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Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media

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JURISDICTIONAL CONFLICT AND JURISDICTIONAL EQUILIBRATION: PATHS TO A *VIA MEDIA*?^φ

Stephen B. Burbank*

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I. INTRODUCTION

My goal in this article is to offer some reflections on jurisdictional conflict stimulated by Professor Posch¹ and on jurisdictional equilibration stimulated by Professor Silberman.² Thus, having brought to bear on the understanding of jurisdictional conflict an account of the etiology and current dilemmas of American jurisdictional jurisprudence, I will assess the roles and prospects of two jurisdictional equilibration devices—the Latin twins, *forum non conveniens* and *lis pendens*—in resolving such conflict, with special attention to international business disputes.

^φ This article is based on a presentation made at the *Conference on Transatlantic Business Transactions—Choice of Law, Jurisdiction and Judgments*, which was held in Barcelona, Spain, June 1-3, 2003. The Conference was co-sponsored by the Association of American Law Schools and the European Law Faculties Association.

* David Berger Professor for the Administration of Justice, University of Pennsylvania. I have profited from the discussions at the conference where this paper was first presented and from comments on a subsequent draft by Samuel Baumgartner, Geoffrey Hazard, Kim Lane Scheppelle, David Shapiro, Linda Silberman, Catherine Struve, and Arthur von Mehren.

1. See Willibald Posch, *Resolving Business Disputes Through Litigation or Other Alternatives: The Effects of Jurisdictional Rules and Recognition Practice*, 26 HOUS. J. INT'L L. 363 (2004).

2. See Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327 (2004) [hereinafter *The Impact of Jurisdictional Rules*].

II. JURISDICTIONAL CONFLICT

Professor Posch's article lays firmly at the door of disagreements about appropriate rules of adjudicatory jurisdiction the difficulties that delegates to the Hague Conference have experienced in crafting a global convention on jurisdiction and judgments.³ In his view, certain grounds of jurisdiction accepted in the United States but regarded as exorbitant under the Brussels Convention and its replacement regulation, combined with the American Rule on cost (including attorney's fee) shifting, the availability of contingency fee representation, and the right to jury trial in civil cases, prompt overreaching by entrepreneurial American plaintiff's lawyers and risk aversion in foreign defendants. The latter are therefore often led either to settle rather than to litigate once a lawsuit has been commenced in the United States, or to anticipate and try to avoid that dilemma through a forum-selection (including an arbitration) clause.

According to this account, the differences in jurisdictional conceptions that have prevented agreement at The Hague overwhelm other differences in the rules and practices applicable in the United States and the E.U. countries that Professor Posch discusses, including differences regarding forum-selection clauses and the recognition and enforcement of foreign judgments.⁴

One need not agree with Professor Posch's account to find interesting the conclusion that what he calls "sociological differences" are probably more important than legal differences to an understanding of the jurisdictional conflict he describes. For present purposes, I would highlight one difference that might be so conceived and that has obvious legal impact.

In many developed countries in the western world, the State directly affords—or provides administrative or other mechanisms that afford—assistance to those who have been injured to a far greater degree than does the United States, where, as a result, litigation picks up the slack. The same is true of mechanisms to vindicate important regulatory interests. These differences reflect, in turn, fundamental differences in attitudes

3. Posch, *supra* note 1 at 364-66. For a recent and deeply learned discussion of the proposed convention that sets it in the comparative context that is necessary both to understand the existing obstacles and to make progress overcoming them, see SAMUEL P. BAUMGARTNER, *THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS: TRANS-ATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION* (2003).

4. Of course, as my colleague, Geoffrey Hazard, points out, one can take the view that "[t]he differences in procedure, especially the cost rule, discovery and jury trial, overwhelm almost everything. So much so that jurisdiction is almost everything." E-mail from Geoffrey Hazard, Professor of Law, University of Pennsylvania Law School, to Stephen Burbank, Professor of Law, University of Pennsylvania Law School (Sept. 9, 2003) (on file with author).

toward the proper role of the State and of private initiative in ordering social life, with predictable effects on general attitudes toward not only litigation but also the status quo and how, if at all, it should be altered.⁵

