should one set of procedural rules apply to disputes of all kinds, regardless of the specific substance of the dispute? That is, should American procedural law be trans-substantive?

At first blush, the stars would seem to be aligned for rethinking the trans-substantive ideal in at least one context—transnational dispute resolution, where some regard the complexities of contemporary practice and the sensitivities of foreign sovereign interests as requiring substantial departure from the trans-substantive ideal.<sup>1</sup> In academia, a proliferation of new teaching materials,<sup>2</sup> new courses<sup>3</sup> and profession-wide initiatives<sup>4</sup> suggest that transnational law<sup>5</sup> has

<sup>1</sup> For a defense of trans-substantivity in procedural law, see Geoffrey C. Hazard, Jr. *The Federal Rules Fifty Years Later: Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244–47 (1989). Despite its modern dominance, the trans-substantive ideal has always had its skeptics. See, e.g., Robert M. Cover, *For James Wm. Moore: Reflections on a Reading of the Rules*, 84 YALE L. J. 718, 732–39 (1975) (observing that it is “by no means intuitively apparent” that the procedural needs of a complex antitrust action are the same as those of a simple automobile negligence case).

<sup>2</sup> See, e.g., GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS* (4th ed. 2006); CHARLES S. BALDWIN IV, RONALD A. BRAND, DAVID EPSTEIN & MICHAEL WALLACE GORDON, *INTERNATIONAL CIVIL DISPUTE RESOLUTION: A PROBLEM-ORIENTED COURSEBOOK* (2004); THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON INTERNATIONAL LITIGATION AND ARBITRATION* (2005); OSCAR G. CHASE, HELEN HERSHKOFF, LINDA SILBERMAN, YASUHEI TANIGUCHI, VINCENZO VARANO, and ADRIAN ZUCKERMAN, *CIVIL LITIGATION IN COMPARATIVE CONTEXT* (2007); ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* (3d ed. 2006); THOMAS MAIN, *GLOBAL ISSUES IN CIVIL PROCEDURE* (2006); JORDAN J. PAUST, JON M. VAN DYKE, & LINDA A. MALONE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* (2d ed. 2005); RALPH G. STEINHARDT, *INTERNATIONAL CIVIL LITIGATION: CASES AND MATERIALS ON THE RISE OF INTERMESTIC LAW* (2002); and RUSSELL J. WEINTRAUB, *INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING* (4th ed. 2003).

<sup>3</sup> See Deborah Jones Merritt and Jennifer Cihon, *New Course Offerings in the Upper-Level Curriculum: Report of an AALS Survey*, 47 J. LEG. EDUC. 524 (1997) (reporting that for the period from 1994 to 1997, international and comparative law courses constituted the largest proportion of new upper-level courses in American law schools). Several law schools recently have introduced courses in international and comparative law in the required curriculum, see Mathias Reimann, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, 22 PENN ST. INT'L L. REV. 397, 415 (2004); Mathias Reimann, *Taking Globalization Seriously: Michigan Breaks New Ground by Requiring the Study of Transnational Law*, MICH. B. J. 52 (Jul. 2003); Elia Powers, *Harvard Alters First-Year Program*, INSIDE HIGHER ED, Oct. 9, 2006, <http://www.insidehighered.com/news/2006/10/09/harvard>.

<sup>4</sup> *Internationalizing the First Year Curriculum, A Symposium from the Association of American Law Schools Annual Meeting January 3–7, 2006*, 24 PENN ST. INT'L L. REV. 735 (2006); Judith Areen, *Expanding Knowledge and Serving Our Communities: Academic, Civil, and International*, AALS NEWS, Feb. 2006, at 6. (detailing AALS initiatives in response to “dramatic growth in transnational law”); *Mid-Year Meeting: Conference on International Law Examines What is Wrong with the Way We Teach and Write International Law, 2007–1* AALS NEWS 10 (Feb. 2007); Franklin A. Gevurtz et. al., *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 267 (2006).

<sup>5</sup> The term “transnational law” was used by Philip Jessup in his 1956 Storrs Lecture on Jurisprudence at Yale Law School. See PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956) (defining

entered a golden age, one in which future graduates of American law schools will know more about foreign legal systems than generations of students that preceded them. In the world of law practice, an influential segment of the bar regards transnational dispute resolution as a distinct specialty, practiced and marketed as such,<sup>6</sup> to be staffed with teams of lawyers of different nationality and legal training in more than one legal system,<sup>7</sup> and the basis for separate sections of local and national bar associations.<sup>8</sup> Moreover, as one shifts gaze from law schools and law firms based in the U.S. to developments abroad, one sees a growing body of treaties and other instruments distinguishing transnational from domestic litigation,<sup>9</sup> with the revitalized discipline of comparative law leading the way.<sup>10</sup>

But if many discern from this set of national and international trends a movement toward transnationalism and comparativism in American procedural law, at least for cases with an international dimension, how confident should we be in this forecast? Two or three decades from today, will the American civil procedure and conflict-of-law rules applicable to transnational disputes be noticeably different from those that govern garden-variety domestic cases? Or will differences between the international and the domestic be differences at the margin, as traditionally has been so?

Debate on this subject was joined in the late 1980s, after publication of Gary Born's and David Westin's landmark, *International Civil Litigation in U.S. Courts*.<sup>11</sup> In a lengthy introduction, Born and Westin argued that what had been regarded as a series of loosely related topics ought to be understood as an integrated field. When seemingly separate doctrinal areas (e.g., extraterritorial application of law, the act of state doctrine, the immunities accorded to foreign states) were studied together, in a systematic way, the whole was greater than the sum of the parts.<sup>12</sup> Born and Westin were soon joined by others announcing the

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transnational law as including "all law which regulates actions or events that transcend national frontiers").

<sup>6</sup> See, e.g., the following law firm websites: <http://www.dpw.com/practice/intlit.htm> (Davis Polk & Wardwell); <http://www.debevoise.com/areasofpractice/ServiceDetail.aspx?ID=4d22f445-806c-47a0-a633-50d96c967bb2> (Debevoise & Plimpton); [http://www.jonesday.com/international\\_litigation\\_arbitration](http://www.jonesday.com/international_litigation_arbitration) (Jones Day) (last visited Feb. 26, 2008).

<sup>7</sup> See generally Richard L. Abel, *Transnational Law Practice*, 44 CASE. W. RES. L. REV. 737, 744-47 (1994) (discussing transnational staffing at various law firms).

<sup>8</sup> See, e.g., <http://www.abanet.org/litigation/committees/international/home.html> (American Bar Association International Litigation Committee); [http://www.dcbar.org/for\\_lawyers/sections/international\\_law/committee.cfm#3](http://www.dcbar.org/for_lawyers/sections/international_law/committee.cfm#3) (District of Columbia Bar International Dispute Resolution Committee); <http://www.nycbar.org/Committees/list.htm#i> (Association of the Bar of the City of New York, Committee on International Commercial Disputes).

<sup>9</sup> For an overview, see Joachim Zekoll, *Comparative Civil Procedure*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1327-62 (Mathias Reimann and Reinhard Zimmermann, eds., 2006). For an overview of a related development, the harmonization of private law in the European Union, see Reinhard Zimmermann, *Comparative Law and the Europeanization of Private Law*, in OXFORD HANDBOOK, *supra*.

<sup>10</sup> See, e.g., Mathias Reimann, *Comparative Law and Private International Law*, in OXFORD HANDBOOK, *supra* note 9, at 1363-94; John A. Jolowicz, *On the Comparison of Procedures, in Law and Justice in a Multistate World*, ESSAYS IN HONOR OF ARTHUR T. VON MEHREN (James A. R. Nafziger and Symeon C. Symeonides, eds., 2002) (discussing developments in Latin America). By way of contrast, Professor Juenger has lamented the relative absence of comparative law insight in modern efforts at procedural reform in the U.S. See Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309 (1999).

<sup>11</sup> GARY B. BORN WITH DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS* (1989) (hereinafter "Born & Westin").

<sup>12</sup> Curtis A. Bradley & Jack Goldsmith III, *Book Review*, 34 VA. J. INT'L L. 233, 239 (1993)

arrival of a new field, “transnational litigation.”<sup>13</sup>

Not everyone agreed with the contention that a new label, and the transformation implied by it, was justified. To be sure, there was widespread agreement as to certain facts: Since World War II, growth in the volume and intricacy of litigation involving foreign parties and parallel proceedings<sup>14</sup> had allowed a subset of U.S. law firms to specialize in the area. In cases with much at stake, multinational corporate clients retained a small army of specialists<sup>15</sup> to assist them in efforts to coordinate concurrent lawsuits, to seize assets on a global basis, and to manage worldwide litigation-related public relations.<sup>16</sup> Clients repeatedly faced with complex cases potentially implicating the laws and regulatory policies of more than one country increasingly sought counsel with expertise in the procedural laws of foreign legal systems, in satellite litigation,<sup>17</sup> in arbitration, and even in advocacy before regional and international tribunals.<sup>18</sup>

Notwithstanding general acknowledgment of these trends, some scholars questioned the significance of these recent developments,<sup>19</sup> whether there was sufficient coherence to transnational litigation as a new “field,”<sup>20</sup> and whether any subset of litigation in American courts is likely to shake off what have been

(reviewing GARY B. BORN WITH DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: CASES AND MATERIALS* (2d ed. 1992)) (“[O]nly by a holistic approach to the doctrines of international civil litigation can one fully appreciate the nature and complexity of certain recurring concepts and themes”); Linda Silberman, *Transnational Litigation: Is There a “Field?” A Tribute to Hal Maier*, 39 VAND. J. TRANS. L. 1427, 1430 (2006) (arguing that international litigation is a field because “the discrete doctrines can only be understood in relation to each other”).

<sup>13</sup> BORN & WESTIN, *supra* note 11, originally referred to the new field as “international civil litigation.” Others have used other labels. See, e.g., Samuel P. Baumgartner, *Is Transnational Litigation Different?* 25 U. PA. J. INT’L ECON. L. 1297, 1312–53 (2004) (using the term “transnational litigation”); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2382, 2390–92 (1991) (the “Federal Rules of Transnational Civil Procedure” and the American “Law of Foreign Sovereignty”); RALPH G. STEINHARDT, *INTERNATIONAL CIVIL LITIGATION: CASES AND MATERIALS ON THE RISE OF INTERMESTIC LAW*, at v (2002) (using the “neologism ‘intermestic’” to reflect that the field combines “elements of *international* and *domestic* life” and noting that current cases in international law “undermine the received distinction between domestic and international law”).

<sup>14</sup> For a discussion of parallel proceedings, see Part V(A), *infra*.

<sup>15</sup> E.g., global asset search firms, translation services, expert witnesses testifying on the content of foreign or international law, accounting firms with expertise in differences among accounting standards from one country to another.

<sup>16</sup> See, e.g., Rufus Jones, *UBS Creates a New Breed of General Counsel: Interview with U. Roth*, INT’L FIN. L. REV. (Nov. 1, 2000), at 24; Isabel Vincent, *In New York the Swiss Are Forced to Change Their PR style*, GLOBE & MAIL (Toronto Can.), January 3, 1998, at D4; Philip Segal, *Nike Hones Its Image on Rights in Asia*, INT’L HERALD TRIB., June 26, 1998.

<sup>17</sup> A common form of satellite litigation is when one or more parties to the main lawsuit goes to another forum in pursuit of preliminary relief, discovery, or sanctions.

<sup>18</sup> In the *Avena/Medellin* litigation, for example, Donald Donovan argued both in the U.S. Supreme Court and in the International Court of Justice. See *Medellin v. Dretke*, 544 U.S. 660 (2005); *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* 2004 I.C.J. 12 (Mar. 31), available at <http://www.icj-cij.org/docket/files/128/8188.pdf>.

<sup>19</sup> See Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1459 (1991) (book review) (noting the long history of international litigation in U.S. courts and the “cross-fertilization” between doctrines and techniques developed in domestic and international litigation).

<sup>20</sup> See, e.g., Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 230 & n112 (1993) (arguing, in referring to Born & Westin, that the purported field lacks “an overriding organizing principle or conception that would provide identity and cohesion to this subject area as a field”); Spencer Weber Waller, *A Unified Theory of Transnational Procedure*, 26 CORNELL INT’L L.J. 101, 114, 117 (1993) (arguing that separate and sequential doctrines of international civil litigation involve “repetitive, fragmented, and ad hoc” interest-balancing tests which are “wasteful, inefficient, and unfair”).

central features of American procedural law for a very long time—a preoccupation with domestic interstate federalism and an understanding of procedural rules as properly autonomous from the substantive nature of the dispute before the court.<sup>21</sup> After all, courts in the United States had served as fora for disputes involving foreign parties and foreign law for a very long time.<sup>22</sup> The American bench had adapted to fluctuating patterns in world trade, to changes in the United States' economic and political stature, and to occasional calls for the U.S. legal system to cooperate more closely with foreign courts.<sup>23</sup> Yet, over a period of more than two hundred years, the rules of civil procedure and conflict of laws applied in transnational cases closely tracked those that applied in domestic cases.<sup>24</sup>

In response to this skepticism, transnationalists assert that the changes brought on by the current phase of globalization are different in magnitude from those encountered by the U.S. legal system before. They argue that at successive stages of litigation, a set of overarching principles repeatedly surface.<sup>25</sup> Regardless of the specific doctrinal issue at stake (e.g., service of process, the effect to be given to a foreign blocking statute),<sup>26</sup> a common pool of policy-based considerations come into play: comity, sovereignty, the efficiency of the international legal system as a whole, the burdens on private parties caught in the crossfire of conflicting national regimes, the desirability of the United States speaking with one voice on matters touching upon the interests of other countries and international bodies. According to Born & Westin, it was these themes, recurrent tensions, and potentially clashing policies that most defined international litigation as a field and made it distinct from purely domestic dispute resolution.

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<sup>21</sup> See, e.g., Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COL. L. R. 1, 23 (1993) (“The failure of American courts and scholars to avail themselves of experience gathered abroad is responsible for the dire state of American jurisdictional law”); Mathias Reimann, *Parochialism in American Conflicts Law*, 49 AM. J. COMP. L. 369, 388 (2001) (“[M]ainstream American conflicts law continues to focus too much on purely domestic issues and to treat international problems as an exotic sideshow.”).

<sup>22</sup> Ariel Lavinbuk has demonstrated in quantitative terms that cases touching upon foreign affairs constituted a large portion of the docket of the Jay and Marshall courts. See Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L. J. 855, 867–86 (2005) (analyzing every foreign affairs case, 323 out of a total docket of 1303 cases, between the years 1791 and 1835).

<sup>23</sup> See generally Note, *Reciprocity for Letters Rogatory Under the Judicial Code*, 58 YALE L.J. 1193, 1193–94 (1949) (summarizing U.S. practice with respect to foreign letters rogatory from the mid-1800s to the mid-1900s).

<sup>24</sup> See Burbank, *supra* note 19, at 1459; Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention, and Progress in National Law in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE* 117, 120–22 (John J. Barcelo III and Kevin M. Clermont, eds., 2002).

<sup>25</sup> See BORN & WESTIN, *supra* note 11, at 313–18 (referring to the need, at each stage of a transnational lawsuit, to (a) balance foreign and U.S. interests, (b) arrive at the optimal degree of judicial involvement in national foreign affairs, (c) resolve potentially competing claims by state and federal laws and institutions in disputes touching upon relations with other countries, (d) determine the status of public international law within the U.S. legal system, and (e) define and apply the doctrine of international comity); see also Samuel P. Baumgartner, *Transnational Litigation in the United States: The Emergence of a New Field of Law*, 55 AM. J. COMP. L. 793, 806–07 (2007) (book review).

<sup>26</sup> For a short summary of blocking statutes—foreign legislation enacted to counter extraterritorial application of U.S. pretrial discovery methods and the U.S. judicial response to this legislation—see GEORGE A. BERMANN, *TRANSNATIONAL LITIGATION* 286–99 (2003).

Nearly two decades have passed since this debate began. In that time, has the procedural law applied by American courts to adjudicate international disputes become noticeably autonomous from that which governs wholly domestic disputes? The analysis that follows will unveil an intellectual predisposition of American courts that is rarely observed by commentators or by courts themselves. When American courts are confronted with disputes with a transnational dimension, they reach for a familiar toolbox—one with tools for fixing domestic problems. They extrapolate from their experience with familiar domestic litigation, especially interstate litigation.

## II. METHODOLOGY

In approaching the question raised in the preceding paragraph, the existing scholarship suffers from three main weaknesses. First, it tends to blur the lines between the descriptive and the normative. Whether the procedural law applicable to transnational litigation is meaningfully distinct from that which governs domestic litigation is not the same question as whether it should be. Yet, much of the work on this subject draws the conclusion that the litigation of international disputes in U.S. courts *is* a separate field because it *ought* to be one. Second, those who see a breakdown of the trans-substantive model in the area of transnational disputes point to developments in law teaching,<sup>27</sup> legal scholarship,<sup>28</sup> and relatively high-stakes commercial and corporate legal practice.<sup>29</sup> Surprisingly little attention has been devoted to a close reading of judicial opinions—to what judges say and actually do. Third, the problem with extrapolating from worldwide developments (especially initiatives in Europe) to draw conclusions about transnationalism in contemporary American procedural law is the failure to grapple fully with American exceptionalism—the extent to which key aspects of civil procedure in the U.S. are not just different from other legal systems, but much different.

The current work seeks to fill this void by focusing on two areas of civil litigation—personal jurisdiction and pre-trial discovery—in which litigation practice in the United States is substantially different from other legal systems, even other common-law legal systems. The influence of transnationalism will be approached by analyzing two sets of data. The first is a representative selection of judicial opinions in disputes that possess some international dimension, such as the presence of foreign litigants, the possible application of foreign law, or the need at some point in the proceedings to secure the assistance of foreign courts. The second are opinions in cases in which all of the parties are based in the U.S., no assistance from foreign authorities is required, and all of the applicable law consists of state or federal statutes or regulations or common law from U.S. jurisdictions.

The focus on judicial opinions is based on an assumption about American

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<sup>27</sup> See Silberman, *supra* note 12, at 1431 (arguing that for both teacher and student it is critical to see a set of issues arising in the transnational context as part of an “interconnected whole”).

<sup>28</sup> See Baumgartner, *supra* note 13.

<sup>29</sup> See Silberman, *supra* note 12, at 1430 (describing how lawyers handling transnational cases see themselves operating in a distinct field due to the practical realities of their work).

legal culture that should be made explicit. The judicial opinion has long been central to the way that Americans think about law. Notwithstanding the importance of statutes and regulations, essentially every part of the legal profession in the U.S.—the bar, the academy, all branches of state and local government—and even the public at large (at least in the case of opinions of the U.S. Supreme Court) fixate on judicial opinions, perhaps because the American legal culture is one in which judicial review of legislation has existed for so long, the range of societal disputes submitted to courts is so broad, and the stature of judges is so high. Given these entrenched characteristics of legal culture in the United States, one is unlikely to make a convincing case about transnationalism in American procedural law based solely on trends in law teaching, big firm litigation practice, and legal scholarship. Courts matter. If the procedural gulf between the transnational and the wholly domestic is widening and the separation is likely to be lasting, then the trend should be surfacing in case law. Specifically, we should be able to see differences in the way that courts approach procedural issues in the transnational and the domestic settings. When substantively similar domestic and transnational cases are put side by side, we should see patterns, such as a hesitation to apply precedents developed in domestic cases to cases with an international dimension.

As we pursue the comparison between domestic and transnational case law outlined above, a specific subset of domestic case law (interstate case law) is of particular interest. These are cases in which all of the parties are domestic but from different states of the U.S. Our focus on these cases is motivated by several considerations: First, in terms of personal jurisdiction and incentives to forum shop, interstate litigation bears some similarity to transnational litigation; typically, one of the litigants is in its home forum and the other is presumed to be at risk of disadvantage. Second, in both situations the interests of sovereign entities, with potentially clashing substantive laws, lurk in the background. Third, in both kinds of cases, assistance from courts or other authorities outside the forum may be needed. Finally, the pervasiveness and importance of interstate litigation is an important facet of American exceptionalism in procedural law.<sup>30</sup> It is difficult to think of another country in which the sovereign attributes of component states is expressed so strongly in private civil litigation (through, e.g., the exercise of personal jurisdiction, choice-of-law rules, rules relating to certain aspects of evidence and immunity).

When this interstate-international comparison is carried out, it becomes apparent that one important set of transnational actors, state and federal judges, continue to regard disputes that cross national borders essentially as variations on those that cross state borders. For many on the American bench, the procedural

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<sup>30</sup> Although other countries are federal in structure (e.g., Australia, Canada, Germany), none exhibit the phenomenon of interstate or interprovincial litigation in the form and with the level of importance to the society as occurs in the United States. The overall uniqueness or “exceptionalism” of the United States in this regard results from a combination of key theoretical features of the American founding and the subsequent history and traditions of the United States: (1) the lines that separate one region of the country from another are not merely administrative or electoral, but jurisdictional as well; (2) at the core of American federalism is the principle that most of private law should emanate not from the national government but rather from smaller political communities; (3) the principle, which was strongly felt at the founding, that a citizen of one state forced to litigate in the courts of another state is in need of structural safeguards to protect that litigant from possible bias.

law employed in the latter is presumptively that which must be employed in the former, with perhaps modest adjustments. So, for example, courts faced with motions to dismiss for lack of personal jurisdiction repeatedly apply the same intellectual framework in evaluating due process with respect to domestic defendants and foreign defendants alike. They have done so over a long period of time, both in the current era of minimum contacts and in past eras, when jurisdiction was driven by conceptions of territoriality.

One byproduct of this pattern is that complicated facets of American domestic law, especially interstate federalism, are carried over to transnational settings in which such preoccupations are poorly suited. A fundamental aspect of American procedural law, such as its predisposition in favor of concurrent jurisdiction<sup>31</sup> (a predisposition with roots in American interstate federalism),<sup>32</sup> is carried over to transnational cases. Our transnational procedural jurisprudence becomes in part a collection of domestic doctrines that are out of place, without any clearly useful purpose. A second byproduct is that American exceptionalism is given free reign in the precise set of circumstances in which this tendency should be questioned. It is, after all, one thing for Americans to launch a “revolution” in choice-of-law methodology as applied to interstate conflict of laws.<sup>33</sup> It is quite another matter to apply that methodology—one that has been tepidly received elsewhere—to cases in which the laws of other countries are being denied applicability.

When these patterns are examined at a macro level, we see a form of U.S. exceptionalism that is rarely discussed—the tendency of the American bench to approach transnational scenarios from the perspective of interstate frameworks, precedents, and policy concerns. These patterns help us to identify a penchant for approaching civil litigation in the wider world through the lens of interstate federalism and the domestic American experience. The principal benefit of identifying this trend is in uncovering a major source of judicial resistance to transnationalism in procedural law—the continuing inclination of the American bench to approach the water’s edge as if it were similar to the interstate borders that underlie many generations of precedent in U.S. procedural law.

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<sup>31</sup> In this context, concurrent jurisdiction means that for any given lawsuit, more than one court in the United States may be able to exercise jurisdiction, and two or more of these suits may even go forward at the same time. The resulting opportunities for forum shopping and parallel litigation on this scale are far less common in other legal systems.

<sup>32</sup> The American legal system’s tolerance for concurrent jurisdiction is in part an outgrowth of the sovereignty that each state of the Union possesses. Congress has never enacted legislation designed to steer state court litigation toward the one state with the closest connection to a dispute or the greatest policy interest in the dispute’s outcome. Indeed, such legislation would trigger serious objections that Congress had overstepped a limitation on its legislative power—federalism. See Kurt H. Nadelman, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323 (1954).

<sup>33</sup> See generally Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 379 (1992); Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309 (1999) (criticizing the excesses of the “revolution” and urging a return to nineteenth-century openness to comparative law); Herma Hill Kay, *A Defense of Currie’s Governmental Interest Analysis*, in 215 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 78, 198 (1989) (describing the introduction of interest analysis by Brainerd Currie as a “watershed” in American conflicts law).