However regrettable the contingency fee, the American Rule on cost-shifting, and the institution of the jury trial in civil cases may appear to a European, they are logical incidents of a system that distrusts government and leans heavily on private litigation to compensate for injury and to enforce important social norms, but that does not provide legal aid that is worthy of the name.⁶ It is not only the self-interest of entrepreneurial American plaintiff's lawyers that prompts resistance to attempts to reduce the availability of litigation forums in the United States when an American alleges injury for which a foreign enterprise may be legally responsible or where the activities of that foreign enterprise are alleged to trigger an American regulatory interest. Forced to pursue vindication thousands of miles from home, and without alternative (that is, non-litigation) means of vindication, our putative American plaintiff might lose not only favorable substantive law but that which experience suggests may be more important in many cases, to wit, the ability to secure representation and to develop evidence necessary to establish liability (discovery).

That said, it is probably equally important for this discussion to note that the current, plaintiff-friendly regime of jurisdictional rules in the United States is a relatively recent phenomenon. For much of our history jurisdictional law and the nature of the society whose needs it served constrained forum shopping. "[T]he greater latitude to assert jurisdiction afforded the states by *International Shoe* and its progeny dramatically enhanced the opportunities for interstate forum shopping and, coupled with loose federal control of state choice of law, the incentives of both litigants and state courts to run a race to judgment, creating a [domestic] market for litigation"⁷ Moreover, just as United States courts in effect assimilated internationally foreign judgments to interstate judgments for

5. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001); see also Stephen B. Burbank, *The Roles of Litigation*, 80 WASH. U. L.Q. 705, 711 (2002) ("private litigation here has long served roles that in other countries are addressed through social insurance, administrative law, and the like").

6. See Paul D. Carrington, *Self-Deregulation, the "National Policy" of the Supreme Court*, 3 NEV. L.J. 259, 260-64 (2003). Any doubt on that score as to the contingency fee should have disappeared when our friends in England, who for more than a century derided contingency fee litigation as "litigation on spec," adopted its genteel cousin, the conditional fee, as a direct result of their inability adequately to fund legal aid. See Burbank, *The Roles of Litigation*, *supra* note 5, at 710-11.

7. Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 210 (2001) (citations omitted) [hereinafter *Jurisdictional Equilibration*].

purposes of recognition and enforcement,⁸ so have they assimilated internationally foreign actors to domestic actors for purposes of applying jurisdictional rules.⁹ That has meant that, with the increase in global commerce following the Second World War, the market for litigation—enabled in large part by the contemporaneous expansion of acceptable jurisdictional bases in the United States—became a global market as well.¹⁰

The use of American jurisdictional law to draw the world into our courts has cast in relief failures of imagination that are evident even in domestic cases. One such failure has been that of the Supreme Court to take a dynamic and comparative view of jurisdiction when adjusting federal constitutional limits on its exercise. Thus, for example, although the Court used the vehicle of *International Shoe*¹¹ to abandon fictions that had previously bridged the gap between a perceived territorial imperative and the needs of an increasingly mobile society, it has never made clear whether there is a continuing need, and hence a proper place, in the new order for the fiction of corporate presence in a state through the conduct of systematic and continuous business activities.¹² There is an argument to be

8. *Id.* at 207-08. In seeking an explanation for the assimilation of internationally foreign judgments to interstate judgments for purposes of recognition and enforcement, I have noted that “the history of both interjurisdictional recognition and jurisdictional equilibration since the founding [of the United States] has been a history of accommodating the perceived needs of sovereignty under constitutional language long on aspiration but short on details,” and I have suggested that it was “easier for such a country and its constituent states to treat other countries like other constituent states than it was or would be for countries without a history of and experience in accommodating internal sovereign claims.” *Id.* at 208.

9. See Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1470-71 (1991) (reviewing GARY B. BORN WITH DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS* (1989)).

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

Id. (citations omitted); see also *infra* text accompanying note 21 (arguing that this disposition to assimilate has been reinforced by the impulse of modern American procedural law to apply the same rules to all cases).

10. As suggested by the remarks of Professor Virgos at the conference, we now have a global market not just in litigation but, more broadly, in dispute resolution.

11. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

12. See Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT'L & COMP. L. 111, 119 (1999) [hereinafter *Jurisdiction to Adjudicate*]; Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 299-300 (1983) [hereinafter *Adjudicatory Jurisdiction*]. The *Perkins* decision casts little if any light because the foreign defendant in that case did essentially all of its limited business

made that, with the adoption of grounds of activity-based or specific jurisdiction that *International Shoe* invited, and given the continued acceptance of domicile (including state of incorporation) as a basis of general jurisdiction, “doing business” jurisdiction should not be permitted, or should be substantially scaled back, in litigation involving domestic (U.S.) defendants.¹³

The same argument is harder to carry in a case involving a foreign defendant precisely because such a defendant has no domicile or seat in the United States. Yet, to say that a defendant is subject to jurisdiction because, and only because, it is doing systematic and continuous business in this country implies that the claim does not arise out of that activity and hence that there is lacking the sort of connection between the underlying transaction or occurrence and the forum that is usually assured by grounds of specific jurisdiction in the United States and, to a lesser extent, by rules of “category-specific jurisdiction”¹⁴ common in many foreign legal systems. It is one thing to say that a corporation should not be heard to complain if sued on an unrelated claim in the place that is its legal home.¹⁵

during and immediately after World War II in Ohio, and because there may not have been an alternative forum available to the plaintiff. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-49 (1952); *see also* Silberman, *The Impact of Jurisdictional Rules*, *supra* note 2, at 333 (discussing *Perkins*). The *Helicopteros* decision, although not repudiating this ground of general jurisdiction, found that it could not be exercised constitutionally on the facts of the case. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-19 (1984).

13. *Cf. Burnham v. Superior Court of Cal.*, 495 U.S. 604, 610 n.1 (1990) (Scalia, J., plurality opinion) (suggesting that, as a constitutional matter, general jurisdiction on the basis of doing business may be restricted to corporations).

14. ARTHUR TAYLOR VON MEHREN, *THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE DOCTRINES, POLICIES AND PRACTICES OF COMMON- AND CIVIL-LAW SYSTEMS* 64 (2003).

Analysis of claims of adjudicatory authority in terms of general and specific jurisdiction leaves out of account a third type which can be called category-specific jurisdiction. The adjudicatory authority asserted is general in the sense that, unlike specific jurisdiction, the particular claims to be litigated need not be linked to the forum but, unlike general jurisdiction, the adjudicatory authority claimed extends only to controversies of a particular juridical character, for example contractual or tortious (delictual) claims.

Id. The author notes that section 29 of the German Code of Civil Procedure makes a “claim of category-specific jurisdiction by the place of performance [that] covers not only disputes respecting the fact or manner of the contract’s performance but also disputes respecting the contract’s creation.” *Id.* at 65.

15. *See Burbank, Jurisdiction to Adjudicate*, *supra* note 12, at 118.

The states of the United States have a shared interest in providing at least one place where a person or corporation can be sued—a jurisdictional “headquarters”—an interest that is shared by plaintiffs. In light of these interests, a person or corporation that has purposefully established such a relationship with a state cannot properly complain that an assertion of jurisdiction is so unfair as to be unconstitutional.

Id. (citations omitted).

It is quite another endlessly to proliferate such homes—to debase the notion of a jurisdictional “headquarters”¹⁶—in the process neglecting the fact that the original fiction was “presence,” not “domicile.”

Until such time as the Court does approach the constitutional inquiry from a dynamic and comparative perspective, however, the best hope for moderation (other than the *forum non conveniens* doctrine, to which I turn below) may be the application to this ground of general jurisdiction of a second order reasonableness analysis now firmly part of the constitutional evaluation of grounds of specific jurisdiction—analysis that, its provenance suggests, is particularly apt in a case involving a foreign defendant.¹⁷ Such analysis has the capacity to distinguish the lot of an individual from that of a corporate (as well as that of a domestic from that of a foreign) litigant, plaintiff or defendant, and hence (even if *sub silentio*) to accommodate the sociological facts of litigation life to which I have referred.¹⁸ Certainly, it could put an end to the worst excesses of “doing business” jurisdiction in transnational litigation, namely those occurring when the contacts of a domestic subsidiary (or related entity) are imputed to the foreign defendant under an *alter ego* or agency theory.¹⁹

16. *Williamson v. Osenton*, 232 U.S. 619, 625 (1914) (“The very meaning of domicile is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by law may be determined.”); see *Burbank, Jurisdiction to Adjudicate*, *supra* note 12, at 118; see also Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1137, 1179 (1966).