### III. INTERSTATE-INTERNATIONAL EQUIVALENCE

One way of categorizing civil litigation in the United States is to divide disputes into three groups: (1) strictly local disputes; (2) interstate disputes; and (3) transnational disputes. Local disputes are those in which all parties are not only American but also from the same state. Interstate disputes are those in which all parties are American but at least two opposing litigants are from different U.S. states. Transnational disputes are those in which at least one significant aspect of the case is foreign.<sup>34</sup> This taxonomy, though admittedly simplistic,<sup>35</sup> can be useful. When state and federal cases are sorted in this way, a striking feature of American procedural law becomes apparent: American courts treat interstate and international disputes remarkably alike, and they have done so for a very long time.<sup>36</sup>

An example of this interstate-international equivalence at work can be found in *Babcock v. Jackson*,<sup>37</sup> a case central to the modern conflicts revolution<sup>38</sup> in the United States and prominently featured in every widely read American case book on conflict of laws. Like much of the modern conflicts canon, *Babcock* involved a car accident and the conflicting laws of multiple jurisdictions. In refusing to apply Ontario's guest statute,<sup>39</sup> the New York Court of Appeals found the place of the accident lacking in significance from the perspective of loss distribution, the central issue in the case. The laws of New York were to be applied, according to the court, because both litigants were from New York, the car in which they set out was registered and insured in New York, and because the post-accident distribution of financial loss had little bearing on Canada's central policy concern—the safety of its roads.

Neither the majority nor the dissenting opinions treat the foreign situs of the accident (Canada) as important. Moreover, in the many cases that

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<sup>34</sup> The label "transnational" can be used even when all parties are domiciled in or incorporated in the same country but important evidence is located abroad, one or more legal issues is governed by foreign law, or the need arises to enforce the final judgment in another country.

<sup>35</sup> Into which category, for example, would one put a suit by a Michigan corporation against another Michigan corporation, where the latter is a wholly-owned subsidiary of a Dutch entity, which may be the subject of U.S. discovery requests?

<sup>36</sup> Actually, the full story is more complicated. Many facets of interstate procedural law in the United States originated with a movement in the opposite direction—from the law of nations to domestic law. See e.g., Burbank, *supra* note 19 at 1466–73 (adjudicative jurisdiction and arbitration); Robert C. Casad, *Jurisdiction in Civil Actions at the End of the Twentieth Century: Forum Conveniens and Forum Non Conveniens*, 7 TUL. J. INT'L & COMP. L. 91 (1999) (discussing approach to forum shopping and doctrine of forum non conveniens); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 51–55 (2006) (analyzing full faith and credit cases); Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1037 (1995) (noting U.S. Supreme Court's "preoccupation with domestic constitutional puzzles" in approaching transnational jurisdictional problems); Mathias Reimann, *Domestic and International Conflicts Law in the United States and Western Europe*, in INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM: ESSAYS IN HONOR OF FRIEDRICH K. JUENGER (Patrick J. Borchers and Joachim Zekoll, eds., 2001) (reviewing choice of law jurisprudence).

<sup>37</sup> 12 N.Y.2d 473 (1963).

<sup>38</sup> For an overview of the "revolution" in scholarship and jurisprudence regarding choice of law in the United States from the 1950s to the present, see, e.g., EUGENE G. SCOLES, PETER HAY, PATRICK J. BORCHERS, AND SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 25–105 (4th ed. 2004).

<sup>39</sup> An Ontario statute barred a passenger from suing the driver of an automobile if the passenger was a guest at the time of the accident. See 12 N.Y. 2d at 477.

subsequently have relied upon *Babcock*, there is not more than a passing observation that *Babcock's* new approach to tort conflicts was unveiled in a transnational setting rather than the more typical interstate setting.<sup>40</sup> It is as if the car and its passengers had crossed the border with Vermont rather than with Ontario. At the heart of this equivalence is an approach to foreign statutes that is common—if it is written in English, then it can be interpreted as if it were the statute of a sister state.<sup>41</sup> The *Babcock* court never pauses to consider whether differences in the legislative process and the means of recording legislative history make assessing the legislative policies of another country different from assessing the legislative policies of another state of the Union.<sup>42</sup> With its silence in this respect, *Babcock* leaves us to wonder whether the court has considered and rejected an approach to choice of law that distinguishes between transnational and interstate cases, or, perhaps, it has not considered this geographic variable at all.<sup>43</sup>

*Babcock* is not an anomaly.<sup>44</sup> Other landmark cases in conflicts law and

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<sup>40</sup> Occasionally, courts state that the conflicts rules applied in transnational cases are the same as those in interstate cases but then fail to explain why this should be so. See, e.g., *Southwell v. Widing Trans. Inc.* 101 Wash. 2d 200, 208–11 (1984) (Dore, J., dissenting) (finding choice-of-law analysis in case at bar involving a defendant from British Columbia “indistinguishable” from a key precedent involving a defendant from Kansas); *Hurtado v. Superior Court*, 522 P.2d 666, 669 n.2 (CA 1974) (“[California’s governmental interests approach is applicable not only to situations involving multistate contacts but also to those involving a state of the United States vis-a-vis a political entity of a foreign country.”).

<sup>41</sup> For more on this unilateral aspect to the way that U.S. courts approach foreign statutes and the policy concerns of other countries, see, e.g., *Neumeier v. Kuehner*, 286 N.E. 2d 454, 455 (N.Y. 1972) (belatedly observing that the court in *Babcock* erred in its superficial analysis of the policies underlying the Ontario guest statute); see generally Andrew N. Adler, *Translating & Interpreting Foreign Statutes*, 19 MICH. J. INT’L L. 37, 39 (1997) (arguing that U.S. courts “often mistakenly tend to perceive foreign law as quite similar to domestic law” and naively apply what they regard as a “plain” meaning to foreign provisions); Dimitrios Evrigenis, *Interest Analysis, A Continental Perspective*, 46 OHIO ST. L.J. 525, 527 (1985) (presenting a perceptive criticism of this facet of interstate-international equivalence); Juenger, *supra* note 10, at 1328 (“Not only d[o] American courts cite spurious authority for asserted foreign policies, but at times they altogether avoid[] discussing policies other than domestic ones”).

<sup>42</sup> For a discussion of different approaches to the use of legislative history, even between common law courts in the United States and those in Great Britain, see Adler, *supra* note 41, at 98–103 (noting differences in the roles of legislative committees and also differences in approach to statutory drafting); James J. Brundey, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U. L. REV. 1 (2007); cf. also Evrigenis, *supra* note 41, at 528 (arguing that one of the principal conflicts methodologies that has followed from *Babcock*, interest analysis, operates in a “rather limited area of law and social life” and involves “totemized legislative policy concepts”).

<sup>43</sup> For further illustrations of this unilateral aspect to the way that U.S. courts approach foreign statutes and the policy concerns of other countries, see the following widely cited choice-of-law cases: *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (declining to examine British regulatory policies or the claim that British law establishes a comprehensive regulatory scheme over the London reinsurance market because the case does not present a true conflict; the defendant is capable of complying with the laws of both the UK and the U.S.); *Hurtado v. Superior Court*, 522 P.2d 666 (Cal. 1974) (concluding, without considering any Mexican legal sources, that Mexico had no interest in the application of its statutory ceiling on recovery in wrongful death cases). In *Milkovich v. Saari*, 295 Minn. 155 (1973), the court sweepingly declared “[W]e are firmly convinced of the superiority of the common law rule of liability to that of the Ontario guest statute,” even though the court conducted no analysis of the Ontario statute, its legislative history, or Canadian case law interpreting and applying it. In response, the dissent had this to say: “We may assume that these Canadian citizens have concurred in the rule of law of their own government as just, so the law of this American forum is not for them the “better standard of justice.” *Id.* at 417–18.

<sup>44</sup> In the absence of clear guidance as to the content of the law of a foreign country, U.S. courts often choose simply to apply the law of the forum. See, e.g., *In the Matter of Oil Spill by The Amoco Cadiz*, 954 F.2d 1279, 1315 (7th Cir. 1992) (applying federal admiralty law to questions of contribution and comparative fault because parties did not argue that French law applied, because “no one has furnished us with the tools to decide the question under French law” and because “[a]ll parties cast the question as one of American maritime law without explaining why”), see generally EUGENE F. SCOLES, PETER HAY,

civil procedure arise from transnational contexts,<sup>45</sup> and in striking out in new directions in such cases, courts rarely explain whether there is anything in the transnational fact pattern before them that limits the applicability of the holding or reasoning when applied in wholly domestic cases. Sometimes, as in the post-*Babcock* cases, interstate-international equivalence takes the form of an opinion in a transnational case becoming a central precedent for interstate cases. At other times, the movement is in the opposite direction; doctrine that has been developed through wholly domestic interstate cases is extended without comment to cases that are transnational.

This latter form of equivalence is illustrated by the Supreme Court's jurisprudence on personal jurisdiction, where post-World War II doctrine has been driven by fairness to the defendant, as measured by the Due Process Clause of the Fifth and Fourteenth Amendments, and the principle that one state should not be permitted to impinge upon the prerogatives of another.<sup>46</sup> Both considerations first surface in cases in which the defendant is domestic, with strong ties to the United States based on citizenship, domicile, or place of incorporation. From domestic constitutional history and considerations of interstate federalism, the Court builds a set of analytical frameworks and concepts: minimum contacts,<sup>47</sup> purposeful availment,<sup>48</sup> "traditional notions of fair play and substantial justice,"<sup>49</sup> and so forth. These concepts and frameworks are then put to use in transnational cases, where

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PATRICK J. BORCHERS, & SYMEON C. SYMEONIDES, CONFLICT OF LAWS § 12.19 (3d ed. 2000).

<sup>45</sup> For other examples drawn from the choice-of-law canon, see *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930) (Mexico and Texas); *Milkovich v. Saari*, 203 N.W.2d 408, 412–17 (Minn. 1973) (Ontario and Minnesota); *Auten v. Auten*, 124 N.E.2d 99, 101–03 (N.Y. 1954) (England and New York). In *Home Insurance*, an important early case on constitutional limits on choice of law, Justice Brandeis did not consider significant differences between allowing the law of the forum to displace foreign law (in that case Mexican law) as opposed to displacing the law of another state. Two of the most important cases on general jurisdiction arise from transnational fact patterns. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (wrongful death action in Texas court against Colombian corporation where accident took place in Colombia); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) (suit in Ohio against mining company incorporated in the Philippines). Neither of the opinions in these cases gives any indication that the jurisdictional standard would have been different if the fact pattern had been interstate. Lower courts repeatedly have applied the Supreme Court's analysis in *Helicopteros* in domestic interstate cases without pausing to consider whether the standard for exercising general jurisdiction over non-resident domestic corporations should be the same as for non-resident foreign corporations. See, e.g., *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072 (9th Cir. 2003) (an interstate case regarding "continuous and systematic contacts" based on activity on the internet with the court carefully noting that *Perkins* and *Helicopteros* were not internet cases but failing to observe that *Perkins* and *Helicopteros* were transnational cases, unlike the case at bar). Similarly, the modern liberal attitude toward forum selection clauses and other conflicts issues relating to contract law was first displayed in international cases and then extended to purely domestic disputes. See Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 VAND. J. TRANSNAT'L L. 421, 440 (1995).

<sup>46</sup> This principle was prominent in Justice White's majority opinion in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). Within a few years, however, the view that the Due Process Clause was not an instrument for guarding the boundaries of interstate federalism prevailed. See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–703, n.10 (1982) (stating that the Due Process Clause "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty"); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 & n.13 (1985). Some scholars call for reviving the view that there is a federalism or sovereignty-based component to the Due Process Clause. See, e.g., Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987).

<sup>47</sup> See *International Shoe v. State of Washington*, 326 U.S. 310, 316 (1945).

<sup>48</sup> See *Hanson v. Denckla*, 357 U.S. 235, 252–53 (1958).

<sup>49</sup> *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

the issue is whether the forum may exercise jurisdiction over defendants who are not domiciled in, resident in, or incorporated in any state of the United States. This transplantation takes place without what would seem to be a necessary pause: is the interstate case truly analogous to the transnational one? Underneath superficial similarities, are there different interests to be considered?<sup>50</sup>

Both versions of equivalence, from interstate to international and from international to interstate, have deep roots.<sup>51</sup> The American case law of the nineteenth century is densely populated with examples of courts plucking from the law of nations well established principles governing the relations among sovereign nations<sup>52</sup> and transporting these principles to disputes implicating not the interests of foreign nations but those of quasi-sovereign states in a federal union.<sup>53</sup>

### A. *The First Wave of American Transnationalism*

This similarity in the treatment of interstate and international cases has been noted before, but only sporadically.<sup>54</sup> After World War II, when the potential arose for U.S. juridical influence to rise in tandem with economic influence,<sup>55</sup> a

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<sup>50</sup> Another illustration of this form of interstate-international equivalence is the expansion of the complete diversity rule of subject-matter jurisdiction from interstate diversity cases to alienage diversity cases. See *Cuebas Y Arredondo v. Cuebas Y Arredondo*, 223 U.S. 376, 388 (1912) (relying on *Strawbridge v. Curtiss* in concluding that complete diversity is required in alienage diversity cases without even considering possible differences between the two types of diversity).

<sup>51</sup> See, e.g., SAMUEL LIVERMORE, *DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS* (1828) (bringing the thinking of European statuists to bear on U.S. domestic conflicts problems). In his judicial opinions and scholarly writings, Joseph Story repeatedly turned to the law of nations and continental European authors for analogies to U.S. interstate conflicts problems. See *Le Roy v. Crowninshield*, 15 F. Cas. 362 (1820) (Story, J.) (collecting U.S. cases and analyzing foreign sources); *Commentaries on the Conflict of Laws, Foreign and Domestic* (1834). For later examples of this influence on the jurisprudence of the U.S. Supreme Court, see *Sun Oil v. Wortman*, 486 U.S. 717, 724 (noting that in the decades immediately following ratification of the Constitution, courts looked without hesitation to international law for guidance in resolving conflict of laws problems, such as whether to apply the forum's statute of limitations); *Huntington v. Attrill*, 146 U.S. 657, 666, 669 (1892) (relying on pre-Constitution international law in holding that penal judgments fall outside the scope of the Full Faith and Credit Clause); see also Cleveland, *supra* note 36, at 49–54 (2006) (describing use of international law as a “structural analogy for the federal system”).

<sup>52</sup> The term “law of nations,” used widely in the 17th, 18th, and 19th centuries, is not synonymous with the modern term “international law.” See generally Jeremy Waldron, *Foreign Law and the Modern *Ius Gentium**, 119 HARV. L. REV. 132–37 (2005) (explaining the “broader meaning” of the term “law of nations”).

<sup>53</sup> See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (looking to “well-established principles of public law respecting the jurisdiction of an independent State” and finding that each state of the United States “possesses exclusive jurisdiction and sovereignty over persons and property within its territory” to the exclusion of other states); *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (evaluating the status of a slave brought into a free state in terms of principles of international law); see generally Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027 (2002) (arguing that principles of the law of nations have often provided a template for Eleventh Amendment jurisprudence).

<sup>54</sup> See, e.g. AMERICAN LAW INSTITUTE, *RESTATEMENT (SECOND) CONFLICT OF LAWS*, §10, Reporter's Note (“By and large, American courts and writers have not distinguished between international and interstate conflicts for choice-of-law purposes.”).

<sup>55</sup> See generally LOUIS HENKIN AND ALBERT J. ROSENTHAL, EDs., *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* (1993) (tracing the influence of U.S. constitutionalism on the practices of other countries and on international human rights instruments).

handful of conflicts scholars argued that the American legal system's tendency to project interstate frameworks onto transnational fact patterns was a hindrance to fostering a more efficient and predictable international regime for resolving transnational commercial disputes.<sup>56</sup> They argued that the path to such a regime, with its benefits to U.S. business interests, lay in integrating U.S. courts into the emerging transnational system of judicial cooperation.<sup>57</sup>

In 1958, Congress created the Commission and Advisory Committee on International Rules of Judicial Procedure (the "Commission") and charged it with recommending changes in American procedural law so as to improve judicial cooperation between the U.S. and other countries.<sup>58</sup> The Commission recommended an overhaul of an international judicial cooperation statute that had never been especially useful.<sup>59</sup> As amended in 1964, the statute (now codified, as amended, at 28 U.S.C. § 1782) authorized federal district courts to assist foreign courts, international tribunals, and foreign litigants in obtaining evidence (documents, physical evidence, and testimony) located in the U.S. and sought for use in judicial proceedings abroad.<sup>60</sup> Congress also followed through on another of the Commission's recommendations. It authorized U.S. membership in the Hague Conference on Private International Law,<sup>61</sup> the leading international organization devoted to facilitating international judicial cooperation through multilateral treaties. Finally, the early 1960s produced a breakthrough in state procedural law. The 1962 Uniform Foreign Money-Judgments Recognition Act

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<sup>56</sup> The lead in this was taken by Professor Albert Ehrenzweig. See, e.g., ALBERT EHRENZWEIG, PRIVATE INTERNATIONAL LAW: A COMPARATIVE TREATISE ON AMERICAN INTERNATIONAL CONFLICTS LAW, INCLUDING THE LAW OF ADMIRALTY 7-10, 19-26 (1967); Albert Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717, 724 (1957) (criticizing the use of concepts developed by courts primarily to suit the "exigencies of interstate relations" with the result of "burden[ing] international conflicts law"); compare Albert Ehrenzweig, *Recognition of Custody Decrees Rendered Abroad*, 2 AM. J. COMP. L. 167 (1953) with Albert Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953); see also Peter Hay, *International Versus Interstate Conflicts of Law in the United States*, 35 RABELSZ 429, 430 (1971) ("International cases present factual aspects and policy considerations which are, indeed, or potentially may be, different from those relevant in domestic (interstate) cases"); Eugene F. Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CAL. L. REV. 1599-1600 (1966) ("To apply mechanically a rule developed in interstate cases to an international situation without a consideration of its policy relevance is both wrong and dangerous."). For a precursor to these works, see Armand B. Du Bois, *The Significance in Conflict of Laws of the Distinction Between Interstate and International Transactions*, 17 MINN. L. REV. 361 (1933).

<sup>57</sup> See generally Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 556-59 (1953) (arguing in favor of federal legislation to cure multiple deficiencies in the ability of U.S. courts to cooperate with foreign legal systems). Jones later served as chairman of the Advisory Committee on International Rules of Judicial Procedure from 1958 to 1966. See text accompanying note 58, *infra*.

<sup>58</sup> See Act of Sep. 2, 1958, Pub. L. No. 85-906, 72 Stat. 1743; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248 (2004).

<sup>59</sup> See Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630 (assistance limited to ordering testimony of person located in the forum and only where request originated from the court of a foreign country); 542 U.S. at 248 (discussing 1948 amendments eliminating requirement that the government of a foreign country be a party or have an interest in the proceeding).

<sup>60</sup> See Pub. L. 88-619, 78 Stat. 995 (1964); S. Rep. 88-1580 (1964) *reprinted in* 1964 U.S.C.C.A.N. 3782. The 1964 changes enabled federal courts to assist in obtaining not only testimony but also documents and other tangible evidence. In addition, district courts were authorized to assist in proceedings before foreign investigating magistrates and administrative decision-makers rather than only courts. Third, the 1964 amendments permitted U.S. courts to respond to requests not only from tribunals and litigants but also from any "interested person."

<sup>61</sup> See Act of Dec. 30, 1963, Pub. L. No. 88-244, 77 Stat. 775.

(the “UFMJRA”)<sup>62</sup> was a step forward in standardizing the diverse approaches of fifty different states with respect to recognizing the civil judgments of courts in other countries.

Though all of these developments were important steps away from isolationism and unilateralism,<sup>63</sup> none expressly addressed the longstanding tendency of American courts, both in applying doctrine and in constructing broader intellectual frameworks, to treat the transnational and the interstate alike. Even after the first post-War wave of treaties and statutes authorized U.S. courts to engage in international judicial cooperation, American courts, with a few exceptions,<sup>64</sup> continued to regard domestic interstate procedural law as the model.

This first post-War effort to bring American procedural law into a more transnational era brought mixed results. The Commission created in 1958 was hampered by uncertain support from Congress.<sup>65</sup> One of its main initiatives, the Uniform Interstate and International Procedures Act (“UIIPA”) was enacted by few states.<sup>66</sup> At the Hague Conference, the U.S. delegation pursued something less than an internationalist agenda as it brought federalism concerns along with it<sup>67</sup> and showed little willingness to use the cover of multilateral negotiations as an opportunity to reevaluate domestic idiosyncrasies.<sup>68</sup> The judicial response to the Hague Conventions was lukewarm. And the two key initiatives in state uniform

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<sup>62</sup> 13 U.L.A. 139 (2002 ed. and 2006 Supp.). The UFMJRA was the work of the National Conference of Commissioners on Uniform State Laws (“NCCUSL”).

<sup>63</sup> See Jones, *supra* note 57, at 538 (“[N]o other government permits such widespread confusion and such profound disregard for the concept of comity”); see also *id.* at 539 (commenting on failure of U.S. executive departments to provide assistance commonly provided by other countries).

<sup>64</sup> See *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 9 (1972) (declining to extend an interstate precedent on the unenforceability of forum selection clauses to a transnational case); *United States v. First Nat’l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting) (“Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.”).

<sup>65</sup> Congress failed to provide all the funding that had been promised and also set a very short period of time for the Commission to carry out its work. See Hans Smit, *The Interstate and International Procedures Act Approved by the National Conference of Commissioners on Uniform State Laws: A New Era Commences*, 11 AM. J. COMP. L. 415 (1962).

<sup>66</sup> It was enacted in only five U.S. jurisdictions. See National Conference of Commissioners on Uniform State Laws (“NCCUSL”), Interstate Depositions and Discovery of Documents Act, July 2006 Draft, at Pref. Note 1, available at [http://www.law.upenn.edu/bll/archives/ulc/idda/2006am\\_draft.txt](http://www.law.upenn.edu/bll/archives/ulc/idda/2006am_draft.txt). NCCUSL withdrew the UIIPA in 1977. In some states, however, the UIIPA was an influential source for drafting longarm statutes and procedural rules. See R. Doak Bishop, *International Litigation in Texas: Texas Rules of Evidence and Recent Changes in the Texas Rules of Civil Procedure*, 36 BAYLOR L. REV. 131 (1984).

<sup>67</sup> Constraints imposed by federalism were given as the reason for the U.S. declining to sign the Bustamante Code produced by the Havana Conference of 1928 and for not becoming a member of the Hague Conference on Private International Law until the 1960s. See Kurt H. Nadelmann, *The United States and the Hague Conference on Private International Law*, 1 AM. J. COMP. L. 268 (1952); JAMES B. SCOTT, *THE INTERNATIONAL CONFERENCES OF AMERICAN STATES, 1889–1928*, at 371 (1931).