17. See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987) (denying specific jurisdiction over a foreign defendant); *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir. 1996) (denying general jurisdiction over a domestic defendant).

18. See von Mehren, *Adjudicatory Jurisdiction*, *supra* note 12, at 313-22; cf. Silberman, *The Impact of Jurisdictional Rules*, *supra* note 2, at 332 (“[I]t would be in keeping with the jurisdictional standard of reasonableness for courts to take into account at the constitutional level such factors as the relative strength of the parties’ bargaining positions.”). Professor Silberman has elsewhere proposed an interesting compromise to bridge the wide gap that has separated negotiators at The Hague when dealing with doing business jurisdiction. In place of the prohibition on assertions of such jurisdiction in the 1999 Hague draft, she suggests:

Article 18 could be modified to prohibit jurisdiction on the basis of the carrying on of the commercial activity by the defendant when the activity did not give rise to the claim “except where the defendant has a branch office or where the defendant’s activity in the forum is evidence of a substantial presence there, and the plaintiff is habitually resident in the forum state.”

Linda J. Silberman, *Can the Hague Judgments Project be Saved?: A Perspective from the United States*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 177 (John J. Barcelo III & Kevin M. Clermont eds., 2002) (citation omitted).

19. See, e.g., *Frummer v. Hilton Hotels Int’l*, 227 N.E.2d 851 (1967). Compare Professor Posch’s discussion of activity-based jurisdiction over a “branch, agency or other establishment” of a foreign corporation. Posch, *supra* note 1, at 369. In an interesting forthcoming article, Professor Hoffman argues that the supposed *locus classicus* of the jurisdictional *alter ego* doctrine, *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), has been consistently and egregiously misinterpreted

This discussion brings to light another failure of imagination in American jurisdictional law, or at least federal constitutional law, which unfortunately has largely displaced state law in fact and in American legal thinking about jurisdiction:²⁰ the failure to recognize a possible need for different rules depending on the characteristics of the litigants.

Th[e] disposition to assimilate international to domestic interjurisdictional cases has been reinforced by the very powerful impulse of modern American procedural law, including for these purposes choice of law, to apply the same rules to all cases. American courts have pursued domestic doctrinal uniformity even when doing so resulted in international disuniformity, as in the interpretation of treaties.²¹

Yet, as Professor Posch reminds us, one should not neglect the possibility that a sociological explanation may cast as much light on this phenomenon as does a legal explanation. Indeed, it would be surprising if the same foundational attitudes regarding the proper roles of the State and of private initiative in social ordering were not operating in and on the rules of adjudicatory jurisdiction.

It was perhaps easier for continental jurisdictional jurisprudence, with its focus on the links between a claim or dispute and the forum, to anticipate a need for, and to create, special rules for consumers and employees, than it was for its American constitutional counterpart, with its focus on the relationship between the defendant, the forum, and the litigation.²² Yet, the logic behind that thought quickly confronts the failure of contemporary American jurisdictional law to protect those who are predictably disadvantaged where the likelihood of such disadvantage is plain for all to see, to wit, when a case involves a contractual choice-of-

and is not, in fact, authority for imputing the jurisdictionally relevant affiliations of one corporation to another. See Lonny Sheinkopf Hoffman, *Constructing the Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. (forthcoming 2004).

20. This phenomenon of linking state to federal constitutional law itself reflects a failure of imagination and one that may entail a variety of costs, arising from: (1) a race to the bottom (when due process is conceived as a floor); (2) normative leveling (when it is conceived as a bed); (3) uncertainty as a result of fact dependency and indeterminacy (in either situation); and (4) “the loss of comparative perspective that may occur when due process is formulated knowing that it will serve as the source of rules for state law.” See Burbank, *Jurisdiction to Adjudicate*, *supra* note 12, at 113-14, 118.

21. Burbank, *Jurisdictional Equilibration*, *supra* note 7, at 208-09 (citation omitted).

22. See von Mehren, *Adjudicatory Jurisdiction*, *supra* note 12, at 317. The “purposeful availment” aspect of minimum contacts analysis only crudely effects such a distinction. Of course, states remain free to distinguish among litigants in fashioning their rules of jurisdiction, but many of them have simply abdicated to federal constitutional law, explicitly or implicitly, thus sacrificing good policy to the desire not to disadvantage local litigants and lawyers. See *supra* note 20. For a discussion of rules that prefer plaintiffs in order to equalize litigation capacity, see VON MEHREN, *supra* note 14, at 201-03.

forum (including arbitration) clause.

The Supreme Court's approach to choice-of-court clauses in *Carnival Cruise Lines*²³ is redolent of freedom of contract notions that, however much one might like to confine them to an age when there was no indoor plumbing, evidently reflect an enduring strain of American thought bound up with belief in individual freedom and responsibility and a fear of paternalistic government. The Court's approach to the interpretation of the Federal Arbitration Act, in turn, deprives the states of the United States of the power to protect those thought to be vulnerable to overreaching unless those states are willing to change their entire law of contracts in order to address particular problems arising out of contracts to arbitrate.²⁴

Ironies abound here, including the fact that American law regarding both choice-of-court clauses and arbitration clauses underwent fundamental change in response to the perceived requirements of international commerce, with those changes then translated to domestic commerce.²⁵ Another irony lies in the possibility that the supposed traditional hostility of American courts to (pre-dispute) arbitration clauses reflected rather, at least in some quarters, concern about overreaching of those less advantaged.²⁶ Yet a third irony appears when one realizes that some states *have* tried to distinguish among disputants in their rules concerning the enforcement of arbitration clauses but have been thwarted by the Supreme Court's interpretation of the supposed requirements of the Federal Arbitration Act.²⁷ The fourth irony, and the one that is most germane to the subject of this Symposium, is that even the *laissez-faire* standard of *Carnival Cruise Lines* and similar cases may afford too much discretion to defeat a choice of court made by parties both of which have adequate means to protect themselves, as the parties to international

23. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

24. *See, e.g., Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement. . . ."). On the other hand, there may be a silver lining, as courts confronted by breathtaking overreaching (re)invigorate the contract doctrine of unconscionability. *See, e.g., Alexander v. Anthony Int'l*, 341 F.3d 256, 264 (3d Cir. 2003); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002); Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361, 373-79 (2002).

25. *See Burbank, The World in Our Courts*, *supra* note 9, at 1471-73.

26. *See Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 339-40 (1997).

27. *See id.* at 379-91; *Southland Corp. v. Keating*, 465 U.S. 1, 10-12 (1984); *Perry*, 482 U.S. at 490-91; *supra* text accompanying note 24.

business transactions typically do.²⁸ This is not surprising because the standard must accommodate all cases.

Thus, American courts have either (as to consumer contracts) traveled from one extreme to another or (as to business-to-business contracts) not traveled far enough, in both situations failing to note the different ways in which the ground is staked out in laws of many other countries that one might have hoped the phenomenon of international litigation, and the invitation to comparative law that it presents, would have brought to their attention.

III. JURISDICTIONAL EQUILIBRATION

A. *Forum Non Conveniens*

One aspect of American jurisdictional law that *has* famously departed from the norm of refusing to distinguish among litigants lies in the differential treatment of American and foreign plaintiffs for purposes of the application of the *forum non conveniens* doctrine. I would be happy to see that distinction in its current form disappear—indeed, I have argued that it should disappear—if only because its treatment in the 1999 Hague draft signals that other countries regard it as invidious.²⁹ But in my view that is a small point at which to stick in the reformation of a jurisdictional equilibration device that has lost its way.

However ancient its lineage, *forum non conveniens* as a general tool of jurisdictional equilibration dates to the 1940s, to the very period, that is, when the Supreme Court was empowering states to broaden their jurisdictional reach. Originally (re)invigorated to deal with wholly domestic litigation (in a very big country), *forum non conveniens* quickly became relevant in federal litigation only in cases where the alternative forum was outside of the United States.³⁰ Moreover, although that is not

28. See Ronald A. Brand, *Forum Selection and Forum Rejection in US Courts: One Rationale for a Global Choice of Court Convention*, in REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF SIR PETER NORTH 51, 63 (James Fawcett ed. 2002); Posch, *supra* note 1, at 375-76.