<sup>68</sup> In recent years, Professor Clermont has advanced this perspective on how the United States should approach multilateral negotiations regarding a jurisdiction and judgments treaty under the auspices of the Hague Conference on Private International Law. See Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 89 (1999) (arguing that the Hague negotiations would “hand [U.S.] lawmakers a . . . benefit in providing the opportunity to untangle the jurisdictional law applied at home”). Back in the 1960s, however, the U.S. delegation negotiating the Hague Evidence Convention did not seek to harmonize U.S. discovery practices in transnational cases with the practices of other countries. Rather, the goal pursued was to make foreign legal systems more receptive to the existing U.S. pretrial discovery model. See S. EXEC. DOC. C, 90th Cong., 1st Sess. at 21 (1967) (“The most significant aspect of the [Hague Service] convention is the fact that it requires so little change in the present procedures in the United States, yet at the same time requires such major changes, in the direction of modern and efficient procedures, in the present practices of many other states.”).

laws, the UIIPA and the UFMJRA, actually were steps backward in one key respect; both tended to reinforce the traditional equivalence of the interstate and the international. Key premises of the UIIPA were that the same long-arm statute should apply to both domestic and foreign defendants (§1.03), that interstate and international judicial assistance were essentially similar (§3.02), and that the procedures for determining the laws of entities other than the forum state (whether the law of a foreign country or of a sister state) should be the same (§4.02). A central feature of the UFMJRA was that a foreign-country judgment satisfying certain minimum requirements should be treated as fully equivalent to a sister-state judgment.<sup>69</sup>

In short, this first wave of post-War procedural transnationalism reveals missed opportunities. State lawmakers standardized long-arm statutes in the aftermath of *International Shoe*<sup>70</sup> but hardly gave thought to writing two sets of long-arm statutes, one for domestic non-residents and one for foreign non-residents. There was also the opportunity, in the context of negotiating the Hague Evidence Convention, to reevaluate the American model of pretrial discovery, at least in cases in which the interests of foreign countries were implicated. That did not happen either. What did happen was the development of a unilateral U.S. approach toward addressing differences in procedural law. Thus the UFMJRA, which extended recognition to foreign judgments without the requirement of reciprocity, functioned as a substitute for judgment-recognition treaties, which might have required comparative law analysis and compromise. The 1964 amendments to 28 U.S.C. § 1782 were another example of unilateral lawmaking in lieu of treaty negotiation. Like the UFMJRA, the amended § 1782 operated on the premise that the self-evident virtues of the American model eventually would be emulated by other legal systems.<sup>71</sup>

### *B. The Second Wave of American Transnationalism*

Two decades elapsed before a second wave of reformers called for U.S. courts to apply a more cosmopolitan procedural law in transnational litigation.<sup>72</sup>

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<sup>69</sup> See, e.g., § 3 (stating that, with some exceptions, a “foreign judgment is enforceable in the same manner as the judgment of a sister-state which is entitled to full faith and credit”). Similarly, the Second Restatement of Conflict of Laws, completed in 1971, stated the general rule (subject to limited exceptions) that the same principles govern choice of law in international settings and interstate settings. See AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) CONFLICT OF LAWS §10, comment c (“The rules in the Restatement of this subject are also usually applicable to cases with elements in one or more foreign nations. This is properly so since similar values and considerations are involved in both interstate and international cases”). Comment d to § 10 states some “significant” differences between the two.

<sup>70</sup> *International Shoe Co. v. State of Washington*, 326 U.S. 3410 (1945).

<sup>71</sup> See S. Rep. No. 1580, (1964) reprinted in 1964 U.S.C.A.N. 3782, 3783 (“It is hoped that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures.”); Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1018, 1018–19 (1965) (noting that the 1964 amendments “accentuate the great liberality with which the United States permits the performance of foreign procedural acts within its borders” and that these amendments reflect the hope of obtaining “more enlightened views” from other countries). Professor Smit served as the reporter for the U.S. Commission and Advisory Committee on International Rules of Judicial Procedure.

<sup>72</sup> Much of their scholarship questioned the practice of applying interstate precedents to determine

The emphasis this time was on making greater use of the methods of comparative law to understand differences between U.S. and foreign procedural laws. It was also an occasion to reconsider the applicability of the Due Process Clause in functioning as a limit on legislative and judicial overreaching with respect to the exercise of jurisdiction in transnational cases.<sup>73</sup>

This time, unlike in the 1960s, the arguments of those advocating more circumspection in the application of domestic procedural approaches to transnational fact patterns were reinforced by visible changes in the profession. Overseas offices of U.S. law firms had become more than post-office boxes.<sup>74</sup> The overseas presence of these firms was expanding as U.S.-trained lawyers flocked to practice areas that had long been marginal for Americans: international arbitration, European Union regulatory law, trade disputes, managing parallel litigation for corporate clients with interests around the world. For the first time, U.S. law firms were employing foreign-trained lawyers in substantial numbers in order to provide sophisticated advice on worldwide forum selection, parallel litigation, preliminary relief, and judgment enforcement. Law schools in the U.S. were adding new international and comparative law courses to the curriculum: EU law, international environmental law, international intellectual property law, and transnational litigation.

The U.S. legal system again seemed poised for a transformation, a shift from a primarily inward-looking posture to one more engaged with the wider world. Though the initiatives launched in the late 1950s and early 1960s had reached only partial fruition, in the early 1990s there was reason to believe that the transformation would be more complete the second time around. Each year, the U.S. economy was becoming more dependent on imports and exports.<sup>75</sup> American law students were being exposed to international and foreign law in record numbers.<sup>76</sup> Changes in global economic power meant that U.S. parties to

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whether the exercise of personal jurisdiction over alien defendants comports with due process. See Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1 (1987); Peter Hay, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on Burnham v. Superior Court*, 1990 ILL. L. REV. 593 (1990); Mary Kay Kane and Ronan E. Degan, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L. J. 799 (1988); Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85 (1983); Janice Toran, *Federalism, Personal Jurisdiction, and Aliens*, 58 TUL. L. REV. 758 (1984).

<sup>73</sup> Both emphases are apparent, for example, in the most recent version of the Restatement of the Foreign Relations Law of the United States, which takes the position that international law, rather than U.S. constitutional law, is sometimes the more appropriate constraint on carrying over what U.S. courts do in interstate matters to what they do in transnational matters. See AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (international law limitations on Congress's legislative jurisdiction); § 421 (1987) (emphasizing international law limitations, rather than constitutional limitations, on the adjudicative jurisdiction of U.S. courts); § 421, comment e (adjudicative jurisdiction based on transient presence, permissible as to domestic defendants, "is not generally acceptable under international law" as to foreign defendants).

<sup>74</sup> See *London Branches, Doubling Down*, AMERICAN LAWYER, May 2001, at 21 (providing data on the growth in size of London offices of major U.S. law firms); Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL'Y INT'L BUS. 1093, 1100–29 (2000) (chronicling the foreign office expansion activities of seventy-two of the largest, most internationally-oriented U.S. firms); Steven Greenhouse, *U.S. Lawyers Flock to Brussels*, N.Y. TIMES, May 13, 1991, at D1; Stephen Labaton, *U.S. Law Firms Expand To Reach Global Clientele*, N.Y. TIMES, May 12, 1988, at A1.

<sup>75</sup> See Christopher L. Bach, *Annual Revision of the U.S. Annual Accounts, 1989–2003*, SURVEY OF CURRENT BUSINESS 52 (July 2004).

<sup>76</sup> Compare JOHN KING GAMBLE, *TEACHING INTERNATIONAL LAW IN THE 1990S* (1992) with RICHARD W. EDWARDS JR., *INTERNATIONAL LEGAL STUDIES: A SURVEY OF TEACHING IN AMERICAN*

transborder transactions could not routinely dictate the choice of forum as they had done a generation earlier. In tandem with these changes, a new literature appeared, proclaiming that a new field, transnational litigation, had arrived.

#### IV. TRANSNATIONALISM AND THE AMERICAN BENCH

This second wave of transnationalism has touched every corner of the American legal profession, but its impact has been uneven. In the academy, signs of its impact are everywhere: the “global law school” model,<sup>77</sup> the comparative and international orientation of the current generation of conflict of laws case books,<sup>78</sup> the marked increase in the number of foreign LL.M. programs at U.S. law schools, and the number of established scholars who have launched second careers by turning to comparative and transnational aspects of their specialties.<sup>79</sup> Among the bar, also, transnationalism has gained traction. U.S.-trained lawyers across a range of practice areas have learned to think not only in terms of federal and state regulatory standards but in terms of global and regional regulation. No highly regarded mergers and acquisitions lawyer today considers pre-merger clearance by the U.S. Department of Justice without also considering the EU merger regulation and the enforcement policies of the European Commission.<sup>80</sup> No competent lawyer drafting contracts for transnational deals approaches the issue of forum selection without considering international arbitration and the worldwide options for preliminary relief.

Transnationalism, however, has had less impact on the American bench. Though litigation involving foreign parties has become common, judicial opinions continue to operate on transnational legal problems with domestic instruments, and they do so whether the task at hand is statutory interpretation or treaty interpretation. Consider the Supreme Court’s interpretation of a treaty that was a centerpiece of the first wave of transnationalism in the 1960s. The majority

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LAW SCHOOLS 1963–64 (1965).

<sup>77</sup> The “global law school” model—semi-permanent visiting foreign faculty, student fellowships, visiting doctoral researchers, clerkships on foreign courts—got off the ground at the New York University School of Law in 1994. See Hauser Global Law Scholars Program “About Us” Page, <http://www.nyu-lawglobal.org/aboutus/aboutus.htm>, last visited February 26, 2008. Since then, other law schools have implemented aspects of the model. See, e.g., Isaak Dore, *The International Law Program at Saint Louis University*, 46 J. LEG. ED. 336 (1996); Diane Penneys Edelman, *It Began at Brooklyn: Expanding Boundaries for First-Year Law Students by Internationalizing the Legal Writing Curriculum*, 27 BROOK. J. INT’L L. 415 (2002); Claudio Grossman, *Building the World Community: Challenges to Legal Education and the WCL Experience*, 47 AM. U. INT’L L. REV. 815 (2002); Santa Clara University International Law Program, <http://www.scu.edu/law/international>, last visited February 26, 2008.

<sup>78</sup> See, e.g., DAVID P. CURRIE, HERMA HILL KAY, AND LARRY KRAMER, CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 727–828 (6th ed. 2001) (chapter on “International Conflicts”); GARY J. SIMSON, ISSUES AND PERSPECTIVES IN CONFLICT OF LAWS: CASES AND MATERIALS (4th ed. 2005) at 297–344 (chapter on “Recognition of Interstate and International Needs”), xxi (supplemental table of contents listing “international conflicts cases”); SYMEON C. SYMEONIDES, WENDY COLLINS PURDUE, AND ARTHUR T. VON MEHREN, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL: CASES AND MATERIALS (2d ed. 2003) at 6–12 (history of choice-of-law doctrine in Europe), 537–87 (“Choice of Law in the International Arena”), 675–709 (“Jurisdiction in International Cases”), 811–855 (“Recognition of Foreign Country Judgments”).

<sup>79</sup> Examples include Norman Dorsen (constitutional law and freedom of expression), Alan Farnsworth (contracts), Geoffrey Hazard (civil procedure), Mark Tushnet (constitutional law).

<sup>80</sup> See Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, L133/1 O.J. (Apr. 7, 2004).

opinion in *Aérospatiale*<sup>81</sup> greatly limited the importance of the Hague Evidence Convention<sup>82</sup> for lawyers conducting transnational discovery practice connected with U.S. proceedings. Under Justice Stevens's approach, litigants in U.S. proceedings seeking evidence located outside the U.S. need not presumptively first avail themselves of the convention's procedures before pursuing unilateral discovery under the Federal Rules of Civil Procedure. Rather, whether such litigants ever need to pursue the treaty route rests in the discretion of the district court.<sup>83</sup> Twenty years of lower court application of *Aérospatiale* has shown that the relevance of the Hague Evidence Convention to U.S. litigants is largely limited to instances in which documents are in the possession of a person or entity that is beyond the personal jurisdiction of the U.S. court or where testimony is sought from someone beyond a U.S. court's subpoena power.<sup>84</sup>

Much has been written on whether the Supreme Court got it right in *Aérospatiale*. In the present context, what is most noteworthy about the case is that the Court approached the interpretation of a multilateral treaty as if it were a wholly domestic source of law.<sup>85</sup> In its search for intent, the majority repeatedly refers to the views of the U.S. executive branch and regulatory agencies,<sup>86</sup> and statements by U.S. negotiators<sup>87</sup> suggesting that the U.S. delegation regarded the treaty as merely supplementing national discovery mechanisms. Thus, in many ways *Aérospatiale*'s treatment of the Hague Evidence Convention resembles the manner in which courts treat legislative history when interpreting domestic statutes; the focus is on statements made by specific U.S. actors in the drafting and voting process rather than on the overall object and purpose of the treaty<sup>88</sup> as

<sup>81</sup> *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987).

<sup>82</sup> Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, done Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231, entered into force for the United States Oct. 7, 1972. Like many of the treaties produced by the Hague Conference on Private International Law, the Convention creates mechanisms by which courts or authorities in one member state provide assistance to courts or litigants in another. At present 44 countries are parties to the Hague Evidence Convention. See [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=82](http://www.hcch.net/index_en.php?act=conventions.status&cid=82), last visited Feb. 26, 2008.

<sup>83</sup> In *Aérospatiale*, the Supreme Court held that a litigant's decision to avail itself of the treaty obligations of foreign authorities is optional, presumably to be done when direct discovery is unlikely to produce optimal results, e.g., discovery from non-parties who are domiciled abroad and who are not U.S. citizens, or discovery in cases in which a final judgment from a U.S. court will need to be enforced abroad by foreign courts which may take a dim view of the failure of U.S. litigants to pursue discovery through the convention.

<sup>84</sup> For a summary of cases and trends in the post-*Aérospatiale* case law, see CHARLES ALAN WRIGHT, ARTHUR MILLER, AND RICHARD L. MARCUS, 8 FEDERAL PRACTICE AND PROCEDURE CIV. 2D §2005.1 (Supp. 2008); Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on its Role in U.S. Civil Procedure*, 57 LAW & CONTEM. PROBS. 77 (1994).

<sup>85</sup> See Burbank *supra* note 19, at 1494. Professor Burbank shows that in some ways the Court treated the Convention "like an ordinary federal statute" and in other ways "failed to give [the] treaty the respect due an ordinary federal statute." *Id.* at 1493–94.

<sup>86</sup> 482 U.S. at 531–32, 535 & n.19 (relying on Presidential letter of transmittal and views of Securities and Exchange Commission).

<sup>87</sup> 482 U.S. at 530–31 & n.13.

<sup>88</sup> In addressing the subject of treaty interpretation, articles 31–33 of the Vienna Convention on the Law of Treaties refer to the "object and purpose" of the treaty, "relevant rules of international law," and the nuances created by authentication in two or more languages. 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980. The United States is not a party to the Vienna Convention but has long taken the position that the Convention is a codification of customary international law on principles of treaty interpretation. See, e.g., *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000) ("We [] treat the Vienna Convention as an authoritative guide to the customary international law of treaties"); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1296 n.40 (11th Cir. 1999); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1361–62 (2d Cir. 1992) (referring to the position of the U.S.

seen from the differing perspectives of the many countries that took part in negotiations.

My concern here is not with whether *Aérospatiale* reached the right result. Rather, the point is that even in the most obviously transnational cases—cases in which foreign parties are present, treaties are in play, foreign governments have filed amicus briefs,<sup>89</sup> and the work product of an international organization is being considered<sup>90</sup>—the Supreme Court has failed clearly to distinguish in its tools of interpretation between the transnational and the purely domestic.

*Aérospatiale* is not an anomaly. In the past two decades, lower federal courts and state courts not only have failed to reflect on the ways in which interpreting international agreements should differ from interpreting domestic sources of law,<sup>91</sup> they repeatedly have acted upon the view that a transnational lawsuit is essentially a variation on a domestic lawsuit. That is, interstate-international equivalence continues in American courts, even as the rest of the profession struggles to come to grips with what is distinctive about transnational law.

The remainder of this part provides three additional illustrations of this process at work: (1) the failure of lower courts to make meaningful distinctions between the interstate exercise of jurisdiction and the transnational exercise of jurisdiction in applying the Supreme Court's 1987 decision in *Asahi v. Superior Court*;<sup>92</sup> (2) the survival of transient presence jurisdiction over foreign defendants based on a loose reading of *Burnham v. Superior Court*; and (3) the tendency of lower courts to approach pretrial discovery in transnational cases as if it were the same as in domestic cases.

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Department of State on the status of the Vienna Convention).

<sup>89</sup> The French government's brief argued that "civil law signatories would have had little incentive to agree to these American-style innovations unless the Convention defined and limited the scope of procedures by which American litigants seek discovery abroad" and that the Convention "should not be interpreted as if it merely gave the United States new and unilateral privileges without imposing upon it any concomitant obligation of restraint." Brief of Republic of France as Amicus Curiae Supporting Petitioner, *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987), at 7 and 10. The amicus brief filed by the Federal Republic of Germany asserted that "attempts to circumvent the Convention constitute a violation of the principle that treaties are to be interpreted in good faith." Brief of Federal Republic of Germany Supporting Petitioner, *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987), at 7.

<sup>90</sup> Periodically, the Permanent Bureau of the Hague Conference on Private International Law convenes special commissions to study how various Hague conventions are functioning in practice. These studies are based in part on an examination of judicial opinions in member states. The report of the 1989 special commission meeting, written shortly after the *Aérospatiale* decision, criticized the U.S. Supreme Court's "one sided" tendency of "concentrating on American sources." See Permanent Bureau of the Hague Conference on Private International Law, Report on the Work of the Special Commission of April 1989 on the operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters 1 & 17 (1989). The Report further observed that the subject of the *Aérospatiale* decision "gave rise to the most extensive discussions" of the meeting. *Id.*

<sup>91</sup> For a thoughtful discussion of this failure in the realm of private international law, see Russell J. Weintraub, *The Need for Awareness of International Standards when Construing Multilateral Conventions: The Arbitration, Evidence, and Service Conventions*, 28 TEX. INT'L L. J. 441 (1993).

<sup>92</sup> 480 U.S. 102 (1987).

### A. Reasonableness and the Foreign Defendant: Applying *Asahi*

If jurisdiction is power, as Justice Holmes famously said,<sup>93</sup> then the law of personal jurisdiction ought to take into account whether power is projected across international borders or interstate borders. The exercise of adjudicative jurisdiction differs in the two situations in terms of: (1) the relevance of international law,<sup>94</sup> (2) the possibility of retaliation by courts or authorities elsewhere, (3) the potential for inconvenience and expense, (4) possible bias for or against one or more of the litigants,<sup>95</sup> and (5) the ability or inability of the forum to vindicate not only its own interests but also those of other polities bearing some connection to the dispute.<sup>96</sup>

It was not until *Asahi v. Superior Court* that the Supreme Court first moved personal jurisdiction doctrine in a direction that explicitly took alienage and foreign residence into consideration and expressly discussed differences between the foreign non-resident defendant and the domestic non-resident defendant.<sup>97</sup> In *Asahi* the Court held that a state court's exercise of specific jurisdiction is subject to an overarching test of reasonableness that is separate from the inquiry into whether the defendant purposefully availed itself of benefits associated with having its products circulate in the forum state.<sup>98</sup> Reasonableness,

<sup>93</sup> See *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). For criticism of the accuracy of Holmes's statement in terms of historical practice, see Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power Myth" and Forum Non Conveniens*, 65 YALE L.J. 289, 303–04 (1956).

<sup>94</sup> See Case Concerning the Arrest Warrant of 11 April 2000 (*Congo v. Belg.*), 2002 I.C.J. 121 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal) (discussing customary international law as imposing limits on the exercise of jurisdiction by national courts); Int'l Law Ass'n, Comm'n on Int'l Human Rights Law & Practice, Final Report: On the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences (2000); Restatement, *supra* note 73, at § 421(a) (stating that international law imposes an overall reasonableness standard that limits the power of a country, through its courts, to exercise jurisdiction over a person or thing located outside the country).

<sup>95</sup> For recent literature examining whether foreign litigants are a target of bias in American courts, see Keven M. Clermont and Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996) (empirical study comparing the "win rates" of domestic and foreign litigants in federal courts); Jack L. Lahr, *Bias and Prejudice Against Foreign Corporations in Patent and Other Technology Jury Trials*, 2 FED. CIRCUIT B.J. 405, 405 (1992) ("A widespread perception within the corporate communities of many industrial countries holds that they will be treated unfairly in U.S. jury trials due to the jury bias and prejudice against foreigners"); Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U.L. REV. 1497 (2003) (finding anti-foreigner bias in U.S. patent litigation); David Wippman, *Dispute Resolution*, 7 FLA. J. INT'L L. 93, 94–95 (1992) (discussing apparent bias against Latin American bank in Texas state court).

<sup>96</sup> Imagine that an allegedly defective component of an automobile causes injury in Florida. Suppose, further, that courts in Florida lack jurisdiction over the defendant. Now imagine two variations on this hypothetical case: In the first variation, the part was manufactured in Alabama by a defendant who is subject to jurisdiction in Alabama. In the second variation, the part was manufactured in Taiwan by a defendant who is subject to jurisdiction in the courts of Taiwan. In some sense both available forums – Alabama and Taiwan – fall short of Florida in terms of their competence in applying Florida tort law and in vindicating Florida's interest in protecting and compensating Florida citizens. But it might be thought that the courts of a sister state (Alabama) come closer in this regard than those of a foreign country.

<sup>97</sup> *Asahi* was decided in the same year as *Aérospatiale* and in the same year that saw publication of the Restatement (Third) of the Foreign Relations Law. The year 1987 also marked the publication of a law review article by Gary Born that was in some ways a precursor to *International Civil Litigation in U.S. Courts*. See Born, *supra* note 72.

<sup>98</sup> There is considerable variation among lower federal courts and state courts on how the purposeful availment and reasonableness prongs of the *Asahi* opinion have been articulated. See, e.g., Juelich v. Yamazaki Mazak Optonics Corp., 682 N.W. 2d 565, 570–71 (Minn. 2004) (articulating a five-factor variation on *Asahi* and stating that the "reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms

according to the Court, has to be demonstrated even when the defendant's products allegedly cause harm in the forum state.<sup>99</sup> Thus, in *Asahi* the exercise of jurisdiction over a Japanese manufacturer of a component part was unreasonable because the burdens on such a defendant when forced to litigate in California were large and the interests of California in adjudicating a third-party claim to which no U.S. litigant was a party were small.<sup>100</sup>

*Asahi* is the only instance in which a Supreme Court majority, writing on the issue of personal jurisdiction, has drawn lines distinguishing transnational litigation from interstate litigation.<sup>101</sup> Under Part II(B) of Justice O'Connor's opinion—the portion in which she wrote for an eight-justice majority<sup>102</sup>—due process entails more than showing that the defendant purposefully directed its behavior at the forum and more than demonstrating a bare minimum of contacts between the defendant and the forum. Justice O'Connor's opinion first reiterated five factors to be considered in all cases (domestic and international) potentially bearing on whether litigation in the forum is reasonable.<sup>103</sup> It then emphasized three considerations in particular that would help courts identify instances in which the assessment of reasonableness might be different for foreign non-resident defendants than for domestic non-resident defendants. These three transnational reasonableness factors are: (1) the “procedural and substantive policies of other *nations* whose interests would be affected by the assertion of jurisdiction,”<sup>104</sup> (2) the “unique burdens placed upon one who must defend oneself in a foreign legal system,”<sup>105</sup> and (3) the effects of adjudicating such a case on the foreign relations policies of the United States.<sup>106</sup>

When legal scholars refer to Justice O'Connor as an internationalist,<sup>107</sup> often it is her enumeration of these three factors in *Asahi* that prompts that

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of unreasonableness to defeat jurisdiction.”).

<sup>99</sup> A lack of reasonableness is characterized as a failure “to comport with traditional notions of fair play and substantial justice.” 480 U.S. at 113, quoting *Milliken v. Meyer*, 311 U.S. at 463 (1940).

<sup>100</sup> *Asahi* began as a multiparty suit involving a product-liability claim by an injured California citizen against the Taiwanese manufacturer of a motorcycle tire tube with a third-party claim against the Japanese component-part maker that had manufactured the tube's valve. Once the California plaintiff reached a settlement with the tube manufacturer, the only claim remaining in the case was the third-party indemnification claim between the two foreign manufacturers. See 480 U.S. at 113–15.

<sup>101</sup> In previous cases, the Supreme Court had adjudicated questions of personal jurisdiction in a transnational context without explicit reference to differences between domestic and transnational litigation. See, e.g., *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (general jurisdiction); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (specific jurisdiction).

<sup>102</sup> Justice Scalia did not join in that part of the opinion. Part II(A) of Justice O'Connor's opinion, the part addressing stream of commerce and purposeful availment, commanded only four votes.

<sup>103</sup> These factors include: the burden on the defendant; the interests of the forum state; the plaintiff's interest in obtaining relief; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interests of the several states in furthering fundamental social policies, 480 U.S. at 113–16, citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980).

<sup>104</sup> 480 U.S. at 115 (emphasis in original).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See, e.g., Friedrich K. Juenger, *A Shoe Unfit For Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1037 (1995); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1564, n.10 (2006).

characterization.<sup>108</sup> But there was more to *Asahi* than its multifaceted reasonableness test. Other facets of the O'Connor opinion caused one to think that the case might be a watershed in terms of the American approach to transnationalism. The overall tone of the opinion was cautionary. The opinion observed that purposeful behavior by the defendant directed at the forum state is not in all cases a sufficient basis for the exercise of personal jurisdiction.<sup>109</sup> Consideration had to be given to the "international context,"<sup>110</sup> a point underlined by a reference to Justice Harlan's dissent in *First National City Bank*<sup>111</sup> and by the open-endedness of Justice O'Connor's formulation. Both suggested that the new transnational approach to procedural law was a work in progress,<sup>112</sup> that the Court would provide further elaboration in subsequent cases, after lower courts had wrestled with what the Court had said thus far.<sup>113</sup> Lower courts were to be vigilant in spotting ways in which the position of foreign defendants was meaningfully different from that of domestic defendants. They were to do their best with the skeletal framework set out in *Asahi*. They were to function as experimental laboratories until the Supreme Court was ready to say more. Perhaps, when the Court did say more, it would discuss the meaning of reasonableness not only in relation to personal jurisdiction but also with respect to a range of other aspects of procedural law. In short, the central message of Part II(B) of *Asahi* seemed to be that *International Shoe* and its progeny were to be applied with subtlety and cosmopolitanism.

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<sup>108</sup> Justice O'Connor also earned that reputation by her participation in public forums on international and comparative law, her support for judicial education programs in the area of international law, and her qualified willingness to consider international and foreign law in interpreting certain sources of U.S. law, including the U.S. Constitution. See, e.g., Sandra Day O'Connor, *Dedication of the Eric E. Hotung International Law Center Building: Keynote Address*, 36 GEO. J. INT'L L. 651 (2004); Sandra Day O'Connor, *Keynote Address: Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC'Y INT'L L. PROC. 348 (2002); Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35 (1996).

<sup>109</sup> See 480 U.S. at 108–12.

<sup>110</sup> *Id.* at 116.

<sup>111</sup> *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) ("Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.").

<sup>112</sup> Much about *Asahi* was unclear. In the absence of a Supreme Court majority on the stream-of-commerce prong, state courts and lower federal courts have not reached a consensus on this issue. See *IMO Indus. v. Kiekert AG*, 155 F.3d 254 (3d Cir. 1998) (discussing disagreement among circuit courts of appeals). State courts have come to conflicting conclusions as to when to apply *Asahi's* reasonableness analysis. Compare *Bordelon v. Denhart*, 770 So. 2d 433 (La. App. 2000) (applying reasonableness prong in dicta as a check on transient presence jurisdiction in interstate case) with *In re Gonzalez*, 993 S.W. 2d 147 (Tex. App. 1999) (upholding, without reasonableness check, jurisdiction based on defendant's presence within state during time that plane was refueling while en route from Colorado to Mexico). For criticism that *Asahi* failed to consider international law limits on the exercise of adjudicatory jurisdiction, see Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373, 386 (1995); Russell J. Weintraub, *Asahi Sends Personal Jurisdiction Down the Tubes*, 23 TEX. INT'L L. J. 55, 65 (1988).

<sup>113</sup> See, e.g., Monroe Leigh, *Jurisdiction—Fourteenth Amendment—Due Process Reasonableness of Exercise of Jurisdiction—“Stream-of-Commerce” Theory as Basis for Assertion of Personal Jurisdiction over Foreign Manufacturer*, 81 AM J. INT'L L. 656, 658 (1987) ("Given the increased volume of international trade and of litigation against foreign parties, the Court will certainly face this issue again.").

There were several bases for expecting that the Court would return to this area of law before long: The reasonableness prong was imprecisely formulated. The Court's new willingness to draw distinctions between the foreign and the domestic in matters of procedure left one to wonder whether this principle should be extended beyond the law of personal jurisdiction to other procedural questions. The Court had just visited the increasingly complex law of personal jurisdiction nearly a dozen times in the span of a decade; why would it go to such lengths to micro-manage this area of law, introduce a new take on the subject, and then leave lower courts to wander about in the new terrain without supervision?

In large part, these expectations have not been fulfilled. *Asahi* has had some influence on whether and how American courts differentiate the position of foreign defendants from that of domestic defendants, but that impact has been marginal. With some exceptions,<sup>114</sup> lower federal courts and state courts have not probed the comparison in a thoughtful way. Their application of *Asahi*'s reasonableness prong often has been perfunctory. Their focus has been on superficial differences and similarities between domestic and alien defendants and not on fundamental ones.

A large proportion of the lower-court case law falls into one or more of the following categories: (1) the court relies on a strong presumption against a defendant claiming that the assertion of jurisdiction is unreasonable;<sup>115</sup> (2) the court focuses on the physical distance between the forum and where the defendant is located, resulting in a "you-know-it-when-you-see-it" test for when a geographical distance is unreasonably far;<sup>116</sup> (3) the court understates the burden on the defendant either by concentrating on linguistic ability or what it sees as a similarity between the U.S. legal system and that of the defendant's preferred forum;<sup>117</sup> (4) the court single-mindedly points to the forum state's interest in

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<sup>114</sup> See, e.g., *In re Nazi Era Cases Against German Defendants Litigation* 320 F. Supp. 2d 204, 231 (D.N.J. 2004) ("It would be hard to find a case where the procedural and substantive policies of another country would be more affected by the assertion of state jurisdiction than this case."); *Simon v. Philip Morris, Inc.* 86 F. Supp. 2d 95 (E.D.N.Y. 2000) (weighing the interests of New York, the United Kingdom, and the European Union, investigating British law, and taking into account the worldwide res judicata effects of a judgment in New York); *General Motors Corp. v. Ignacio Lopez de Arriortua*, 948 F. Supp. 656, 667-68 (E.D.Mich. 1996) (taking into account whether a RICO action in a U.S. court would be deemed to be contrary to German public policy); *F. Hoffman-La Roche, Inc. v. Superior Court*, 130 Cal. App. 4th 782, 805, 30 Cal.Rptr.3d 407, 425 (Cal.App. 2005) (coordinated efforts by global drug companies to gather and report information on drug safety "should not result in a court's exercise of jurisdiction over a foreign parent or affiliated pharmaceutical company").

<sup>115</sup> See, e.g., *Ballard v. Savage*, 65 F.3d 1495, 1501 (9th Cir. 1995); *Southern Systems, Inc. v. Torrid Oven, Ltd.*, 58 F. Supp. 2d 843, 8512 (W.D. Tenn. 1999). Although *Asahi* did say that when minimum contacts have been established "often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant," 480 U.S. at 114, it did not articulate a seemingly unshakable presumption, as these cases do.

<sup>116</sup> Sometimes this distance supports a finding that the exercise of jurisdiction would be unreasonable. See, e.g., *Outokumpu Engineering Enterprises, Inc. v. Kvaerner Enviro Power, Inc.*, 685 A.2d 724, 732 (Del. Super. 1996) ("Even in the jet, fax, e-mail, internet and overnight delivery age, a case with international implications should cause this Court to pause before imposing its jurisdiction."); *Lichon v. Aceto Chemical Co., Ltd.*, 182 Ill. App. 3d 672, 685 (1st Dist. 1989) (characterizing the distance between England and Illinois as "vast" and thus supporting a finding of an unreasonable burden on the defendant). More often, the potential burden associated with a large geographic distance is found to be manageable because of modern forms of communications and transportation. See, e.g., *Pro Axxess, Inc. v. Orlux Distribution, Inc.*, 428 F.3d 1270, 1280 (10th Cir. 2005) ("[Defendant's] headquarters in France is a substantial distance from Utah, but . . . [its] employees and its agents travel to and operate in the United States to conduct economic activity, minimizing concerns about the burden"); *Aristech Chemical Intern. Ltd. v. Acrylic Fabricators Ltd.*, 138 F.3d 624, 628 (6th Cir. 1998) ("Simply stated, the distance between Ontario and Kentucky is not overly burdensome."); *Ensign-Bickford Co. v. ICI Explosives USA Inc.*, 817 F.Supp. 1018, 1031 (D.Conn. 1993) (denying motion to dismiss based on "relatively short distance" from Ontario, Canada to Connecticut"); *In re Teknek, LLC*, 354 B.R. 181, 204 (Bkrcty. N.D.Ill. 2006) ("The whole concept of a burden is not what it was when the doctrine was born, either, due to advances in modern communication, travel, and the use of local counsel."). For additional cases, see Parrish, *supra* note 46, at 23, n.112-14 (2006).

<sup>117</sup> Canadian defendants are especially at risk of losing the reasonableness prong based on the view that there is little burden in their being required to litigate in a foreign legal system that is "rooted in the same common law tradition." See *Aristech Chemical Intern. Ltd. v. Acrylic Fabricators Ltd.*, 138 F.3d 624, 628 (6th Cir. 1998); *Theunissen v. Matthews*, 935 F.2d 1454, 1462 (6th Cir. 1991). Courts advancing this reasoning fail to acknowledge that there are important differences in procedural law between Canada and the United States and that similarities between Canada and the United States cut both ways; they not

providing a judicial forum in which an injury can be vindicated;<sup>118</sup> (5) the court either ignores *Asahi's* three transnational factors or incorporates additional variables in its jurisdictional reasonableness analysis so that the inquiry morphs into something resembling a forum non conveniens analysis.<sup>119</sup>

Collectively, these permutations orient the analysis toward factors that are relatively easy to identify and quantify, or at least appear that way. State and lower federal courts fix upon the burden on the litigants, usually the burden on the defendant, and the seemingly strong interests of the forum. Little attention is devoted to the rest of the O'Connor analysis—the effects that the exercise of jurisdiction likely will have on the procedural and substantive policies of other nations and on U.S. foreign relations. When carrying out the inquiries prescribed by *Asahi*, lower courts do little in the way of comparative law analysis in order to get a better handle on what the respective burdens really are, on what the policies of other nations may be, and on what the impact on U.S. foreign relations is likely to be. In reading the post-*Asahi* case law, one gets the impression that the differences between domestic litigation and transnational litigation are regarded as differences of degree and not differences in kind. At the extreme, some lower-court opinions suggest that technology is the solution to the complexities of disputes that sprawl across national boundaries and that the answer to multi-

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only decrease the burden for the defendant in litigating in the U.S., they also decrease the plaintiff's interest in litigating in the U.S. rather than Canada. For cases inquiring into the facility of the defendant or of witnesses with the English language but saying nothing about the plaintiff's facility with languages other than English, see, e.g., *Fortis Corporate Ins. v. Viken Ship Management*, 450 F.3d 214, 223 (6th Cir. 2006); *Pro Access, Inc. v. Orlux Distrib. Inc.* 428 F.3d 1270 (10th Cir. 2005); *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1115 (9th Cir. 2002); *Metro-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F.Supp. 2d 1073, 1093 (C.D.Cal. 2003).

<sup>118</sup> *Asahi* warned against “find[ing] the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state.” 480 U.S. at 115. Notwithstanding this caution, lower courts have strayed in two respects. First, they overstate the forum's interest. See, e.g., *Southern Systems, Inc. v. Torrid Oven, Ltd.*, 58 F. Supp. 2d 843 (W.D. Tenn. 1999); (whenever a Tennessee resident alleges breach of contract, the forum has a strong interest in providing a forum); *Apollo Tech. Corp. v. Centrosphere*, 805 F. Supp. 1157, 1187 (D. N.J. 1992) (upholding personal jurisdiction over Philippine agent in breach of contract action because any recovery by a plaintiff who resides in the forum “benefits the forum state”). Second, they fail to give fair-minded consideration to whether the interests of the plaintiff and the forum can be vindicated by tribunals elsewhere. An egregious example of this is *General Motors Corp. v. Ignacio Lopez de Arriortia*, 948 F. Supp. 656 (E.D. Mich. 1996), in which the district court recited a list of the shortcomings of German procedural law, particularly in regards to pretrial discovery, as supporting GM's right to litigate a claim for theft of trade secrets in its home court. *Id.* at 667–68. Such cases fail to grapple with Supreme Court precedents finding that foreign courts and arbitral tribunals can be relied upon to provide due process to U.S. litigants. See *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (upholding arbitration agreement with respect to U.S. antitrust claims based in part on “respect for capacity of foreign and transnational tribunals”); *Hilton v. Guyot*, 159 U.S. 113 (1895) (establishing general rule that judgments of foreign courts will be recognized in the U.S. notwithstanding differences in procedural law between foreign system and U.S.).

<sup>119</sup> For cases in the former category, see, e.g., *Sloss Industries Corp. v. Eurisol*, 488 F.3d 922, 933–34 (11th Cir. 2007); *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 631 (11th Cir. 1996) (misstating the *Asahi* framework by failing even to mention the procedural and substantive policies of Canada or the effects of adjudicating the case on U.S.–Canadian relations). For cases of the forum non conveniens variety, see, e.g., *Amoco Egypt Oil Co. v. Leonis Nav. Co., Inc.*, 1 F.3d 848, 853 (9th Cir. 1993) (mistakenly stating that a plaintiff resisting a motion to dismiss for lack of personal jurisdiction must demonstrate the unavailability of an alternative forum); *Andersen v. Sportmart, Inc.*, 57 F.Supp. 2d 651, 661 (N.D. Ind., 1999) (exercise of jurisdiction over Taiwanese distributor by federal court in Indiana is unreasonable because “minimum contacts are more strongly established in New Jersey”); *DeMoss v. City Market, Inc.*, 762 F.Supp. 913, 920 (D. Utah 1991) (“[P]laintiff resides in Utah and many of the witnesses and much of the evidence is located here”); *Moni Pulo Ltd. v. Trutec Oil and Gas, Inc.*, 130 S.W.3d 170, 181 (Tex.App. 2003) (“Asking Texas jurors to decide such matters [the effect of colonial treaties on an African boundary dispute] places them in an untenable position.”).

jurisdictional complexity is to harness the internet to transport documents and conduct low cost videoconferences.<sup>120</sup>

Not all post-*Asahi* decisions trivialize the differences between transnational and interstate litigation, but many do.<sup>121</sup> A concrete example shows that so much of what goes on in lower courts misses *Asahi's* call for nuance and a comparative sensibility. Consider the manner in which American courts approach language, specifically the ability to speak and understand English in the context of depositions, document production, and court proceedings. The typical judicial inquiry is whether the foreign party and its employees “speak English,” as if there should be a straightforward “yes” or “no” answer to this question. But, of course, even in the everyday use of language, mastery falls along a continuum with no clear “pass” or “fail” markers. As one moves from casual conversation to contentious legal proceedings, with terms of art and questioning designed to trap, the seemingly simple question—Does she speak English?—is not so simple.<sup>122</sup> A more meaningful set of queries (which do not surface in the case law or academic literature) might touch upon both language and culture as follows: Will a witness grasp a leading question’s nuances? Will a deponent fully understand how a deposition transcript ultimately will be used? Does a foreign resident appreciate that litigation in the United States is an adversarial presentation of starkly opposing positions with little room for gray? Does the foreign witness know that the inclination to acknowledge shared responsibility for a bad outcome (common in some societies) likely will result in dire consequences in a U.S. lawsuit?

The fact that such questions about language and cultural context are practically never asked is a measure of just how far we are, post-*Asahi*, from giving meaning to the concept of “reasonableness,” even within the narrow confines of an inquiry into jurisdiction. Imagine, for example, that a complaint is filed in the United States against a medium-sized business based in India. If the suit goes forward in the U.S., discovery rules will require disclosure of thousands of internal corporate emails in pretrial discovery. What are the likely consequences in terms of “the procedural and substantive policies of other nations” if personal jurisdiction is upheld and disclosure of the emails is ordered?

Before one can try to answer this question, it is necessary to consider who wrote these communications. Would an employee based in New Delhi expect that an email written hastily today would some day be at the center of a multimillion-dollar lawsuit in a U.S. court? In writing an email, would such an employee

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<sup>120</sup> See Martin Davies, *Taking Evidence by Videolink in International Litigation*, in INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETER E. NYGH (Talia Einhorn and Kurt Siehr, eds., 2004).

<sup>121</sup> To be sure, there are opinions that thoughtfully consider the impact of adjudicative jurisdiction on efforts to foster transnational cooperation. See, e.g., *F. Hoffman-La Roche, Inc. v. Superior Court*, 30 Cal.Rptr.3d 407 (Cal.App. 2005) (actions of foreign pharmaceutical company in coordinated efforts to report information concerning drug safety “should not result in a court’s exercise of jurisdiction over a foreign parent or affiliated pharmaceutical company”); *Kotera v. Daioh Intern. U.S.A. Corp.*, 40 P.3d 506, 520 (Or. 2002) (considering the interests of Japan and finding that the dispute “has touched Oregon, but its origins and practical effects are rooted in Japan”).

<sup>122</sup> For a thoughtful reflection on the impact of language on many facets of dispute resolution, see TIBOR VARADY, *LANGUAGE AND TRANSLATION IN INTERNATIONAL COMMERCIAL ARBITRATION* (2006). For observations regarding multilingualism and other aspects of transnational practice, see Vivian Grosswald Curran, *The Role of Foreign Languages in Educating Lawyers for Transnational Challenges*, 23 PENN. ST. INT’L L. REV. 779 (2005).

exercise the circumspection of a litigation-conscious employee based in the U.S.? If the answer to these questions is no, then an earnest attempt at “reasonableness” might well be complicated. Should we take into account the possibility that pretrial discovery and the presentation of proof at trial will be unbalanced? Some foreign defendants are likely to be at a disadvantage; they may have retained potentially damaging internal communications that a well-informed litigation-conscious domestic litigant will not even have generated. At what point is a foreign litigant placed at so much of a procedural disadvantage by these differences in common practice and expectations as to be unreasonably required to litigate in the United States?

Now imagine that the Indian company loses the case because its own internal emails (unearthed during discovery) were used effectively against it. A plausible consequence of this loss, especially if it is one with some possibility of recurring, is that the company will adopt document circulation and retention policies designed to respond to the threat of future litigation in the U.S. Such a response implicates the second of the O’Connor transnational factors—the effects that the exercise of jurisdiction likely will have on the procedural and substantive policies of other nations. The manner in which foreign citizens communicate with one another in the workplace (a workplace located in India) will be influenced by fear of litigation in America. In fact, one can imagine that the suppression of certain kinds of communications—those pertaining to safety and product testing, for example—will run contrary to the interests and regulatory policies of India. From the perspective of U.S. policy regarding products liability, this change in behavior of foreign companies in response to potential litigation in the United States can be seen as either a good or bad development. Reasonable policymakers might disagree. The insight I wish to make here is not about the relative merits of different tort policies or approaches to pretrial discovery. My point is more focused; American courts confronted with scenarios such as this one do not even acknowledge that if they rule that the emails must be produced, the ruling is quite likely to have an impact on access to and retention of information in other countries and the manner in which product safety is investigated and documented by firms abroad, firms that may ship only a small percentage of their products to the U.S. market. And the failure to identify extraterritorial effects such as these and incorporate them into a personal jurisdiction reasonableness analysis takes place regularly, notwithstanding *Asahi*’s instruction that lower courts consider the procedural and substantive policies of other countries with interests that might be affected by the assertion of jurisdiction by a court in the U.S.

By probing beneath the surface, we discover that the relationship between language and reasonableness is not as straightforward as the existing case law suggests. Procedural rulings that turn on language readily implicate cultural differences, and an assumption of parity between the domestic and the foreign litigant in this respect can easily result in a kind of indirect regulation of communication and access to information in other countries.

Now consider the third *Asahi* factor, the impact of the exercise of jurisdiction on U.S. foreign policy. After *Asahi*, one might have expected to see lower court opinions with an approach to jurisdiction that is more assertive when enforcement of an important U.S. policy is at stake. Such cases are readily

found.<sup>123</sup> One searches in vain, however, for opinions in which the approach to jurisdiction is less assertive because the U.S. policies in play are not especially fundamental. When confronted with disputes that implicate interests a good deal less weighty than antitrust enforcement or combating serious bank or securities fraud, lower courts either ignore the third *Asahi* factor altogether or mechanically make reference to important U.S. policy interests even when such interests are not self-evidently weighty.<sup>124</sup> One also searches in vain for opinions that grapple with the fact that the Supreme Court elsewhere has ruled that the antitrust laws and the federal securities laws can be entrusted to arbitrators.<sup>125</sup> One might think that other cases touching upon U.S. foreign policy interests might be in safe hands outside a U.S. forum, at least if Congress has not indicated otherwise. But during the twenty years in which *Asahi* has been applied, little of this type of analysis has been carried out—so little, in fact, as to call into question whether American courts really have turned the corner toward treating transnational litigation as a distinct field.

In sum, though *Asahi* seemed to require courts to take a serious look at the impact of U.S. procedural rules on the litigants, the internal dynamics of other societies, and good relations between the United States and other countries, lower courts have been guided instead by intuition, easy-to-measure variables, and a preoccupation with whether the defendant will be unduly burdened by having to defend litigation in the forum. Viewed in this light, the difference between an interstate suit and a transnational one can appear small, especially in an age in which communication is instant and inexpensive,<sup>126</sup> the global lingua franca is English, pretrial travel is rarely essential,<sup>127</sup> and few suits go to trial.<sup>128</sup> If these

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<sup>123</sup> In *Kensington Int'l, Ltd. v Société Nationale des Petroles du Congo*, 2006 WL 846351 (SDNY 2006), the U.S. policies identified by the court were those against money laundering and transporting stolen goods in foreign commerce, and those embodied in the Patriot Act of 2001. See also *Zurich Capital Mkts, Inc. v. Coglianesi*, 388 F. Supp. 2d 847, 859 (N.D. Ill. 2004) (upholding jurisdiction over foreign defendant based in part on “substantial interest” in the enforcement of the federal securities laws and protection of investors in U.S. securities markets); *Dee-K Enters, Inc. v. Heveafil Sdn., Bhd.*, 982 F.Supp. 1138, 1148 (E.D. Va. 1997) (referring to the “important national policy” of enforcing the federal antitrust laws).

<sup>124</sup> For example, in *Pro Access, Inc. v. Orlux Distribution, Inc.*, 428 F.3d 1270 (10th Cir. 2005), a case in which a U.S. plaintiff sued a French defendant for breach of a distributor agreement and the defendant claimed that no contract had been formed, the court completely glossed over the *Asahi* transnational analysis in abruptly concluding that because the dispute was not governed by French law (at least not according to Utah choice of law rules) “the exercise of jurisdiction would not affect France’s policy interests.” *Id.* at 1280. See also *Hershey Pasta Group v. Vitelli-Elvea Co.* 921 F.Supp. 1344, 1351, n.9 (M.D. Pa. 1996) (because the parties failed to brief the issue, “the court will presume that there is no substantial conflict between Turkish and American policy concerns.”); Lichon, *supra* note 116, at 686 (noting the court’s duty, under *Asahi*, to exercise great care and reserve with respect to the interests of Great Britain and the foreign relations interests of the U.S. federal government, but then failing to identify what those interests are).

<sup>125</sup> See *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (“The importance of the private damages remedy [in private antitrust actions], however, does not compel the conclusion that it may not be sought outside an American court”); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515–16 (1974) (upholding arbitration clause with respect to securities law claims).

<sup>126</sup> By means of the internet, the cost of transporting vast amounts of text and pictures is practically zero.

<sup>127</sup> It is technically feasible to conduct most depositions satisfactorily by videoconference, and various internet services offer such capability at little or no cost.

<sup>128</sup> See Ad Hoc Committee on the Future of Civil Trial, American College of Trial Lawyers, *The “Vanishing Trial.” the College, the Profession, the Civil Justice System*, 226 F.R.D. 414, 417 (2005) (reporting that 1.8% of cases in the federal system and 15.6% of cases in a sample of state-court systems

continue to be the considerations that really matter to courts in the U.S., then it is easier to see transnational litigation in U.S. courts as a somewhat exotic variant of domestic interstate litigation than as an autonomous field. It takes no special expertise to prepare an affidavit stating that Jakarta is very, very far from Chicago or that \$50 million worth of product sales in the U.S. is an awful lot. The future of transnational litigation as a distinct field turns instead on judicial attention to international standards of procedural law and judicial appreciation of the subtle ways in which the choice of forum and the applicable procedural law influence outcomes in litigation and behavior in anticipation of litigation.