29. See Burbank, *Jurisdictional Equilibration*, *supra* note 7, at 212, 240-42. There is irony here as well, as those who liken American courts to lights drawing to them moths from around the world would have us regard as invidious discrimination an attempt to control the swarm by privileging the claims of American plaintiffs. See *id.* at 241.

30. See *id.* at 211-12; Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 313 (2002). In his comments on a draft of this article, David Shapiro inquired whether the doctrine had ever been employed to dismiss a case in favor of a domestic forum to which transfer could not be made under 28 U.S.C. §1404 because the alternative forum was not a court in which the suit “might have been brought” originally. See e-mail from David Shapiro, Professor of Law, Harvard Law School, to Stephen Burbank, Professor of Law, University of

true of all candidates for a *forum non conveniens* dismissal in state courts,³¹ federal law has continued to provide the model for most states' law on the subject.³²

There is one aspect of the differential treatment of domestic and foreign plaintiffs for these purposes that reveals what is fundamentally wrong with the doctrine: it was built, or at least is sustained, on fictions, if not hypocrisy. Thus, the justification given for such differential treatment is that a U.S. forum chosen by a domestic plaintiff is likely to be convenient whereas no such confidence is warranted as to a U.S. forum chosen by a foreign plaintiff.³³ The notion that in this world of global commerce, transport, and communications, the lawyers for plaintiffs, domestic or foreign, are usually more interested in convenience than they are in litigation advantage is equaled in naiveté only by the notion that it is the quest for convenience that usually prompts defense lawyers to file *forum non conveniens* motions.³⁴

Similarly, the notion that an adequate alternative forum is a necessary condition for a *forum non conveniens* dismissal cannot be taken seriously. That is not only because the Supreme Court has made clear that the

Pennsylvania Law School (Sept. 10, 2003) (on file with author). I am not aware of such a case. Professor Shapiro's question brings to mind, however, the phenomenon of a case that is filed in the courts of a state that either has not embraced the doctrine or that applies a version more protective of jurisdiction than federal law, and that is subsequently removed to federal court and dismissed. *See, e.g., Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir. 1985). On the assumption that refiling in state court would only lead (again) to removal and dismissal, I have always regarded such a case as strong evidence of the dubiety of the view, taken in *Sibaja* and many other cases, that federal *forum non conveniens* law can be applied in a diversity case (in which state substantive law will be applied). *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), should not be thought to speak to the question. Formally, that case was different because it involved litigation in state court. More importantly, what Justice Kennedy referred to in his dissent as the "reverse-*Erie* metaphor" is not just "not a sure guide." *Id.* at 467. It is thoroughly misleading. *See* Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1557 n.39 (1992) [hereinafter *Federal Judgments Law*]. Of course, if this view were to prevail, it would strengthen the argument for federal statutory control of *forum non conveniens* in international cases. *See* Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L. J. 501, 523-25 (1993) [hereinafter *Developments in Jurisdiction*]; Burbank, *Jurisdictional Equilibration*, *supra* note 7, at 242-46.

31. American courts, unlike other common law courts that employ *forum non conveniens*, typically dismiss rather than stay the case, one of the aspects of American practice that should be changed. *See* Burbank, *Jurisdictional Equilibration*, *supra* note 7, at 243.

32. *See* Davies, *supra* note 30, at 315-16.

33. *See* Piper Aircraft v. Reyno, 454 U.S. 235, 261 (1981); Burbank, *Jurisdictional Equilibration*, *supra* note 7, at 212.