### *B. Tag Jurisdiction and the Foreign Defendant*

There is a second area of personal jurisdiction law in which the failure to distinguish the interstate from the international is even more remarkable—"transient jurisdiction" or "tag jurisdiction," a variant of personal jurisdiction based solely on a defendant's physical presence in the forum when served with process. Notwithstanding roots in the 17th-century European understanding of sovereignty among nation-states,<sup>129</sup> the principal application of these ideas in 19th-century American courts was in interstate litigation. When a domestic defendant domiciled in a state other than the forum was served with process while temporarily present in the forum state, the act of service alone conferred general jurisdiction over that defendant.<sup>130</sup> In the period before the wholesale arrival of state long-arm statutes,<sup>131</sup> tag jurisdiction was a mainstream feature of interstate litigation. In contrast, the exercise of transient jurisdiction over foreign defendants has always been rare, perhaps because service is more difficult to accomplish and, once accomplished, less likely to be followed by a judgment that is easily enforced abroad.<sup>132</sup>

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went to trial in 2002). It makes little sense, in evaluating reasonableness, to place much emphasis on forecasting the burdens associated with attending a trial in the United States if a trial is unlikely to take place.

<sup>129</sup> See, e.g., Ulrich Huber, *De Conflictu Legum*, reprinted in D.J. Llewelyn Davies, *The Influence of Huber's De Conflictu Legum on English Private International Law*, 18 BRIT. Y.B. INT'L L. 49, 65 (1937) ("Those are held to be subject to a sovereign authority who are found within its boundaries, either permanently or temporarily."). On the influence of 17th-century Dutch thought on British and American conceptions of jurisdiction and sovereignty, see ALAN WATSON, *JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN THE CONFLICT OF LAWS* 1-27 (1992) (describing Huber's influence on Story); James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73 (1990).

<sup>130</sup> Jurisdiction in such an instance is "general" because the defendant can be required to defend any claims, even those with no nexus to his or her presence within the forum at the time of service.

<sup>131</sup> Such statutes were once premised on a fiction of consent. See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 356-57 (1927) (upholding the constitutionality of a state statute authorizing jurisdiction over non-resident motorist based on finding that "the state may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served").

<sup>132</sup> A default judgment from a state or federal court in the U.S. can be enforced on an interstate basis, through the Full Faith and Credit Clause of the Constitution and the Full Faith and Credit statute, in any other state or federal court in the United States, so long as the domestic court that entered the original judgment validly exercised personal and subject matter jurisdiction. Neither the FFC Clause nor the FFC Statute applies to the recognition of U.S. judgments in other countries.

By the mid-1980s, shortly before the Supreme Court decided a string of landmark transnational cases (e.g., *Mitsubishi*,<sup>133</sup> *Asahi*, *Aérospatiale*, *Alvarez-Machain*<sup>134</sup>), the continuing validity of tag jurisdiction as applied to foreign defendants was in doubt. The Third Restatement squarely came out against its validity under international law,<sup>135</sup> and a number of American scholars also expressed reservations.<sup>136</sup> Even the purely domestic interstate use of tag jurisdiction was thought by some to be on shaky ground: *International Shoe* had undermined the conception of territoriality that traditionally had supported power theories of jurisdiction.<sup>137</sup> *Shaffer v. Heitner* had suggested that any jurisdictional practice, no matter how well established by history and tradition, might be found to be unconstitutional under the new formula articulated in *International Shoe* and its progeny.<sup>138</sup> A number of commentators in civil procedure and conflict of laws predicted tag jurisdiction's demise.<sup>139</sup> Outside the U.S., transient jurisdiction was on its way to becoming regarded as "exorbitant."<sup>140</sup>

In this context, transnational transient jurisdiction (despite its relatively small practical importance)<sup>141</sup> was of uncertain validity when the Supreme Court

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<sup>133</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615 (1985) (holding that international comity concerns required enforcement of arbitration clause with respect to antitrust claims even if such a clause might not be respected in a case with no transnational component).

<sup>134</sup> *U.S. v. Alvarez-Machain*, 504 U.S. 655, 669–70 (1992) (upholding criminal jurisdiction of U.S. federal district court to try Mexican national abducted from Mexico and brought to the U.S.).

<sup>135</sup> See RESTATEMENT, *supra* note 73, at § 421, comment e (“[J]urisdiction based on service of process on a person only transitorily in the territory of the state, is not generally acceptable under international law”).

<sup>136</sup> See, e.g., Born, *supra* note 72, at 35 & n.147; Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?* 7 TUL. J. INT’L & COMP. L. 111 (1999); Hay, *supra* note 72.

<sup>137</sup> 326 U.S. at 316 (1945) (noting that the centrality of “de facto power over the defendant’s person” had “given way,” to a modern view that “due process requires only that” a defendant “have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”).

<sup>138</sup> 433 U.S. 186, 211–212 (1977) (“[T]raditional notions of fair play and substantial justice’ can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage”); see also Robert Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV. 1031, 1035 (1978).

<sup>139</sup> See Daniel O. Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?* 25 VILL. L. REV. 38, 60–68 (1979–1980); Friedrich Juenger, *Judicial Jurisdiction in the United States and the European Communities: A Comparison*, 82 MICH. L. REV. 1195 (1984); Martin Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981); David H. Vernon, *Single-Factor Bases of In Personam Jurisdiction: A Speculation on the Impact of Shaffer v. Heitner*, 1978 WASH. U.L.Q. 273, 302–305 (1978); Joseph P. Zammit, *Reflections on Shaffer v. Heitner*, 5 HASTINGS L.Q. 15, 20–24 (1978).

<sup>140</sup> Transient jurisdiction was becoming marginalized even in England and Ireland. In becoming parties to the Brussels Convention in 1978, the United Kingdom and Ireland undertook a treaty obligation not to exercise transient jurisdiction over defendants domiciled in any other EU country. See Council Convention 78/884/EEC on the Accession of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the Protocol of Its Interpretation by the Court of Justice, art. 4 (Oct. 9, 1978) available at <http://curia.europa.eu/common/reccdoc/convention/en/c-textes/brux06a-idx.htm>.

<sup>141</sup> In terms of frequency of use and economic impact, the exercise of personal jurisdiction over a foreign defendant based on transient presence in the United States is far less important than the exercise of specific jurisdiction through state long-arm statutes or general jurisdiction by virtue of continuous and systematic contacts with the forum. See Paul R. Dubinsky, *The Reach of Doing Business Jurisdiction and Transacting Business Jurisdiction Over Non-U.S. Individuals and Entities*, 64 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, Working Document Series (1998) available at

granted *certiorari* in *Burnham v. Superior Court*.<sup>142</sup> The case involved service of process on a New Jersey defendant while temporarily present in California. Writing for a four-justice plurality, Justice Scalia upheld the exercise of jurisdiction, relying on original intent as applied to the Fourteenth Amendment and on the length of time over which tag jurisdiction had been upheld by American courts.<sup>143</sup> In a concurring opinion with echoes of *Asahi*, Justice Brennan disagreed with broad reliance on historical practice. Maintaining that presence in the forum at the moment of service should merely create a presumption of fairness, the Brennan concurrence insisted that all exercises of jurisdiction, even those with a long historical pedigree, had to comport with “traditional notions of fair play and substantial justice.”<sup>144</sup>

Given the wholly domestic fact pattern, neither opinion broached a number of important questions. Could foreign citizens whose presence in the United States was temporary and unrelated to the cause of action nonetheless be “tagged?”<sup>145</sup> Could such defendants, like domestic defendants, properly be subjected to American historical practices that had, over time, come to diverge from international norms? Or, post-*Asahi*, did “reasonableness” qualify all assertions of jurisdiction over foreign defendants?

As with *Asahi*, the Court has not revisited the many questions left open in *Burnham*. In the eighteen years since *Burnham*, state and lower federal courts have had to make their own way on transnational transient jurisdiction, with the following options open to them: (1) investigating whether the longstanding historical practice cited by Justice Scalia with respect to tag jurisdiction over domestic defendants exists with respect to foreign defendants; (2) rejecting the historical approach altogether and instead conducting case-by-case determinations as to how reasonableness varies with nationality and residence; (3) declining to extrapolate from either the Scalia or Brennan opinions and, instead, looking to whether international law imposes limits on tag jurisdiction with respect to foreign defendants.<sup>146</sup>

State and lower federal courts have taken none of these paths. Unanimously, they have upheld transient jurisdiction over foreign defendants,<sup>147</sup>

[http://www.state.gov/www/global/legal\\_affairs/dubinsky.html](http://www.state.gov/www/global/legal_affairs/dubinsky.html).

<sup>142</sup> 495 U.S. 604 (1990).

<sup>143</sup> *Id.* at 619 (“The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system”).

<sup>144</sup> *Id.* at 629–30 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>145</sup> This issue was flagged by Professor Hay immediately after the *Burnham* opinion came down. See Hay, *supra* note 72, at 602–03, but not addressed when the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) drafted the Uniform Family Interstate Support Act of 1996, which “codifies” the holding of *Burnham*. See NCCUSL, Uniform Family Interstate Support Act of 1996, § 201, comment, available at <http://www.law.upenn.edu/bll/archives/ulc/uifsa/famsuul6.htm>. This uniform act has now been enacted in all 50 states and in the District of Columbia. For a chart with links to state implementing legislation, see <http://www.divorcesource.com/tables/familysupportact.shtml>.

<sup>146</sup> See, e.g., Strauss, *supra* note 112.

<sup>147</sup> See, e.g., *First American Corp. Inc. v. Price Waterhouse*, 154 F.3d 16 (2d Cir. 1998) (upholding service of subpoena on non-party U.K. partnership based on in-hand service on one of the partners while physically present in New York); *Kadic v. Karadzic*, 70 F.3d 232, 247 (2d Cir. 1995) (service on Bosnian Serb leader in New York); *Bourassa v. Desrochers*, 938 F.2d 1056, 1057–58 (9th Cir. 1991) (service of process on Canadian citizen in Florida); *Dole Food Co., Inc. v. Gutierrez*, 2004 WL 3737123 (C.D. Cal. July 13, 2004) (service of process on Nicaraguan defendant while physically present in California); *In re Gonzalez*, 993 S.W. 2d 147 (Tex. App. 1999) (service of process on Mexican citizen during airplane layover in Texas); *Flores v. Melo-Palacios*, 921 S.W.2d 399 (Tex. App. Corpus Christi 1996) (upholding

and they have done so with unadorned citations to *Burnham* without explaining why they believe *Burnham* requires this result in a transnational setting. In none of these cases has a court acknowledged that *Burnham* is an interstate case, lacking a majority opinion, and that it need not be viewed as a controlling precedent with respect to transnational application of tag jurisdiction. Instead, lower courts' reliance on *Burnham* causes one to wonder whether distinctions between interstate application of tag jurisdiction and transnational application have even been brought to the court's attention by counsel. The response of lower courts to motions challenging tag jurisdiction is similar to their response to motions challenging jurisdiction based on the reasonableness prong of *Asahi*. In both instances, courts are strongly inclined to treat the transnational case as functionally the same as the interstate case.

This nearsightedness in the post-*Burnham* case law is especially noteworthy. Nothing in the *Burnham* opinions expressly addressed whether foreign defendants, like domestic defendants, with no prior connection to the forum could be subject to general jurisdiction based on transient presence in the forum state, and nothing in either the Scalia or Brennan opinions suggested that the Court was thinking about potential future cases involving tag jurisdiction in a transnational setting.<sup>148</sup>

This is especially true of the Brennan opinion, which stuck closely to the interstate fact pattern before the Court. That opinion put forward a case-by-case approach and said that, in most instances, the exercise of jurisdiction based on transient presence would satisfy the test of reasonableness. But the reasons advanced for this last conclusion do not fit transnational cases well at all. The reasons given were that: (1) case law over many years has put potential defendants on notice that venturing away from home entails a risk of being sued in a distant forum; (2) the defendant receives benefits from the forum (e.g., police protection, the "benefits of the forum state's economy")<sup>149</sup> while he or she is there; (3) tag jurisdiction is not unreasonably one-sided; the defendant has the right to file counterclaims and otherwise participate in litigation in the forum on equal terms with citizens of the forum state; (4) the imposition on the defendant is typically "slight,"<sup>150</sup> especially if the defendant already has expended the resources to enter the forum voluntarily on prior occasions.

None of these arguments applies with much force to a foreign citizen who has been served with a summons and complaint during a brief visit to the U.S. Foreign non-residents are far less plausibly put on notice of the risks of tag jurisdiction than are domestic defendants.<sup>151</sup> A foreign visitor does indeed receive

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exercise of personal jurisdiction over Mexican citizen on two alternative grounds—residence in Texas and service of process while physically present in Texas); *Sarieddine v. Moussa*, 820 S.W.2d 837 (Tex.App. Dallas 1991) (service of process in Texas on Lebanese citizen resident in Bahrain; jurisdiction not contested); *Schinkel v. Maxi-Holding, Inc.*, 30 Mass. App. 41, 45 (App. Ct. 1991) (resident of Finland served with process in Massachusetts while on vacation).

<sup>148</sup> The briefs filed in *Burnham* understandably did not address international aspects of transient jurisdiction; the case at bar was purely domestic.

<sup>149</sup> 495 U.S. at 637–638.

<sup>150</sup> *Id.* at 638–39.

<sup>151</sup> In most countries, the practice of transient jurisdiction is unknown. A non-lawyer visiting Orlando for a short holiday can hardly be expected to be aware of an idiosyncratic U.S. jurisdictional practice that departs from the international norm.

certain benefits from a visit to the United States, but to suggest that amenability to general jurisdiction thousands of miles from home is part of some implied quid pro quo is far-fetched.<sup>152</sup> For many foreign defendants, some of the effects of tag jurisdiction are indeed one-sided.<sup>153</sup> Finally, the potential burdens of defending a suit far from home in a legal system with unfamiliar rules and timetables can hardly be characterized as “slight.” That an individual has once traveled to the United States hardly demonstrates that being required to retain U.S. counsel and participate in the unfamiliar processes of the American civil justice system is an imposition that is reasonable.<sup>154</sup>

Given the indications that the Supreme Court was not thinking in transnational terms in *Burnham*, the lockstep manner in which lower courts have upheld the exercise of transient jurisdiction over foreign defendants based on a quick citation to *Burnham* is noteworthy.<sup>155</sup> One would be more convinced that American courts were in fact prepared to recognize transnational litigation as a new and separate field if they were willing to grapple with two major ways in which foreign defendants are situated differently than domestic defendants: their relationship to international law and their relationship to the U.S. Constitution.

On the first difference, international law has little to say about the terms on which a court in the United States exercises adjudicatory jurisdiction over an American citizen, whether an in-state resident or an out-of-state resident. As invoked against domestic defendants, tag jurisdiction is solely a matter of domestic law. For the foreign defendant, however, international law can be a source of jurisdictional rights. The existence of such rights is most apparent in countries that are party to treaties on jurisdiction,<sup>156</sup> but such rights can also be

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<sup>152</sup> A more plausible quid pro quo is that in return for police protection in Times Square, foreign tourists inject cash into the economy of New York and the United States as a whole.

<sup>153</sup> For example, U.S. courts carrying out a choice-of-law inquiry are far more reluctant to apply the law of a foreign country than the law of a sister state. See John G. Sprankling and George R. Lanyi, *Pleading and Proof of Foreign Law in U.S. Courts*, 19 STAN. J. INT'L L. 3, 9–11 (1983) (discussing ways in which U.S. courts avoid having to ascertain and apply foreign law).

<sup>154</sup> Justice Brennan’s discussion of factors that bear on whether tag jurisdiction is reasonable never refers to *Asahi*. There are two main differences between *Asahi* and *Burnham* that potentially explain the absence of any mention of *Asahi*’s reasonableness analysis by Justice Brennan in *Burnham*, even though the two cases were decided within three years of one another. First, *Asahi* was a case about specific jurisdiction, not general jurisdiction. Second, *Burnham*, on its facts, was a purely interstate case posing no need for the Court to speculate, at least not explicitly, on the relevance of Part II(B) of *Asahi* on a case presenting a transnational variation on *Burnham*.

<sup>155</sup> In *U.S. v. Alvarez-Machain*, 504 U.S. 655, 660–61 (1992), decided two years after *Burnham*, the Court upheld criminal jurisdiction over a foreign national who had been abducted from Mexico and physically brought before a court in Texas. The Court relied on *Frisbie v. Collins*, 342 U.S. 519 (1952) (criminal defendant abducted in Chicago and brought to Michigan for trial) and *Ker v. Illinois*, 119 U.S. 436 (1886) (abduction from Peru to Illinois). The Court made no effort to distinguish between the interstate precedent (*Fisbie*) and the transnational one (*Ker*).

<sup>156</sup> See, e.g., Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1998 O.J. (L 304) 36 (the “Brussels Convention”) (multilateral treaty among European Union member countries that was transformed into an EU Regulation, effective as of March 2002). The United States is not a party to the Brussels Convention but is a party to the 1958 New York Convention, which divests national courts of jurisdiction in instances in which the parties have agreed to submit a dispute to arbitration. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. (II) (3) [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997, entered into force June 7, 1959. Recently, the United States and 66 other countries took part in negotiations under the auspices of the Hague Conference on Private International Law to create a global treaty for enforcing choice-of-court agreements. See Convention on Choice of Court Agreements, concluded June 30, 2005, not yet entered into force, available at [http://www.hcch.net/index\\_en.php?act=conventions.listing](http://www.hcch.net/index_en.php?act=conventions.listing). Article 6 of the choice-of-court convention mandates that courts other than the one specified in a valid choice of court agreement dismiss actions filed

found in other sources of international law.<sup>157</sup> Because of the dearth of U.S. treaties relating to adjudicative jurisdiction, in a transient jurisdiction case in a U.S. court, the key international law question is whether the exercise of jurisdiction violates customary international law. Neither *Asahi* nor *Burnham* probed that question, and lower courts have not done so subsequently.

As for the second difference, the domestic defendant stands before the U.S. Constitution in a different posture than does the non-resident alien. For all the ways in which non-citizens draw rights from the U.S. Constitution,<sup>158</sup> aliens are not part of the collective “We the People.”<sup>159</sup> Their diminished stature has practical implications in terms of whether transient jurisdiction is reasonable. For the domestic defendant, the burden of defending a lawsuit in a forum with which one has practically no connection is counterbalanced by certain constitutional and statutory rights: the right to litigate against one’s adversary on equal terms;<sup>160</sup> the right to initiate an independent suit elsewhere in the U.S.; the ability to make use of full faith and credit;<sup>161</sup> the protections afforded by federal venue statutes;<sup>162</sup> the reassurance that important aspects of procedural law do not vary greatly from one court in the United States to another;<sup>163</sup> the ability potentially to move the suit elsewhere in the U.S.;<sup>164</sup> and the right, if all else fails, to seek protection under U.S. bankruptcy law.

For the foreign non-resident defendant, the strategic disadvantages of tag jurisdiction are not mitigated to the same extent. The foreign defendant receives no protection from federal venue statutes<sup>165</sup> and will find it difficult to change the venue, especially if the plaintiff is resident in the U.S.<sup>166</sup> The foreign defendant can initiate a parallel suit elsewhere in the U.S., but typically there is little to gain

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with them.

<sup>157</sup> See *Congo v. Belg.*, *supra* note 94 at ¶¶ 19–69 (examining national legislation, national case law, treaties, and decisions of international tribunals for evidence of customary international law regarding limits on the adjudicative jurisdiction of national courts).

<sup>158</sup> See generally DAVID COLE, ENEMY ALIENS 105–16 (First Amendment rights of aliens); GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 52–63 (1996) (discussing Alien and Sedition Acts of the Adams administration).

<sup>159</sup> Even in those instances in which provisions of the Constitution have been construed as conferring rights on aliens, that interpretation is often reached with an eye on preventing detrimental spill-over effects on U.S. citizens. See, e.g., *Reno v. American Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488 & n.10 (1999) (First Amendment rights of deportable aliens); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 285 (1990) (Brennan, J., dissenting) (“By respecting the rights of foreign nationals, we encourage other nations to respect the rights of our citizens.”).

<sup>160</sup> See *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934) (“The privileges and immunities clause . . . requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens.”).

<sup>161</sup> If the first suit is in state court and the second suit is in federal court, there will be a strong presumption that the second forum will neither stay nor dismiss its proceedings, see *Colorado River Constr. Dist. v. U.S.* 424 U.S. 800 (1976); therefore the plaintiff will not have gained an exclusive forum through tag jurisdiction. The first suit to be litigated to a final judgment will then have preclusive effects with respect to the other. See U.S. Const., art. IV, §1; 28 U.S.C. § 1738.

<sup>162</sup> See 28 U.S.C. § 1391 (a)-(d) & (g).

<sup>163</sup> For example, the courts of all states afford the right to jury trial; all permit pretrial discovery and pretrial dispositive motions; and all have relatively similar laws governing litigation-related privileges.

<sup>164</sup> If the suit initially is brought in state court, it can be removed to federal court. See 28 U.S.C. § 1441. From there, it can be moved to a federal court in another part of the country. See 28 U.S.C. § 1404.

<sup>165</sup> See 28 U.S.C. § 1391 (d) (alien may be sued “in any district”).

<sup>166</sup> See *infra* text accompanying note 212.

by doing so.<sup>167</sup> Although the foreign defendant who is rendered insolvent by an adverse judgment can file for bankruptcy, U.S. bankruptcy law traditionally has not made that protection available on the same terms as for U.S. citizens and residents.<sup>168</sup>

In sum, the current practice of state courts and lower federal courts in matter-of-factly rejecting objections to tag jurisdiction by foreign defendants is an especially vivid illustration of the continuing nature of interstate-international equivalence by the American bench. An interstate precedent that failed to command a Supreme Court majority has been extended by lower courts to transnational cases. This extension has taken place despite questions as to compliance with international law and notwithstanding the lack of indications that the Supreme Court intended for foreign defendants and domestic defendants to be treated alike in this respect. Finally, this extrapolation from interstate to international has occurred with little or no analysis or explanation by the courts doing it.<sup>169</sup>

### *C. Judicial Assistance: Discovery in Aid of Foreign Proceedings*

Personal jurisdiction is not the only area of civil procedure in which the approach to transnational litigation has been shaped by interstate doctrines and frameworks. Extrapolation from the interstate to the international has also shaped the American approach to transnational judicial cooperation, especially the pursuit of testimony, documents, and physical evidence located in the United States and sought in connection with a legal proceeding elsewhere. In this arena, U.S. courts have long interacted with foreign courts as if the latter were domestic tribunals located in another part of the United States. Recent case law shows that this approach is still common.

As with tag jurisdiction, there is a history to this. Throughout the 1800s and well into the 1900s, the principal avenue for securing either physical evidence located outside the forum or the testimony of non-party witnesses was through the assistance of other courts—either courts in sister states or foreign courts.<sup>170</sup> The

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<sup>167</sup> Typically, the foreign defendant wishes to litigate the controversy in a foreign forum. A parallel foreign proceeding, however, does not come within the scope of the Full Faith and Credit Clause or the Full Faith and Credit Statute. Thus a judgment in such a proceeding will not necessarily have preclusive effects on the U.S. suit that was initiated by tag jurisdiction.

<sup>168</sup> See *Atlanta Shipping Corp. v. Chemical Bank*, 631 F.Supp. 335 (S.D.N.Y. 1986) (in order to file for bankruptcy protection, foreign corporation must have a place of business in the U.S.); *In re Levy*, 221 B.R. 559, 565–67 (Bkrcty. S.D. Fla. 1998) (non-resident alien cannot claim Florida homestead exemption in U.S. bankruptcy proceedings).

<sup>169</sup> An important qualification needs to be made to the conclusions of this section. If personal jurisdiction is upheld, the case can be dismissed pursuant to a *forum non conveniens* motion. However, not all state court systems permit *forum non conveniens* dismissals. See, e.g., *Vernon's Tex. Statutes and Codes Ann., Civ. Prac. & Rem. Code* § 71.051 (forum non conveniens dismissals not permitted if plaintiff is a legal resident of Texas). In the federal courts, the plaintiff's choice of forum is entitled to considerable deference if the plaintiff is a U.S. citizen or resident. See *Piper Aircraft v. Reyno*, 454 U.S. 235, 255 (1981).

<sup>170</sup> With respect to a non-party residing outside the territory of the forum, the forum court lacked subpoena power over that person with respect either to testimony or physical evidence. The litigants to a dispute, unlike non-party witnesses, could be ordered by the forum court to testify or produce evidence under threat of sanction.

basis on which a sister-state court might be inclined to comply with the request was comity,<sup>171</sup> a legal principle developed by seventeenth and eighteenth-century Europeans<sup>172</sup> concerned about interactions among nation states.<sup>173</sup> As an imprecise legal principle, comity found fertile soil in the U.S. after being imported by early American jurists like Joseph Story and applied to relations among states in a federal union.<sup>174</sup>

In terms of interstate discovery, it was not until widespread adoption in the 1920s and 1930s of the Uniform Foreign Depositions Act (UFDA) that a litigant in one forum could count on the assistance of state courts elsewhere.<sup>175</sup> Not until well after the enactment of the Federal Rules of Civil Procedure in 1938 did smooth and seamless pursuit of nationwide discovery in the federal courts become a reality.<sup>176</sup> Similarly, judicial cooperation on an international scale was largely consigned to the realm of comity,<sup>177</sup> with all the uncertainty and delay that might be entailed. Though one federal statute did authorize federal courts to assist foreign courts in obtaining the testimony of persons in the United States, that statute was so restrictive in scope as to be of little use.<sup>178</sup> Not until the 1960s and

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<sup>171</sup> See *Everett v. Bourne*, 21 Or. 218, 227 (1891) (“It is true the duty may not be imposed by positive local law, but it rests on national comity, creating a duty that no state could refuse to fulfill without forfeiting its standing among the civilized states of the world.”).

<sup>172</sup> See generally Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 20–30 (1966) (discussing Ulrik Huber, Christian Rodenburg, Johannes Voet, and Paulus Voet).

<sup>173</sup> A distinction needs to be made here between interstate pretrial cooperation and post-trial cooperation. The latter term refers to recognition and enforcement of the final judgments of sister-state courts, a process addressed by the Full Faith and Credit Clause of the Constitution, art. IV, § 1, and by the Full Faith and Credit Statute, 28 U.S.C. § 1738, and thus governed by obligations stronger than comity.

<sup>174</sup> See HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 79 (R. Dana 8th ed. 1866) (“There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws, but their application is admitted, only from considerations of utility and the mutual convenience of states”); STORY, *supra* note 51, at § 29 (“[T]he rulers of every empire from comity admit that the laws of every people in force within its own limits, ought to have the same force everywhere, so far as they do not prejudice the powers or rights of other governments, or of their citizens”); see generally Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821–22 (1989).

<sup>175</sup> See *Everett v. Bourne*, 21 Or. 218, 227 (1891) (“[I]t is conceded that there is no statute in this state expressly, and in so many words, conferring jurisdiction on the circuit courts of this state” to receive letters rogatory from another state); *id.* (“This question is one involving the comity of states, grows out of necessity, and is recognized by the law of nations”). The Uniform Foreign Depositions Act (UFDA) was promulgated by the National Conference of Commissioners on Uniform State Laws in 1920 and adopted in 13 states before being superceded by the Uniform Interstate and International Procedures Act in 1962. The history is summarized in the introduction to the 2007 Uniform Interstate Depositions and Discovery Act, available at [http://www.law.upenn.edu/bll/archives/ulc/idda/2007act\\_final](http://www.law.upenn.edu/bll/archives/ulc/idda/2007act_final). Prior to 1920, some states enacted their own judicial assistance statutes, which were precursors to the UFDA. See, e.g., *Davis v. LeHigh Valley R. Co.*, 97 N.J.L. 412 (1922) (interpreting New Jersey statute); *Buck v. Strong*, 19 Pa. C.C. 174; 1897 WL 3366 (Pa. 1897) (interpreting Pennsylvania statute).

<sup>176</sup> It should be noted, however, that before the change in U.S. norms regarding pretrial discovery brought about by the Federal Rules, the scope of all pretrial discovery, though varying from state to state, was narrow by current standards. The occasions for seeking discoverable information from non-parties in a state other than the forum were infrequent, in part because state and federal procedural rules did not entitle a litigant to much in terms of pretrial discovery. The Federal Rules greatly liberalized access to pretrial discovery in suits in federal courts. Within a generation, this aspect of the Federal Rules had an impact on discovery practice in state courts throughout the country. See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. Pa. L. Rev. 1999 (1989).

<sup>177</sup> 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 320 (1842) (discussing the importance of offers of reciprocity among the courts of different countries in the context of letters rogatory and commissions).

<sup>178</sup> See Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630. Assistance under this statute was limited to

1970s were truly useful statutory and treaty mechanisms put in place for U.S. courts to cooperate with foreign courts in making evidence available across national borders.<sup>179</sup> And when the new statutory and treaty-based approach did arrive, it followed the domestic model: party-driven discovery with a minimum of intervention by courts. In short, the overall pattern for cross-border discovery (interstate and international) was as follows: an early period dominated by comity; a transition to more formal duties defined by statutes, uniform acts, or treaties; and a receptiveness on the part of U.S. courts to requests from foreign courts that mirrored the treatment accorded sister-state courts during the same time period.

An appreciation of this last point begins by noting another practice that seems remarkable today—use of the term “foreign” by the courts of one state in characterizing proceedings in the courts of another state.<sup>180</sup> In an era in which state citizenship mattered as much as national citizenship, this seemed appropriate. The laws of another state, particularly one located in a different region of the country, could seem foreign. The basic philosophy of pretrial discovery varied from one state to another.<sup>181</sup> Interstate requests for assistance, like international requests, were pursued through letters rogatory<sup>182</sup> or the appointment of commissioners,<sup>183</sup> and the reception accorded such requests rested with the discretion of the receiving court.<sup>184</sup> Until promulgation of a uniform act in 1936,<sup>185</sup> the norm was that a court in one state would not take judicial notice of the laws of another state,<sup>186</sup> a rule that reflected the reality that throughout much of

one form of evidence (testimony) and only when requested through a letter rogatory directly from a foreign court. For a summary of the history of this statute and amendments to it, see *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247–50 (2004).

<sup>179</sup> The United States signed the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters in 1970 and ratified it in 1972. See [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=82](http://www.hcch.net/index_en.php?act=conventions.status&cid=82) (last visited Mar. 10, 2008).

<sup>180</sup> See, e.g., *Van Dyke v. Doughty*, 140 N.W. 627, 630 (Mich. 1913) (referring to Iowa court as a “foreign tribunal”); The Revised Uniform Enforcement of Foreign Judgments Act (UEFJA), drafted in 1964, uses the term “foreign” to refer to the judgment of a sister state. See UEFJA §1.

<sup>181</sup> See generally Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 702–14 (1998) (summarizing period of state “experimentation” with regard to discovery in the early 1900s).

<sup>182</sup> See *Teidman v. The Signe*, 37 F. Supp. 819, 820 (D. La. 1941).

<sup>183</sup> See generally FRANCIS WHARTON, TREATISE ON THE CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW, INCLUDING A COMPARATIVE VIEW OF ANGLO-AMERICAN, ROMAN, GERMAN, AND FRENCH JURISPRUDENCE 722 (1872) (explaining the appointment of commissioners as common practice among various nation-states). The similarity between interstate judicial assistance and international judicial assistance changed with widespread adoption of the UFDA, which moved the former from the realm of comity to that of statutory duty.

<sup>184</sup> See, e.g., *Van Dyke v. Doughty*, 140 N.W. 627, 628 (Mich. 1913) (finding that questions raised in interrogatories presented through letters rogatory from sister-state were not relevant); *Doubt v. Pittsburgh and Lake Erie RR Co.*, 19 Pa. C.C. 178, WL 3367 at \*3 (Pa. Com. Pl. 1897) (“[I]t never could have been intended to make the courts of this State the unquestioning and perhaps unwilling agents of a court of another State.”); *id.* at \*3 (“It may be admitted that the comity of nations in this matter has the force of law, but it still leaves to the court whose power is invoked the right to determine as to the legality and rightfulness of its exercise.”); *Buck v. Strong*, 19 Pa. C.C. 174, 1897 WL 3366, \*2 (Pa. 1897) (characterizing letters rogatory as “polite requests to the court of a foreign jurisdiction to cause the witnesses to appear before that court and answer the interrogatories thereto annexed, upon the assurance of a willingness to do the same for that court in a similar case”).

<sup>185</sup> Judicial Notice of Foreign Law Act, 9 UNIF. L. ANN. 399.

<sup>186</sup> See *In re Estate of Drumheller*, 252 Iowa 1378 (1961); JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, INCLUDING THE STATUTES § 2558 (3d ed. 1940) (“It was generally held at common law that a foreign law is a matter of “fact”), § 2573 (“The laws of foreign nations and States—not being laws of the forum at all. . . . at common law

the 1800s, accessing the current law of another state could be as difficult as collecting legal sources from England.

Today, the story is in part different but in part the same. The difference is that courts in the U.S. are quite forthcoming with discovery assistance, both in an interstate context and in an international one. What remains the same is that attitudes toward transnational discovery and transnational judicial cooperation continue to be shaped by domestic precedents, a pattern that is apparent in the application of the statute whose amendment in 1964 was discussed in Part III(B) and which is now codified as 28 U.S.C. section 1782.<sup>187</sup>

Two aspects of the recent section 1782 case law bring this last point home.<sup>188</sup> First, American courts rarely tailor their discovery orders to be compatible with the discovery norms in the foreign legal system in which the main action is pending.<sup>189</sup> Their inclination is to make available to applicants whatever testimony and document discovery would be the norm if the main proceeding were pending in the U.S. Second, the relationship between trial court and appellate court in section 1782 proceedings has become modeled on the relationship that exists in domestic discovery practice. Specifically, the same standard of review (abuse of discretion) has been held to apply, even though such a high degree of deference is inappropriate in the transnational context. Both of these issues are explored in more detail below.

First, with respect to the scope of discovery and the range of persons and entities able to obtain it, cases repeatedly affirm the ability of section 1782 requesters to obtain information through U.S. discovery procedures that is not subject to discovery in other legal systems. In practical terms this means the following: (1) The specific evidence that is sought need not be admissible in the foreign legal system in which suit is pending;<sup>190</sup> (2) The type of discovery mechanism made available in the U.S. need not be one that is available in the foreign legal system;<sup>191</sup> (3) The request need not come from a foreign court or

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would not be noticed.”); Annotation, C.T. Dreschler, *Uniform Judicial Notice of Foreign Law Act*, 23 A.L.R. 2d 1437 (1952); *but cf.* *Owings v. Hull*, 34 U.S. 607, 625 (1835) (finding federal circuit courts, unlike state courts, obliged to take judicial notice of laws of all states); Arthur Nussbaum, *Proof of Foreign Law in New York: A Proposed Amendment*, 57 COLUM. L. REV. 348 (1957) (arguing that proof of the law of a foreign nation may involve different procedures and problems than proof of the law of a sister state).

<sup>187</sup> In the last two decades, American courts have experienced a substantial increase both in section 1782 requests and in litigation relating to those requests. See John Fellas and David Zaslow, *Obtaining Evidence Located in the U.S. for Use in Foreign Litigation: 28 U.S.C. §1782,756 PLI/Lit 123* (March 2007) available on Westlaw (JLR database).

<sup>188</sup> The current version of the statute provides, in relevant part: “The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.” The statute further authorizes district courts to order discovery pursuant to a letter rogatory, the request of a foreign or international tribunal, or upon the application of “any interested person.”

<sup>189</sup> This perspective on the entire process of procedural reform in relation to transnational litigation was articulated by Harry Jones in 1953, five years before he became chairman of the Advisory Committee created by Congress in 1958. See Jones, *supra* note 57, at 560 (calling for a “campaign of reciprocal education” between the U.S. bar and the bars of civil law countries so as to better understand what aspects of discovery and procedure each desires the other to accept).

<sup>190</sup> See *Application of Asta Medica, S.A.*, 981 F.2d 1, n.6 (1st Cir. 1992); *In re Letters Rogatory from Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216 (9th Cir. 1976).

<sup>191</sup> See *In re Bayer AG*, 146 F.3d 188, 193–194 (3d Cir. 1998); *In re Application of Gianoli Aldunate*, 3 F.3d 54, 59–60 (2d Cir. 1993). Pretrial depositions, for example, are not a part of trial

international tribunal. The foreign litigants themselves can avail themselves directly of the fruits of section 1782 without their requests being filtered by a foreign court;<sup>192</sup> (4) The applicant making the section 1782 request need not first attempt to obtain the information through discovery mechanisms available in the foreign legal system where the main action is pending.<sup>193</sup>

Undesirable results may follow from U.S. courts routinely granting foreign litigants access to information on the same scale as that which prevails under U.S. domestic discovery norms. Wide access to documents, databases, and non-party witnesses can substantially increase the expense of the overall proceedings, thus causing the foreign proceedings to favor litigants with large economic resources and litigants who are pursuing discovery rather than providing it. U.S.-style discovery also exposes parties to new risks that may strongly influence their decision to litigate or to settle. For example, as a result of information obtained through discovery in the U.S., foreign litigants or third-parties may be exposed to public scrutiny and embarrassment that would not occur in their home countries.<sup>194</sup>

Foreign courts can take steps to protect their own proceedings from these effects,<sup>195</sup> but this may be easier said than done. Not all foreign judges are familiar enough with U.S. discovery methods to anticipate what satellite proceedings in the U.S. entail. Those foreign courts inclined to disregard testimony or documents obtained via section 1782 may not realize that such testimony may never come before them because the prospect of discovery in the U.S. creates pressures to settle the case. Moreover, foreign judges accustomed to awarding costs and attorneys' fees to the prevailing party face several complicated questions: Who should pay for the discovery efforts in the U.S.? The party who ultimately prevails in the suit? The party who initiated discovery in the U.S.? Should the large costs of discovery in the U.S. be examined with an eye toward which avenues of permissible discovery (permissible, that is, under U.S. law) were unnecessarily pursued? Would a foreign court unfamiliar with U.S. discovery rules be equipped to make this last inquiry?

The second aspect of recent section 1782 case law that shows domestic perspectives being extended to transnational litigation concerns the standard of

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preparation in most other legal systems.

<sup>192</sup> In the one instance in which the Supreme Court has interpreted the statute, the court held that even non-litigants can obtain information through section 1782 so long as the request is made by an "interested person" with a reasonable contemplation of eventual litigation. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004).

<sup>193</sup> *See Malev Hungarian Airlines v. United Tech. Int'l Inc.*, 964 F.2d 97, 100 (2d Cir. 1992).

<sup>194</sup> For example, discovery in the U.S. may reveal that a defendant manufacturer produces goods in poor countries under sub-standards conditions. Even if this fact has little relevance to the specific issues being litigated, the liberal American approach to pretrial discovery might permit this line of inquiry because it is designed to lead to admissible evidence. *See Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("Where relevant and non-privileged facts remain hidden . . . and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts"); *see generally* JACK H. FRIEDENTHAL, MARY KAY KANE AND ARTHUR R. MILLER, CIVIL PROCEDURE 400-02 (4th ed. 2005) (collecting lower court cases). The result might be that the defendant is faced with a choice—settle the suit or risk great damage to brand image—a choice that it would not face if U.S. discovery were not available.

<sup>195</sup> For example, by enjoining the parties from making section 1782 requests in American courts or by refusing to consider evidence obtained via such requests. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 261 (2004).

appellate review. Every appellate court that has addressed this issue has found that a district court's ruling in a section 1782 proceeding is subject to reversal only for abuse of discretion. Courts of appeals reverse those lower-court discovery rulings that are "plainly wrong"<sup>196</sup> and lead to "manifest injustice."<sup>197</sup> Given this leeway by appellate courts, there is considerable variation in the approach to discovery taken by trial courts, not only from one circuit to another, but even within the same circuit. Some judges limit the number of interrogatories and the length of depositions. Some judges strongly encourage parties to work out discovery issues on their own. Some judges are hands-on. Others rely extensively on magistrates.<sup>198</sup>

In domestic litigation, this abuse of discretion standard makes a good deal of sense. The trial court, unlike the court of appeals, can more easily take account of the entire context in which a specific discovery dispute fits and make a ruling with the benefit of having monitored the case for months or years through status conferences, motions, and other occasions for evaluating the intentions and good faith of litigants and their lawyers. The court of appeals, in contrast, has only a paper record. Often decisions with respect to discovery are made as part of a package that reflects a trial judge's sense of overall fairness and parity. Appellate courts are not as well positioned to judge whether the many rulings made during discovery balance out. Also, from the viewpoint of court administration, parties and their lawyers need to know that even subtle forms of misbehavior will lead to bad consequences—if not formal sanctions, then the loss of the benefit of the doubt on discovery questions and the likelihood that the trial judge's rulings on such matters will be final. Lastly, domestic discovery rulings are not final judgments. They are not subject to appellate review until the final judgment in the entire case has been reached by the lower court and an appeal has been granted. If the standard of review were more exacting than abuse of discretion, a large proportion of final judgments might be overturned on appeal because of erroneous discovery rulings. The result would be a system that many would find unacceptably inefficient in terms of effort wasted on summary judgment motions and trial time.<sup>199</sup>

Few of these considerations are persuasive when applied to a district court's discovery rulings in section 1782 proceedings. With section 1782 discovery, the role of a U.S. district judge is limited. The request initiates a self-contained legal proceeding designed to support the main suit in a foreign or international forum. This satellite discovery litigation is typically shorter than the discovery phase of comparable domestic litigation and certainly shorter than an entire domestic law suit. The magistrate or district judge ruling on discovery

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<sup>196</sup> See *Mack v. Great Atlantic and Pacific Tea Co.*, 871 F.2d 179, 186 (1st Cir. 1989).

<sup>197</sup> *Id.*; see also *Brandt v. Wand Partners*, 242 F.3d 6, 18 (1st Cir. 2001) (stating that the discretion of district court judges and bankruptcy judges on matters of discovery is "very broad" and stating that appellate courts "simply cannot manage the intricate process of discovery from a distance").

<sup>198</sup> For an argument in favor of construing section 1782 as granting wide discretion to district courts, see *Comment: How to Construe Section 1782: A Textual Prescription to Restore the Judge's Discretion*, 61 U. CHI. L. REV. 1127 (1994).

<sup>199</sup> Another likely reason for the deferential standard of review is that if the standard were more rigorous, the workload for appellate courts in reviewing the many discovery related decisions made by trial courts would be considerable.

requests does so after having learned far less about the case, the parties, and the lawyers than trial judges do in domestic litigation, so that it is less clear than in the domestic context that an appellate court is in a poor position to second guess rulings made by the district court.

Wide discretion is inappropriate for a second reason. With section 1782 discovery, a district court and a U.S. jury are not the ultimate consumer of the evidence produced; a foreign court is. The element of continuity—the same judge supervising the case from pleading to discovery to dispositive motion to trial—is not present. This difference matters because a district judge ruling on a summary judgment motion in a domestic case makes that ruling aware of what avenues of discovery were pursued, which avenues were not permitted, and the effect of its discovery rulings on briefing at the summary judgment stage and beyond. Such is not the case in transnational discovery under section 1782.

Third, the time frame for appellate review of section 1782 rulings differs from that in domestic litigation. A district court's ruling in the former is a final judgment for purposes of the final judgment rule.<sup>200</sup> Whereas in domestic proceedings, a party unhappy with a discovery ruling must wait until the final outcome of the entire lawsuit before obtaining appellate review of the discovery ruling, the timing is different with section 1782 determinations. A reversal by an appellate court will not overturn a jury verdict or the disposition of a case reached after extensive summary judgment briefing. This difference, one that flows from the satellite nature of 1782 proceedings, is another reason that the abuse of discretion standard is inappropriate in transnational cases.

Fourth, the lack of uniformity produced by an abuse of discretion standard is more problematic in the transnational context than in the domestic one. The downside of allowing each circuit (and even each judge) great leeway is that, to foreign litigants and foreign governments, the disparity of results can seem unprincipled. If a request of a court or government ministry from Country X is denied by a district judge in Nevada, and that ruling is at odds with what district judges in New Jersey allow, Country X may take offense and even retaliate in some way. Similar concerns inspired the Framers, Congress, and generations of American judges to develop mechanisms for bringing about uniform application of procedural laws as they bear upon foreign relations.<sup>201</sup>

Despite these differences between domestic discovery practice and transnational discovery, the abuse of discretion standard of review has been adopted unanimously without any appellate court having reflected on this difference and having explained why so deferential a standard of review is warranted in the context of transnational judicial assistance. Rather, the source of the abuse of discretion standard appears to be the predominance of that standard in nearly all aspects of domestic discovery. Appellate judges are unaccustomed to

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<sup>200</sup> See *Kestrel Coal Pty. Ltd., v. Joy Global Inc.*, 362 F.3d 401, 403 (7th Cir. 2004); *Bayer AG v. Betachem, Inc.*, 173 F.3d 188, 190 n.1 (3d Cir. 1999) ("Only the discovery dispute under 28 U.S.C. § 1782 is occurring in the United States. Therefore, because the underlying litigation is in Spain, this discovery order is immediately appealable.").

<sup>201</sup> Among the motivations for enactment of the Foreign Sovereign Immunities Act was to create a uniform federal approach to litigation involving foreign governments by shielding them from juries, allowing immediate appellate review, and creating special rules on preliminary relief and execution of judgments. See Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602–1611 (2000)).

exercising much supervisory authority over domestic discovery. In the context of section 1782 discovery, they have shown little inclination to inquire deeply into the impact of U.S.-based discovery on proceedings in foreign legal systems and on relations with other countries.

## V. CAVEATS AND OBJECTIONS

The analysis thus far has unveiled an intellectual predisposition of American courts, one that is rarely commented upon or challenged. When American courts are confronted with disputes with a transnational dimension, they reach for a familiar toolbox—one with tools for fixing domestic problems. They extrapolate from their experience with familiar domestic litigation, especially interstate litigation. From the perspective of foreign litigants, this extrapolation is sometimes beneficial. When full due process rights are extended to them, foreign litigants are generally less susceptible to suit in the U.S. than if they were armed only with protections accorded them under international law.<sup>202</sup> As a consequence, only a subset of foreign companies and individuals causing harm in the U.S. can be sued here,<sup>203</sup> and only a subset of complex suits (e.g., interpleader, multiple third-party claims) can be consolidated in a U.S. forum.<sup>204</sup> But interstate analogies can also cut the other way: Foreign defendants are amenable to tag jurisdiction.<sup>205</sup> They face the burden and expense of American-style discovery if their adversary turns to section 1782.<sup>206</sup> And personal jurisdiction tends to be exercised over them based on an understanding of *Asahi* that has been shaped by interstate precedents.<sup>207</sup>

The fact that interstate analogies sometimes benefit foreign litigants and sometimes work to their detriment reinforces another impression one gets from the case law: the use of interstate analogies by U.S. courts does not appear to be result driven. One might hypothesize that interstate analogies are associated with specific bottom-line outcomes (e.g., upholding the exercise of jurisdiction), but manipulation of this sort does not seem to be at work. The case law discussed

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<sup>202</sup> For example, foreign civil litigants enjoy the same Seventh Amendment right to jury trial as domestic litigants, *cf. Grandfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (upholding right to jury trial and making no distinction between foreign litigant and domestic litigant) even though no such right exists under customary international law. A second example is that, in the context of complex litigation, a foreign defendant cannot be required to defend a third-party suit in the U.S. absent satisfaction of the minimum contacts test with respect to that specific defendant. Other legal systems are more permissive in terms of consolidation. *See, e.g.,* Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters L12/1 O.J. (2001) art. 6(1) (European Union rule regarding jurisdiction in actions involving multiple defendants).