34. *See, e.g.,* Silberman, *Developments in Jurisdiction*, *supra* note 30, at 525-26; Davies, *supra* note 30, at 324-26. Moreover, as well described by Professor Davies, "[g]aining access to foreign evidence has become much easier since 1947, as international litigation law and practice have developed." Davies, *supra* note 30, at 324.

remedy provided by an “adequate” forum means only one that is not “so clearly inadequate or unsatisfactory that it is no remedy at all.”³⁵ American courts have no coherent or consistent view of the role or weight, if any, that should be given in *forum non conveniens* analysis to the constellation of legal rules and arrangements that determines whether a putative plaintiff has real, as opposed to theoretical, access to court and to means of proof essential to gain a remedy.³⁶

The most disturbing fiction of all, however, is the notion that *forum non conveniens* analysis is (and should be) impervious to regulatory interest triggered by policies underlying rules of substantive law and those ancillary rules that in this country are thought necessary to its vindication. That, of course, is a possible message of the Supreme Court’s *Piper* decision, where the prospect of even a substantial change in the governing substantive law was said to be worthy of little weight.³⁷ It is a message that is difficult (but not impossible) to square with the Court’s articulation of relevant “public interest” factors and one that, in any event, lower courts have had great difficulty heeding.³⁸ For good reason.

American legal thought and practice have traditionally regarded jurisdiction and choice of law as different problems requiring discrete analysis.³⁹ That traditional posture came under pressure in two Supreme Court decisions, where distinguished justices argued unsuccessfully that a state’s interest in applying its law to a dispute should count for something in assessing the constitutionality of an assertion of jurisdiction in its courts.⁴⁰ It is in any event seriously problematic in situations where the choice-of-law process does not work, as may often be true in cases where the alternative forum is foreign (particularly when the dispute implicates regulatory statutes).⁴¹ Still, specific jurisdiction at the constitutional level

35. *Piper*, 454 U.S. at 254.

36. See Burbank, *Jurisdictional Equilibration*, *supra* note 7, at 242-43; Davies, *supra* note 30, at 346-48.

37. See *Piper*, 454 U.S. at 247.

38. See Burbank, *Jurisdictional Equilibration*, *supra* note 7, at 212; Davies, *supra* note 30, at 358-60. It is ironic that, in the type of case for which *forum non conveniens* was dusted off and extended in 1947, domestic diversity litigation in federal court, see *supra* text accompanying note 30, “a change in the governing substantive law was held to be impermissible in . . . cases that could be transferred under the mechanism enacted in 1948.” Burbank, *Jurisdictional Equilibration*, *supra* note 7, at 212 (citation omitted).

39. See, e.g., VON MEHREN, *supra* note 14, at 36-38.

40. See *Hanson v. Denckla*, 357 U.S. 235, 258-60 (1958) (Black, J., dissenting); *Shaffer v. Heitner*, 433 U.S. 186, 223-28 (1977) (Brennan, J., concurring in part and dissenting in part).

41. See von Mehren, *Adjudicatory Jurisdiction*, *supra* note 12, at 323-31. For an exception, see Burbank, *Jurisdictional Equilibration*, *supra* note 7, at 245 n.197 (discussing Article 137(1) of the Swiss Private International Law Act).

is likely to guarantee at least the potential for regulatory interest in the forum.

In a domestic case, when the courts of a state—the law of which could constitutionally be applied to a dispute—are found not to have jurisdiction to adjudicate, the case can usually be refiled in another state, where there is still a possibility that the law of the first state will be applied, where, if not, the substantive law is likely to be similar, and where in any event the plaintiff will have available the same or very similar arrangements for gaining access to court and the proof necessary to establishing her claim (if it can be established at all). The same is true if a state court dismisses a domestic case within its jurisdiction under the *forum non conveniens* doctrine.

In a transnational case, on the other hand, both a dismissal for lack of jurisdiction and a *forum non conveniens* dismissal portend, as we have seen, not just the application of substantive law that may be very different (and far less favorable to the plaintiff), but, as an anterior matter, barriers to bringing or pursuing suit that are often insuperable, at least for an individual plaintiff (i.e., natural person). That is a cost that American interests must bear when the defect is lack of jurisdiction. But it is more obviously a self-inflicted wound—inflicted, moreover, by institutions with only a tenuous claim to power⁴²—when there *is* jurisdiction but the domestic forum is challenged as inconvenient.