<sup>203</sup> *See, e.g.,* *Outokumpu Engineering Enterprises, Inc. v. Kvaerner EnviroPower, Inc.*, 685 A.2d 724, 732 (Del. Super. Ct. 1996); *Lichon v. Aceto Chemical Co., Ltd.*, 182 Ill. App. 3d 672, 685 (1st Dist. 1989).

<sup>204</sup> The federal interpleader statute, 28 U.S.C. § 1335, operates under the principle of minimal diversity but still has limits. *See State Farm v. Tashire*, 386 U.S. 523, 535–36 (1967) (interpleader “cannot be used to solve the vexing problems of multiparty litigation arising out of a mass tort” and was not intended to be an all-purpose “bill of peace”).

<sup>205</sup> *See* Part IV(B), *supra*.

<sup>206</sup> *See* Part IV(C), *supra*.

<sup>207</sup> *See* Part IV(A), *supra*.

above is not especially tainted by examples of interstate analogies seized upon when they work to the detriment of alien litigants and cast aside, without explanation, when they point in the opposite direction. Benefits and burdens roughly balance out, and variations on interstate-international equivalence have been a part of American procedural law for so long as to suggest that analogizing in this way is one avenue by which American courts understand the wider legal world, perhaps subconsciously. These analogies, are, in other words, a kind of intellectual box that is sufficiently constraining as to require conscious effort to think outside the box.

Before exploring the relationship between interstate-international equivalence and American exceptionalism, I address some objections that might be raised to what has been said thus far.

*A. Objection No. 1: The Pervasiveness of Interstate-International Equivalence Has Been Overstated*

The point of Part IV is not to suggest that American courts are sleepwalking. The claim is not that state and federal judges are unaware that in transnational cases there may be international law to apply or that the conduct of litigation may have ramifications for U.S. foreign relations. Rather, Part IV supports a claim far less sweeping but nonetheless important: there are patterns in the way that American courts approach transnational legal relationships. One such pattern is to use interstate relationships as a model and point of departure. Rather than start from first principles, courts begin with a ready-made framework. Rather than turn first to a defendant's litigation-related rights under international law, courts immediately consider foreign litigants' rights under the U.S. Constitution. In *Asahi*, for example, both opinions immediately turned to an established framework under the Due Process Clause. Although this framework originated in litigation traversing state boundaries, it was applied to litigation traversing national boundaries. To get from one setting to the other requires an intellectual jump (a leap, really) that can be seen in opinions dating back to the early 1800s and that continues to the present day. Signs of this intellectual leap surface in opinions from many time periods, from the era in which due process was defined in terms of territoriality, to the current one in which minimum contacts are the benchmark; from the era in which code pleading and trial by stealth were the norm to the current era in which notice pleading and broad pretrial discovery reign.

Part IV also is not meant to suggest the absence of counterexamples. The data—judicial opinions from various time periods—do not line up so neatly. There are indeed areas of procedural law in which distinctions are drawn between the domestic and the international, and interstate analogies are either rejected or greatly modified. For the sake of balance, one such area, parallel litigation, will be discussed briefly.

The doctrine of *forum non conveniens*<sup>208</sup> is one of the tools that American courts employ to avoid the inefficiency of two similar lawsuits concurrently

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<sup>208</sup> See *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981).

proceeding to judgment in two different forums.<sup>209</sup> In applying the doctrine of forum non conveniens, a court assesses whether to allow a suit before it to go forward or, rather, to be dismissed in favor of an action in another forum. Whether a suit brought in a U.S. forum will be dismissed is strongly influenced by whether the plaintiff is domestic or foreign.

The cases draw a distinction at the outset in terms of the source of law. When the attempted move is from a court in the U.S. to one in another country, the issue is controlled by common law.<sup>210</sup> With the interstate version of forum non conveniens (when the attempted move is from one federal district court to a federal court in a different state), the controlling source of law is a federal statute, 28 U.S.C. § 1404.<sup>211</sup> Next, a distinction is made with respect to presumptions. When suit is brought by a U.S. plaintiff, the presumption is that the choice of forum is not the result of forum shopping, or at least not the sort of forum shopping that is disfavored—domestic plaintiffs are entirely at liberty to choose to file suit in one state rather than in another. Thus for the domestic plaintiff, the choice of forum is regarded as presumptively motivated by the natural desire to litigate close to home, and the burden is on the defendant to show that proceeding in a U.S. court would be an unwise use of public and private litigation resources. In contrast, when a foreign plaintiff chooses a U.S. forum, that choice is accorded no deference. The choice to litigate far from home is inherently suspect, and the burden of persuasion runs the other way; the plaintiff must show that the balance of public and private conveniences tilts in favor of allowing litigation to proceed in the United States.<sup>212</sup>

Finally, a distinction is made at a third stage. Before sending the plaintiff off to re-file elsewhere, the court must be convinced that there is an “adequate alternative forum,” another place where a comparable claim can be brought and some reasonable remedy can be had.<sup>213</sup> When the other forum is located in the U.S., the adequate-alternative-forum inquiry is perfunctory. The standard typically is met by showing that the defendant is amenable to personal jurisdiction in some other district in the U.S., that venue in the other district is proper, and that the applicable statute of limitations in that other place has not yet run out.<sup>214</sup> In transnational cases, the adequate-alternative-forum inquiry is not perfunctory. Courts look beyond personal jurisdiction and statutes of limitations to such

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<sup>209</sup> Other tools (res judicata, collateral estoppel, full faith and credit) are used with respect to consecutive, rather than concurrent, litigation.

<sup>210</sup> In federal courts, the question is controlled by federal common law. See *Vasquez v. Bridgestone/Firestone, Inc.* 325 F.3d 665 (5th Cir. 2003); *Esfeld v. Costa Crociere, S.P.A.* 289 F.3d 1300 (11th Cir. 2002). In state courts, the issue is controlled either by state statute or state common law. See generally *Martin J. McMahon, Annotation, Forum Non Conveniens Doctrine in State Court as Affected by Availability of Alternative Forum*, 57 A.L.R. 4th 973 (1987 & Supp. 2006) (collecting cases and referencing statutes).

<sup>211</sup> When a transfer falls within the scope of 28 U.S.C. § 1404, the mechanics of transfer are straightforward. Unlike the international context, there is no uncertainty as to whether the second forum will in fact proceed with the case. See 28 U.S.C. § 1404(a), annotation (1982); 15 *WRIGHT & MILLER: FEDERAL PRAC. & PROC.* § 3841.

<sup>212</sup> See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Iragorri v. United Technologies Corp.*, 274 F.3d 65 (2d Cir. 2001) (en banc).

<sup>213</sup> See *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1165–66 (5th Cir. 1987); *AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) CONFLICT OF LAWS* § 84, comment C (1971).

<sup>214</sup> See *Yang v. Odom*, 409 F. Supp. 2d 599 (D.N.J. 2006).

considerations as the subject matter jurisdiction of foreign courts, the independence of their judges, potential bias, undue delay, impact on U.S. public policy, and other factors.<sup>215</sup>

Thus judicial application of *forum non conveniens* shows that the interstate and the international are not always treated as equivalent. It is not true that American courts unreflectively employ domestic analogies all the time. But they do so a lot. Discussion of counterexamples such as this one is worthwhile for the sake of accuracy and balance, but consideration of such counterexamples should not cause us to lose sight of a pattern that is both important and underappreciated: the use of interstate analogies has been a part of American procedural jurisprudence for a very long time. Its occurrence has continued in the decades after key statutory changes (e.g., 28 U.S.C. §1782) and treaty developments (e.g., ratification of various Hague Conference conventions) seemed to signal a change in direction. Analogizing remains a frequent interpretive move that is taken in such a wide variety of settings as to exert broad influence over the way in which the American legal system confronts the wider world. Even when judicial opinions make express distinctions between the transnational and the domestic, some form of interstate analogy usually lurks in the background.<sup>216</sup>

More importantly, the chief value of Part IV is in drawing attention to a pattern that is rarely noticed. To the extent that a focus on vivid examples of interstate-international equivalence fails to give equal time to counterexamples, the imbalance would seem to be warranted if it effectively catches the attention of transnationalists who forecast the steady ascendancy of American procedural law from parochialism to cosmopolitanism without fully considering all the evidence. To these transnationalists (with whom I am mostly in agreement in terms of normative analysis), the analysis in Part IV is meant to raise an uncomfortable but hopefully useful series of questions about the status of transnational law in the United States: How can transnational litigation be a distinct field if U.S. courts frequently view transnational cases as little more than variations on more familiar domestic fact patterns? How can one celebrate the triumph of the transnational perspective if American courts still rarely look to international or comparative law for procedural norms, indeed, for any norms? How can we be confident in our

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<sup>215</sup> See BORN & RUTLEDGE, *supra* note 2, at 415–24.

<sup>216</sup> A fair examination of this last assertion would require a more detailed exposition than the scope of the current article permits, but a few brief illustrations make the point. The American law relating to parallel litigation is actually more complicated than presented above. So, for instance, in applying and balancing the so-called “public factors” and “private factors,” lower courts freely cite § 1404 precedents when adjudicating cases governed by the federal common law of *forum non conveniens* and vice versa. In fact there is little difference in the two contexts in terms of how these factors are either applied or weighed. There is also some analogizing at work with respect to another tool for managing parallel litigation, the anti-suit injunction. Though judicial opinions make clear that meddling in foreign proceedings differs from meddling in redundant proceedings in some other federal district, *see, e.g., Kirby v. Norfolk Southern Railway Co.*, 71 F.Supp. 2d 1363 (N.D.Ga. 1999), they nonetheless routinely work off of the same key interstate precedents. *See, e.g., Goldhammer v. Dunkin' Donuts, Inc.*, 59 F.Supp. 2d 248 (D. Mass. 1999) *citing* *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) *citing* *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976); *see generally* Louise Ellen Teitz, *Parallel Proceedings: Treading Carefully*, 33 INT'L LAWYER 403 (1999) (providing a survey of lower federal court applications of *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976)); George Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589 (1990) (comparing interstate anti-suit injunction cases with transnational cases).

forecasts of the future if the American legal system has confronted similar global pressures before and has responded with only minor adjustments rather than a full-scale reevaluation of dispute resolution from the perspective of the transnational litigant?

*B. Objection No. 2: A Focus on U.S. Courts is Too Narrow*

Linda Silberman and Samuel Baumgartner<sup>217</sup> raise another useful objection: Even if American courts superimpose the domestic onto the transnational, is not a focus almost exclusively on American case law too narrow? Should not our opinion on whether transnational litigation is an autonomous field turn on more than what American courts are doing? Should we not also give thought to the wave of transnationalism sweeping through other parts of the profession? The larger reality, they observe, is that transnational perspectives are pervasive—in first-year case books,<sup>218</sup> in daily law practice in large and small cities,<sup>219</sup> in legislation,<sup>220</sup> and in the work of professional organizations, even those that in the past focused on domestic legal matters.

In a recent article, Professor Silberman argues that current law reform initiatives in the area of procedural law show that transnational perspectives have made inroads into the way that Americans approach law reform.<sup>221</sup> She is right. Two projects of the American Law Institute do show a shift away from ALI's traditionally domestic-centered focus. The Jurisdiction and Judgments Project,<sup>222</sup> which began as an effort to draft implementing legislation for an anticipated

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<sup>217</sup> See Baumgartner, *supra* note 13, at 1297 & 1393 (arguing that “taking transnational litigation seriously as a field” will require proceduralists to undertake “in-depth procedural comparison and international relations theory” and to “take an active role in discussing the relationship between domestic approaches to transnational litigation and supranational and international trade organizations”).

<sup>218</sup> See, e.g., JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON, AND HELEN HERSHKOFF, *CASES AND MATERIALS ON CIVIL PROCEDURE* (9th ed. 2006); THOMAS MAIN, *GLOBAL ISSUES IN CIVIL PROCEDURE* (2005); LINDA J. SILBERMAN, ALLAN R. STEIN, AND TOBIAS BARRINGTON WOLFF, *CIVIL PROCEDURE: THEORY AND PRACTICE* (2d ed. 2006); STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN, AND THOMAS O. MAIN, *CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT* (3d ed. 2008).

<sup>219</sup> See R. Doak Bishop, *International Litigation in Texas: Texas Rules of Evidence and Recent Changes in the Texas Rules of Civil Procedure*, 36 *BAYLOR L. REV.* 131 (1984); Adam J. Levitt, *An Illinois Lawyer's Guide to Service of Process in Mexico*, 82 *ILL. B.J.* 434 (1994); James A. R. Nafziger, *International and Foreign Law Right Here in River City*, 34 *WILLAMETTE L. REV.* 4 (1998).

<sup>220</sup> See NY Gen. Obligation Law § 5-1401 (permitting parties to “any contract . . . arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars” to have New York law apply “whether or not such contract . . . bears a reasonable relation to this state”); NY Gen. Obligations Law § 5-1402 (permitting access to a New York forum for that subset of contracts covered by 5-1401 for which the aggregate amount of the transaction is one million dollars or more). A major purpose behind the enactment of these two provisions in 1984 was “to encourage parties in large commercial transactions to choose New York as the forum in which to litigate their disputes.” McKinney’s CPLR Rule 327, Practice Commentary C327:4; see also *Credit Français Int’l, S.A. v. Sociedad Financiera de Comercio, C.A.*, 490 N.Y.S. 2d 670 (S.Ct. 1985) (interpreting 5-1401 and 5-1402 and observing that “[j]ust as the dollar has become the international standard for monetary transactions, so may parties agree that New York law is the standard for international disputes.”)

<sup>221</sup> See Silberman, *supra* note 12.

<sup>222</sup> See AMERICAN LAW INSTITUTE, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE* (2006). The reporters for the project were Professors Silberman and Andreas Lowenfeld.

Hague Conference treaty regulating the conditions under which the domestic courts of one country would be required to recognize civil judgments entered in another,<sup>223</sup> had its roots in international soil. The proposed federal statute that resulted from the effort calls for federalizing this area of procedural law as a way of presenting foreign judgment-creditors with a uniform U.S. approach<sup>224</sup> and as a way of making a set of legal questions more responsive to federal interests and less beholden to state interests. The second effort, the ALI/UNIDROIT project on Transnational Principles of Civil Procedure,<sup>225</sup> goes beyond purely U.S. law reform. A collaboration between the American Law Institute in the U.S. and the International Institute for the Unification of Private Law (“UNIDROIT”)<sup>226</sup> in Italy produced a set of specialized procedural rules and principles intended to displace the ordinary domestic procedural rules applied by national courts in a specific category of cases—commercial disputes in which the litigants are nationals of or habitually resident in different countries or in which property in one country is subject to claims asserted by a party from another country. Even more so than the Jurisdiction and Judgments Project, the ALI/UNIDROIT effort sought to draw upon insights from comparative law and sought to address major differences between U.S. procedural norms and those prevailing in other countries.<sup>227</sup> Not only was the project championed by prestigious organizations on both sides of the Atlantic, drafts were translated into more than ten languages and vetted at workshops in nearly twenty countries.<sup>228</sup>

In the search for procedural norms, both efforts drew upon treaties, the laws of legal systems other than the United States, and contemporary practices in international arbitration.<sup>229</sup> Participants in both efforts consciously tried to move existing U.S. procedural law in a direction less dependant on domestic analogies and domestic-centered policy analysis.<sup>230</sup> ALI’s proposed judgment recognition statute is less anchored in full faith and credit jurisprudence than the 1962 Uniform Act that it seeks to replace<sup>231</sup> and the commentary to the ALI/UNIDROIT

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<sup>223</sup> For background on the initial Hague Jurisdiction and Judgments project and why it was drastically scaled back, see SAMUEL P. BAUMGARTNER, *THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS: TRANSATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION* (2003).

<sup>224</sup> Currently, the recognition of foreign judgments is largely governed by state law, and notwithstanding the existence of the UFMJRA (see text accompanying note 62, *supra*), there is considerable variation in the laws of the fifty states on this subject. In July 2005, NCCUSL promulgated the: “Uniform Foreign-Country Money Judgments Recognition Act.” See <http://www.nccusl.org/Update/ActSearchResults.aspx>. The Act revises the 1962 version of the UFMJRA. Thus far, the 2005 version has been enacted in Colorado and Michigan.

<sup>225</sup> ALI/UNIDROIT Principles of Transnational Civil Procedure (2004), available at <http://www.unidroit.org/english/principles/civilprocedure/main.htm>.

<sup>226</sup> UNIDROIT, an intergovernmental organization based in Rome, was established in 1926. The many multilateral conventions negotiated under UNIDROIT’s auspices can be found at <http://www.unidroit.org/english/conventions/c-main.htm>.

<sup>227</sup> ALI/UNIDROIT Principles, *supra* note 225, at xvii (stating that the project “crossed divides that separate United States procedural law from the laws of virtually all other countries, including England, Canada, and Australia”).

<sup>228</sup> *Id.* at 17–24.

<sup>229</sup> See Silberman, *supra* note 12, at 1432–33 (“We drew on comparative law, looking to the experience of other countries with respect to their recognition and enforcement practices.”).

<sup>230</sup> *Id.*

<sup>231</sup> See Linda J. Silberman and Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of*

Principles repeatedly notes instances in which a practice that may be appropriate in purely domestic litigation should be regarded as inappropriate in transnational cases.<sup>232</sup>

These recent ALI initiatives certainly warrant consideration. It is significant that ALI launched these two high profile efforts, both in the area of procedural law, despite having done relatively little connected with international or comparative law in the past.<sup>233</sup> Such developments suggest that in the near future the perspective of American judicial opinions may differ from those in the recent past, especially given the impact that ALI's work historically has had on U.S. judges.

Despite this objection, there is good reason for paying more attention in these pages to what American courts currently do than to what influential scholars and lawyers urge that they do. To begin with, this is so because the evidence thus far is thin as to whether these ALI initiatives are having or will have a substantial impact on U.S. procedural law and practice. The lack of such evidence (these initiatives are comparatively recent) is quite important because the American legal system, far more than most, is judge-centered. No jurisprudential movement ultimately succeeds in the United States unless it influences what courts do. A fashion that becomes all the rage in the academy will nonetheless have limited long term impact if the attention of the bench is not captured. No turn of events in law practice produces a lasting paradigm shift unless it brings about some change in the way that courts do their work. So, although it is fair to agree with Professor Silberman that developments throughout the American legal profession have a bearing upon how we assess the status of transnational law in the United States, these developments need to be read in the context of a legal culture that is court-centered, especially in the realm of procedural law.<sup>234</sup>

It is not that the growing transnational orientation of American legal education does not matter. It does. It is not that the past decade has not witnessed significant developments toward the transnationalization of procedural law in the European Union.<sup>235</sup> It has. It is not that these developments in the EU will not

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*Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635 (2000). The differences between the UFMJRA and the ALI initiative on judgment recognition becomes clear when one examines the different processes that produced the two texts. The UFMJRA emerged from a process dominated by state interests through the work of a body experienced in one aspect of the recognition problem—harmonizing differences in sister-state laws. In contrast, the ALI Judgments Project started from a different place. It was not constrained by interstate relationships and full faith and credit as a template. Though state officials provided input into the ALI effort, state interests were never allowed to eclipse the fundamentally international nature of the endeavor, an endeavor conceptualized not as bringing the blessings of full faith and credit to the world but rather as building a bridge across the large abyss separating certain U.S. litigation norms from those of other legal systems. Moreover, the ALI effort was outward looking in a way that the UFMJRA was not. The drafting committee for the ALI statute devoted considerable time to evaluating the jurisdictional practices and recognition practices of other countries.

<sup>232</sup> See ALI/UNIDROIT Principles, *supra* note 225, Comment 2B (“Mere physical presence as a basis of jurisdiction within the American federation has historical justification that is inapposite in modern international disputes.”); Comment 11B (rejecting notice pleading in the context of transnational litigation).

<sup>233</sup> A notable exception was ALI's role in preparing the Restatement of the Foreign Relations Law of the United States.

<sup>234</sup> This court-centeredness begins for every would-be lawyer with the first reading assignment in the first week of law school and lasts throughout legal studies to a greater extent than it does in other countries.

<sup>235</sup> Until the early 1970s, nearly all procedural law in Europe, including the law applicable to

trigger changes elsewhere with respect to the balance between domestic procedural law and transnational procedural law.<sup>236</sup> They might. It is not that the normative views of legal scholars do not exert influence. They sometimes do. But even when combined, all of these ingredients still do not make a cake, at least not in the United States. The main point of the case analysis in Part IV is to show that it is still unclear whether a crucial ingredient—an engaged and proactive bench—is part of the mix. The value of focusing on interstate-international equivalence in the work product of U.S. courts is in challenging transnationalists to wrestle with an important set of data that calls into question whether their preferred normative outcome will prevail.

### C. *Objection No. 3: The Time Frame is Too Short*

Another objection is that even if one focuses primarily on the perceptions and behavior of U.S. judges, a time frame of two decades is too short in which to perceive a substantial shift. On the American bench, where many judges have life tenure and the turnover is gradual, change takes place slowly. Some of the more important changes attributable to the legal realism movement of the 1930s did not come about until the 1960s and later. The law and economics movement began several decades ago, but arguably the pervasiveness of its impact on judicial reasoning is just being felt now. It would be unrealistic to expect that the global forces that are prompting change in law firm behavior and changes in the academy would quickly surface in judicial opinions. Only recently has a significant subset of American judges begun interacting regularly with judges from other countries. Only since 2002 has the annual meeting of the American Society of International Law included regular keynote addresses by justices of the U.S. Supreme Court.<sup>237</sup> Only with widespread use of the internet has it become possible to obtain legal sources easily and inexpensively from around the world. Only in the last decade has a significant effort been made in the U.S. to create judicial education programs on international and comparative law.<sup>238</sup> Only now is the American bench becoming populated with people who were offered a wide selection of international and comparative law courses in law school and who became familiar with transnational scenarios in law practice, before becoming judges.

This objection too has some merit. If one looks again to Europe, one sees

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transborder litigation, was national law. Today, a substantial and growing body of procedural law is pan-European and applies only to cases involving litigants from different countries. EU courts, in interpreting legislation in the field of private international law, frequently insist that terms be given autonomous definitions—meanings different from those associated with the same terms in national legal systems. See Anna Gardella & Luca G. Radicati di Brozolo, *Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction*, 51 AM. J. COMP. L. 611 (2003).

<sup>236</sup> In the last two decades, the situation in Europe has changed markedly. The EU legislative process has produced a substantial and growing body of new procedural law applicable solely to transborder disputes. A list of initiatives can be found at [http://ec.europa.eu/justice\\_home/doc\\_centre/civil/doc\\_civil\\_intro\\_en.htm](http://ec.europa.eu/justice_home/doc_centre/civil/doc_civil_intro_en.htm), the website of the European Commission.

<sup>237</sup> For the text of these keynote addresses, see *Proc. of the Ann. Meeting of the Am. Soc'y of Int'l Law* (Sandra Day O'Connor (2002), Stephen Breyer (2003), Antonin Scalia (2004), Ruth Bader Ginsburg (2005), Anthony Kennedy (2006)).

<sup>238</sup> See Frans J. Vanistendael, *Blitz Survey of the Challenges for Legal Education in Europe*, 18 DICK. J. INT'L L. 457, 458–59, 463–66 (2000).

that the increasingly autonomous character of EU law (autonomous from the legal systems of the EU's member states) did not happen overnight. Change resulted from decades of planning and funding by the European Commission and years of effort by European law faculties in implementing required courses, creating pan-European student and faculty exchanges, and creating specific institutes whose work has emphasized the autonomous character of European Union law.<sup>239</sup> The first texts in Austria, Germany, and Switzerland devoted specifically to international civil procedure and transnational litigation appeared long before transnational litigation was truly an autonomous field in those countries.<sup>240</sup>

But those who say that we are now witnessing the emergence of a transnational system of justice with the inevitable entry of U.S. courts as full participants<sup>241</sup> may find such a prediction unfulfilled. It may well be that the cumulative force of so many developments on so many fronts ultimately will transform the American bench. But maybe not. At other times in the past, the stars seemed to be aligned for major change. With the U.S. rise to global economic and political dominance after World War II, the forces seemed to be in place to cause the American bench and legal profession to assume a global leadership role in judicial cooperation, harmonization of procedural law, and support for international tribunals. It did not happen. The legislative initiatives of the 1960s promoted the American model of dispute resolution, but (contrary to prediction) few countries followed and few compromises were reached.<sup>242</sup> The United States joined the Hague Conference, UNIDROIT, and other organizations concerned with bridging differences among legal systems, but U.S. delegations to those organizations often did little bridging, and in interpreting the texts that did emerge, American courts leaned toward unilateralism.<sup>243</sup> The United States was instrumental in creating the International Court of Justice, arguably the centerpiece of international adjudication, but also instrumental in making the ICJ a weak institution for much of its life.<sup>244</sup>

The results may be different this time. Arguably, the latest wave of globalization is different from those that have come before. But, then again, to nearly every generation the present seems different than the past. It is indeed true

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<sup>239</sup> See DAVID BEDERMAN WITH CHRISTOPHER J. BORGES & DAVID A. MARTIN, *INTERNATIONAL LAW: A HANDBOOK FOR JUDGES* (2001) (materials used in connection with the Judicial Outreach Program of the American Society of International Law).

<sup>240</sup> See Samuel P. Baumgartner, *Transnational Litigation in the United States: The Emergence of a New Field of Law*, 55 AM. J. COMP. L. 793, 794 (2007) (book review).

<sup>241</sup> See Donald Francis Donovan, Remarks at Annual Meeting, American Society of International Law (Mar. 30, 2007) reported in *The Future of International Law: Proceedings of the 101st Annual Meeting of the American Society of International Law* 376 (2007); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); Steinhardt, *supra* note 2, at 2; Melissa Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L. J. 497, 502–05 (2005).

<sup>242</sup> See text accompanying notes 58–71 *supra*.

<sup>243</sup> See text accompanying notes 67–68, 81–91, *supra*; cf. BAUMGARTNER, *supra* note 223 at 30–41 (arguing that “unilateralism . . . has controlled U.S. approaches to transnational litigation for quite some time” and that U.S. treaty negotiation in the field of private international law is characterized by “actively promot[ing] the chosen U.S. approach and impatience with foreign solutions”).

<sup>244</sup> See generally THOMAS M. FRANCK, *JUDGING THE WORLD COURT* (1986) (analyzing Reagan administration decision to pull out of ICJ proceedings against Nicaragua).

that American courts are receiving a tremendous number of transnational inputs. But the current period is not completely unique in that respect either. Earlier periods also saw the U.S. legal system on the receiving end of foreign and international law and litigation involving foreign parties.<sup>245</sup> In short, we need to be skeptical of the claim that external circumstances alone will bring about the transnationalization of the American judiciary. We need to be more mindful of factors that the existing literature on transnational litigation downplays, such as the tendency of the U.S. legal system to be inward looking and out of sync with others. We need to confront American exceptionalism.

## VI. THE PERSISTENCE OF EXCEPTIONALISM IN AMERICAN PROCEDURAL LAW

The claim that transnational litigation in the United States should be (and is well on its way to becoming) a separate field transcends discussion about the growing specialization of litigation practice in the United States. At stake in the debate about the status of transnational litigation is whether the American legal system is entering a new period of openness to outside influences and, if so, whether or not this is to be applauded. At issue is whether the U.S. approach to adjudication should retain core features that distinguish it from other legal systems: notice pleading, broad and expensive pretrial discovery, a permissive approach toward concurrent jurisdiction and forum shopping,<sup>246</sup> the predominance of multi-factored tests rather than clear rules,<sup>247</sup> the important role assigned to lay persons as jurors, high rates of settlement, unusually high damages awards, the availability or threat of punitive damages, the presumption against awarding attorneys' fees to the prevailing party. In short, the manner in which the issue was first framed by Born & Westin and has been discussed ever since has tended to obscure a central inquiry: Will American exceptionalism in procedural law fall victim to globalization? Should it?

With the term "exceptionalism" I mean to link the analysis carried on thus far in this article with the rich body of literature, some of it dating back nearly two centuries,<sup>248</sup> about the nature of American society and its relationship to law: In what ways does reliance on and reverence for law distinguish American society? In what respects is the way that courts function in American life unique?

The expansive social science literature on American exceptionalism touches upon subjects as diverse as social mobility, the importance of

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<sup>245</sup> See generally MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789–1914* (2004); David J. Bederman, *The Feigned Demise of Prize*, 9 EMORY J. INT'L REV. 31 (1995); Lavinbuk, *supra* note 22.

<sup>246</sup> That is, should it retain a permissive approach to forum shopping among courts in different states. *Post-International Shoe* and in the wake of the American revolution in conflict of laws, it is not unusual for a plaintiff to have a choice of where to sue the defendant and for differences in the law applied by courts in different fora to be a basis for forum shopping. The *Erie* doctrine is not designed to discourage forum shopping among different state-court systems, but rather among state courts and federal courts in the same state.

<sup>247</sup> See BAUMGARTNER, *supra* note 223, at 12 (observing that to Europeans the "frequent use of interest-balancing tests appears crude and unsophisticated").

<sup>248</sup> See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield and Delba Winthrop eds. & trans., 2000) (1840).

immigration, the centrality of race, the reasons for high crime rates, the significance of being adjacent to militarily weak neighbor countries, and the enduring conviction that the American experiment (in self-government, in economic liberty, in the rule of law) has global significance.

In the legal academy, American scholars today show a fresh interest in American exceptionalism. Recent work illuminates American exceptionalism in such substantive fields of law as criminal law,<sup>249</sup> freedom of expression,<sup>250</sup> privacy,<sup>251</sup> human rights,<sup>252</sup> election law,<sup>253</sup> and other subjects. Some of this work comes from reformers, unhappy with the status quo in the United States on such matters as capital punishment or the legal status of gays and lesbians. For scholars in this group, comparison is a tool for bringing about change in substantive U.S. law.

For a second group, American exceptionalism is a cause for celebration. Like the reformers, the “celebrationists” find that the differences between the U.S. legal system and those of other countries run deep. Unlike the reformers, those in this second group discern in these differences a healthy diversity of opinion, a predictable set of responses to different circumstances, or evidence of American superiority. In foreign affairs law, for example, those who celebrate American exceptionalism (so-called “New Sovereignists,” to use Peter Spiro’s phrase<sup>254</sup>) brandish a wariness of international institutions and multilateralism as a badge of honor.<sup>255</sup> In human rights law, the defenders of the U.S. jurisprudence under the Alien Tort Statute make no excuses for the U.S. legal system’s innovation in employing its courts to adjudicate civil claims for human rights violations that often have little connection to the United States. Rather, scholars and NGOs urge

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<sup>249</sup> See, e.g., International Center for Prison Studies, *World Prison Brief* (2007) available at [http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb\\_stats.php?area=all&category=wb\\_poprate](http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poprate) (reporting that the United States has the largest prison population in the world and also the highest incarceration rate); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 57, 57 (Michael Ingatoeff ed., 2005) (observing that the few countries that, in addition to the United States, vigorously employ the death penalty are “generally ones that the United States has the least in common with politically, economically, or socially”).

<sup>250</sup> See, e.g., RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH* (2006); Michel Rosenfeld, *Hate Speech in Comparative Perspective: A Comparative Analysis*, 24 *CARDOZO L. REV.* 1523 (2003); Frederick Schauer, *The Exceptional First Amendment* in Ingatoeff, *supra* note 248, at 30–56.

<sup>251</sup> See, e.g., James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151 (2004).

<sup>252</sup> Particularly the relative lack of social and economic rights in the U.S. constitution. See Cass R. Sunstein, *Why Does the U.S. Constitution Lack Social and Economic Guarantees?* in Ingatoeff, *supra* note 249, at 90–110.

<sup>253</sup> See generally Symposium: *Democracy and Elections in North America: What Can We Learn from Our Neighbors?* 3 *ELECTION L. J.* 395 (2004).

<sup>254</sup> See Peter Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, *FOREIGN AFF.*, Nov.–Dec. 2000.

<sup>255</sup> See ROBERT BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 15, 19, 21 (2003) (decrying the “internationalization of law” asserting that the “United States should not make the mistake of accepting that treaties have the force of law no matter what vital interests of the nation are at stake,” and arguing that “[i]nternational law is not law but politics”); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 *STAN. L. REV.* 1557 (2002); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 *MINN. L. REV.* 71 (2000); John Yoo and Will Trachman, *Less Than Bargained For: The Use of Force and the Declining Relevance of the United Nations*, 5 *CHI. J. INT’L L.* 379 (2005).

other countries to follow the American lead.<sup>256</sup> For celebrationists on both the right and the left, tampering with American exceptionalism presents the risk of diluting what is exceptionally good about the American tradition with respect to law, courts, and constitutionalism.

Transnationalists disagree. Transnationalists specializing in procedural law tend to see America's modern encounter with globalization and its byproduct, transnational litigation, as requiring significant change in American procedural law, change that, in the opinion of some, involves more than multilateral treaties and the occasional creation of specialized U.S. procedural rules.<sup>257</sup> Rather, the globalization of business and the globalization of due process<sup>258</sup> produce basic insights about the nature and limits of adjudication, and these insights plausibly could cause legislators and judges to rethink the basic way in which the U.S. legal system manages all litigation, domestic and transnational. Put differently, the core of the transnationalist position is that even if the primary influence of comparative civil procedure currently is in assessing how U.S. courts should adjudicate a circumscribed category of cases (those with a transnational component), that influence is unlikely to remain confined to such a narrow area. Eventually the insights gained from familiarity with the procedural law of other countries and with emerging global procedural norms will affect U.S. views on wholly domestic dispute resolution.<sup>259</sup> U.S. domestic procedural law may change in significant ways.

Although the transnationalist position is rarely stated in terms as sweeping as in the previous paragraph, this is a fair statement of what prominent transnationalists envision.<sup>260</sup> Indeed, their vision can be disaggregated into three parts. Two are descriptive and one is normative. The first is that during the twentieth century, American procedural law steadily grew different from that of other countries, even from Great Britain. Key markers on this path to divergence were the introduction of the Federal Rules, the move from territoriality to minimum contacts in personal jurisdiction, the rise of public law litigation,<sup>261</sup> and

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<sup>256</sup> See, e.g., Beth Stevens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE INT'L L. J. 1 (2002); Elizabeth van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L. J. 141 (2001). I include myself in this group. See Paul R. Dubinsky, *Proposals of the Hague Conference and their Effect on Efforts to Enforce International Human Rights Through Adjudication*, 117 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, WORKING DOCUMENT SERIES (1998).

<sup>257</sup> Paul Berman, for instance, argues that judges need to change the way they see themselves; they need to "think of themselves as cosmopolitan transnational actors," Paul Schiff Berman, *Judges as Cosmopolitan Transnational Actors*, 12 TULSA J. INT'L & COMP. L. 109, 110 (2004).

<sup>258</sup> See, for example, Judge Richard Posner's articulation of "international due process" in *Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000); see also Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2123–39 (2004).

<sup>259</sup> See Geoffrey C. Hazard, Jr., *International "Harmonization" of Procedural Law*, 76 TEX. L. REV. 1665, 1668–69 (1998) (comparing the international harmonizing potential of the ALI/UNIDROIT project to the harmonizing impact of the Federal Rules of Civil Procedure); see also Anthony J. Scirica, *Judge's Response to Professors Hazard and Taruffo*, 25 PENN. ST. INT'L L. REV. 519, 519 (2006) ("[T]he Transnational Principles and Rules may cause us to reexamine the foundations of our respective procedural rules with a view toward considering revisions. Over time, this reexamination may encourage transnational harmonization of civil procedure.").

<sup>260</sup> At the 2007 annual meeting of the American Society of International Law, Donald Donovan argued that recent developments in international litigation and arbitration point to the creation of a "truly international system of justice." See Donovan, *supra* note 241.

<sup>261</sup> See Abram Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982);

the revolution in choice of law methodology.<sup>262</sup> By the late 1970s, the American approach to civil justice differed greatly from competing models.

The second component, also descriptive, is that in the final decades of the twentieth century, globalization caused the brakes to be applied (albeit lightly) to this divergence. In the U.S., a second wave of transnationalism brought a renewal of efforts dating from the 1960s to create a procedural law more finely tuned to the challenges posed by cases involving foreign parties, foreign law, or the need for the assistance of foreign authorities. International forum shopping began to look different from domestic forum shopping.<sup>263</sup> In choice of law, the Second Restatement held out the promise that the interests and policies of foreign countries would not routinely be treated as if they were the interests and policies of sister states.<sup>264</sup> And, fairly read, Justice O'Connor's opinion in *Asahi* said that due process had to be understood as context dependant, so an assertion of jurisdiction that would be reasonable in an interstate setting might not be reasonable in an international setting. Some of the expectations triggered by these developments have come about.<sup>265</sup>

Third, and normatively, the transnationalist view is that procedural change and judicial innovation in at least one category of cases (those with a transnational dimension) is to be welcomed. After all, the trans-substantive ideal has never been well suited to disputes in which U.S. courts interact closely with foreign legal systems. Little of the basic U.S. approach was developed with such cases in mind. Therefore, we should be hesitant to insist on a single set of procedural rules when doing so poses both the risk of imposing unfair disadvantages on foreign litigants and creating wide-ranging conflict with foreign countries. Rather, we need to be open to the prospect that even basic aspects of the system, such as the right to a civil jury trial, perhaps should not operate in the exact same way in transnational cases as in domestic ones.<sup>266</sup> Finally, this set of normative claims raises a wider set of questions. While we are rethinking the role of juries in transnational cases, perhaps we should reexamine the role of juries in all civil cases. While we are considering access to federal court for foreign litigants, perhaps we should revisit access to federal courts on the basis of diversity of citizenship in general. In other words, the now ongoing American encounter with foreign legal systems must not only be regarded as a challenge to accommodate the basic assumptions of our procedural law with the equally fundamental views of foreign countries. It must also be a learning experience and

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Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281(1976).

<sup>262</sup> See *supra* notes 33 & 38.

<sup>263</sup> Under *Piper Aircraft v. Reyno*, for example, a foreign plaintiff's choice of a U.S. forum is entitled to less deference in a forum non conveniens analysis than is the choice of a U.S. plaintiff. See 454 U.S. 235, 255–56 (1982).

<sup>264</sup> See AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 10 (1971).

<sup>265</sup> See Born & Rutledge, *supra* note 2, at 142–44.

<sup>266</sup> For a thoughtful discussion of the jury trial in relation to the ALI/UNIDROIT Transnational Principles project, see Geoffrey C. Hazard, Jr., *Jury Trial and the Principles of Transnational Civil Procedure*, 25 PENN. ST. INT'L L. REV. 499 (2006); see also Rolf Stürmer *Some European Remarks on a New Joint Project of the American Law Institute and UNIDROIT*, 34 INT'L LAWYER 1071, 1074 (2000) ("The jury trial is the main source of mistrust and aversion of European defendants in the United States as a forum of international litigation").

an opportunity for self-reflection.

My disagreement with this three-stage account is not with the normative position. I agree that the complications associated with transnational dispute resolution—e.g., complications relating to language, parallel proceedings, judgment enforcement—frequently warrant a variance from the established doctrine applied in wholly domestic cases. Rather, my disagreement is with the descriptive account given by a number of scholars who have advanced this normative view.

For all their differences, what the reformers and the celebrationists most have in common is the sense that the United States is not just different, but much different. They share the view that fundamental aspects of U.S. law – for example, the widespread constitutionalization of so many legal issues and the pervasiveness of federalism—run so deep that radical change moving the U.S. substantially in the direction of other legal systems is unlikely, at least within a short span of time. Ironically, this similarity is perhaps what most differentiates these two groups from the transnationalists discussed throughout this article. As a group, transnationalists operating in the realm of procedural law are also keenly aware of the many significant differences between U.S. procedural norms and those that prevail in other countries. But as a group, they share the conviction that U.S. procedural law is headed for change, toward greater similarity with emerging global standards of procedural justice, in the direction of losing some of its exceptionalism. So, when the American Law Institute launched its project on Transnational Rules and Principles of Civil Procedure, it did so expecting that the gap between American norms of pretrial discovery and continental norms could be bridged, that a fusion of the best of both approaches could be engineered in the near future. As of this writing, there are serious questions as to whether the ALI/UNIDROIT effort will have any measurable impact on U.S. judicial practice. Similarly, when the U.S. delegation to the Hague Conference on Private International Law spent the better part of a decade attempting to negotiate a broad multilateral treaty regulating the assertion of jurisdiction by national courts and providing for the recognition of foreign-country judgments, it was acting on the optimistic view that a mixed convention—a kind of middle ground between the Brussels Convention and U.S. norms—might serve as a step in the direction of harmonization, as a way station of sorts for American migration away from exceptionalism.<sup>267</sup> Few American judges had an interest in the negotiations, and those who did tended to see more pitfalls than possibilities.<sup>268</sup>

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<sup>267</sup> The “mixed convention” idea was proposed by the late Professor Arthur von Mehren, one of the United States’ foremost scholars in comparative law and conflict of laws, see Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 BROOKLYN J. INT’L L. 17 (1998), and pursued vigorously by the U.S. delegation. For an extended period of time, the effort largely turned into a bilateral negotiation between the United States and the EU countries, with wide differences in the basic approach to personal jurisdiction. See Prelim. Doc. No. 16, “Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference,” Hague Conference on Private International Law 5–8 (Feb. 2002) available at [http://www.hcch.net/upload/wop/gen\\_pd16e.pdf](http://www.hcch.net/upload/wop/gen_pd16e.pdf). Ultimately the scope of the project was cut back drastically, for many reasons, including an unbridgeable gap between an expansive, activity-based approach to jurisdiction by the United States and a strong opposition to this approach by a large majority of other delegations. What emerged from nearly ten years of effort was the Choice of Courts Convention. See *supra* note 156.

<sup>268</sup> These observations are based in part on workshops that the author conducted regarding the Hague jurisdiction and judgments treaty negotiations with federal and state judges. These workshops were held

The analysis presented here is inspired to some degree by the ease with which transnational scholars in procedural law seem to be underestimating the depth of American exceptionalism. There is irony in this; the current crop of American scholars in civil procedure and conflict of laws is perhaps as well versed in the comparative and international dimensions of their field as any group of American legal scholars and any generation of American proceduralists. Because today's transnationalist arguments are advanced by people with no misconception regarding the uniqueness of American civil justice, the present work does not dwell on the familiar list of such differences in procedural law between the U.S. and other countries: approaches to joinder and class actions, contingency fees, the selection of judges, the input of expert witnesses, and so on. Instead, the goal here is more modest and more focused: I seek to draw attention to an aspect of American exceptionalism that is infrequently noticed and, apparently, easily forgotten. And that is the longstanding penchant of American courts for bringing principles of interstate federalism to bear on litigation that is international rather than interstate in scope. A critical and longstanding aspect of U.S. exceptionalism in procedural law is to regard the frameworks and principles developed to deal with interstate legal problems as a model for addressing problems that are international in scope. Generations of jurisprudence and theory developed with the purpose of refining the American conception of federalism are enlisted to help the U.S. legal system navigate its way through a rising tide of civil disputes that are transnational in scope. The assertion of jurisdiction over foreign entities is regarded as a variation on the problem of asserting jurisdiction over out-of-state defendants. Domestic choice-of-law jurisprudence is put to work in deciding which law should apply to controversies connected to two or more countries. Rules for interpreting domestic sources of law are readily applied to international and foreign sources of law. Foreign-country judgments are equated with sister-state judgments. The model for judicial cooperation in the international context is judicial cooperation in the interstate context. In short, in repeated waves of juridical transnationalism, Americans have displayed a habit of seeing the wider world in their own image. And American courts in particular continue to display an inclination to regard the American experience in federalism—fifty sovereign states bound together by a federal constitution—as yielding insights applicable in an international context.

Moreover, the last two decades of cases show something even more revealing. It is not as though judges applying *Burnham* do not know the nationality or domicile of the person “tagged” with service of process. It is not as if the state and federal bench is wholly unaware that the rest of the world has a different view of pretrial discovery than the United States. Nonetheless, in opinion after opinion the implications of these facts about the world are not explored. In other words, from the viewpoint of those who want to see U.S. procedural law in one particular category of cases move away from exceptionalism and towards a rapprochement with other legal systems, it is not solely, or even mainly, a knowledge problem. It appears to be deeper than that. For many on the U.S. bench, interstate federalism is a metric for understanding a

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at the 2002 annual meeting of the Conference of Chief Justices and the 2002 Federal Judicial Center workshop for judges of the Second and D.C. Circuits.

host of procedural issues that arise when a dispute spills across borders, regardless of the character of the border.

The misuse of domestic analogies may be a product of intellectual confusion, but it can yield concrete, real-world harms. Treating transnational disputes as close cousins of domestic ones tends to cloud the question of what procedural rights should be extended to foreign litigants. Guided by interstate analogies, U.S. courts typically regard the issue as one of constitutional law rather than international law.<sup>269</sup> In determining the procedural rights of foreign litigants, courts look to the Fifth and Fourteenth Amendments rather than to treaties or to customary international law.<sup>270</sup> This can lead to an overextension of rights (such as when the U.S. legal system declines to exercise jurisdiction over a foreign litigant, even under circumstances when international law would permit the exercise of jurisdiction)<sup>271</sup> and also to an under-extension of rights, such as when a U.S. court asserts jurisdiction over a foreign litigant under circumstances in which international law frowns on such a basis for asserting jurisdiction.<sup>272</sup> In the context of pretrial discovery, the interstate perspective leads U.S. courts into friction with foreign courts even when the intent is to be cooperative. And too little appellate review is extended to section 1782 rulings because minimal appellate review is the norm in domestic discovery practice.

The chief problem with much of the American literature on transnational civil litigation is that it ignores what American courts are actually doing. For all the strengths of the normative arguments advanced by transnationalists, their descriptive account is flawed. Changes in law practice, legal education, and global business are offered as evidence of the inevitability of major changes in the way that the U.S. legal system relates to the wider world. To be sure, the changes brought on by the latest wave of globalization are real, but as Part IV shows, it is a leap of faith to infer that the American legal system will respond systematically and not incrementally and marginally, as it has in the past. Such a leap requires one to put aside the fact that such prescriptions have been offered before, only to go unheeded.

The claim that transnational litigation in the United States has become a separate field is, at bottom, a claim that the American legal system is becoming less distinct, less different from other legal systems, and more open to outside influences. It is a claim that, at least in one area of procedural law, Americans are prepared to look more extensively at what other countries do and let go of what

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<sup>269</sup> See Parrish, *supra* note 46, at 19–28.

<sup>270</sup> See Born, *supra* note 72, Strauss, *supra* note 112, Weintraub, *supra* note 112.

<sup>271</sup> Consider, for example, multiparty litigation. Under article 6(1) of the Brussels Regulation, a co-defendant in a multi-defendant action can be sued “in the courts for the place where any [defendant] is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.” European Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, O.J. L 12 (Jan. 16, 2001). In the United States, the Fifth and the Fourteenth Amendments have been construed as not permitting consolidation in this manner. Regardless of how efficient it would be to consolidate litigation in one forum, there must be a constitutionally adequate basis for the exercise of personal jurisdiction over each defendant. See *New York Life Ins. v. Dunlevy*, 241 U.S. 518, 520–21 (1916). Due process also imposes limits on consolidating all potential plaintiffs in one action. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 739–40 (1977) (interpleader action).

<sup>272</sup> See AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §421; Burbank, *supra* note 136, at 116 (commenting on the *Burnham* case and “the continuing use of a jurisdictional standard that the rest of the world regards as exorbitant”).

has been a theme in international private law litigation in U.S. courts—projecting fundamental aspects of the American legal system, such as interstate federalism, onto the international legal system. The data presented here suggest that, at this point in time, these claims are still more aspirational than real.