One cannot reach a judgment whether American jurisdictional law is exorbitant without a normative measuring rod. Comparative jurisdictional inquiry suggests as an appropriate measure the extent to which rules of jurisdiction tend to assure the existence of a regulatory interest in the underlying dispute. By that standard, certain jurisdictional rules currently applied in American courts *are* exorbitant. Particularly in a world where litigation convenience is a predominating concern chiefly of courts, it should be an acknowledged purpose of *forum non conveniens* doctrine to achieve the balance that is lacking in American law because of both (1) the traditional separation of jurisdiction and choice of law and (2) judgment recognition standards that ignore the merits and the law applied except when manifestly contrary to public policy. That, in fact, is what many courts are doing today, when, although they speak of convenience and inconvenience, their eyes seem fixed on the presence or absence of a domestic regulatory interest.⁴³

42. See Burbank, *Jurisdiction to Adjudicate*, *supra* note 12, at 120.

43. See Burbank, *Jurisdictional Equilibration*, *supra* note 7, at 212.

According to this view, the failure of American law to integrate jurisdictional and choice of law doctrine, together with a recognition practice that permits neither a choice of law

It remains to bring that consideration to center stage, a process that reflection about both the sociological differences and the hypocrisy of current law discussed above can only facilitate. When that occurs, it will be apparent that differential treatment of domestic and foreign plaintiffs, far from constituting invidious discrimination, can represent the rational and consistent implementation of an equilibration device that resists the dismissal of cases in which there is likely to be a domestic regulatory interest.⁴⁴ Thinking about the doctrine in that way should also prompt a reassessment of even such a hallowed jurisdictional ground as domicile (or habitual residence),⁴⁵ as it should of the illegitimate child of a transitional fiction: “doing business” jurisdiction. Finally, giving regulatory interest its proper role in the *forum non conveniens* analysis could put an end to situations in which courts dismiss cases brought under regulatory statutes such as the antitrust or securities laws on *forum non conveniens* grounds even though there is both adjudicatory jurisdiction and jurisdiction to prescribe.⁴⁶

B. *Lis Pendens*

Turning finally to *lis pendens*, I have little to add to Professor Silberman’s discussion,⁴⁷ a fact that causes me no regret because that discussion, and the *lis pendens* provisions of the proposed federal statute included in it,⁴⁸ draw heavily on my previous work in this area.⁴⁹ As

test nor reexamination of the merits, renders it important to consider domestic regulatory interests before jurisdiction is surrendered. Jurisdictional standards that more broadly implemented domestic regulatory interests should diminish the need for this equilibration device.

Id. at 236-37 (citations omitted).

44. “But we are all, I hope, discriminating, and thus . . . capable of distinguishing differences in treatment that are prompted by the consistent application of factors that are nationality-neutral from differences that are causally tied to the consideration of nationality (or habitual residence).” *Id.* at 241. See Davies, *supra* note 30, at 375-76.

45. See Burbank, *Jurisdictional Equilibration*, *supra* note 7, at 236.

American jurisdictional law does not have a monopoly on overreaching[,] and . . . limitations of foresight can call forth a similar need in other systems. Even such a hallowed jurisdictional ground as domicile may benefit from the equilibration that *forum non conveniens* or some similar device can provide, and functionally similar jurisdictional equilibration may already occur without invocation of the dreaded Latin phrase.

Id. (citations omitted).

46. See *id.* at 245. For a discussion of *forum non conveniens* in federal statutory cases, see Lonny Sheinkopf Hoffman & Keith A. Rowley, *Forum Non Conveniens Analysis in Federal Statutory Cases*, 49 EMORY L.J. 1137 (2000).

47. See Silberman, *The Impact of Jurisdictional Rules*, *supra* note 2, at 338-44, 356-57.

48. See AMERICAN LAW INST., INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT

developed there, this promising means of mediating actual transnational jurisdictional conflict has had a checkered history in the federal courts of the United States, owing to yet another failure of imagination, as well as to the indifference of the Supreme Court. Here the failure of imagination is to treat the courts of Spain, for example, as either other federal courts or the courts of a state of the United States, which is how they must be treated so long as different federal circuits resort to different domestic models, neither of which is suitable for transplant and one of which is incoherent in its original context.⁵⁰ The American Law Institute (ALI) proposed statute would bring order out of this chaos in a thoughtful, measured, and uniform way; its *lis pendens* provisions are suitably narrow in scope⁵¹ and sufficiently flexible to prevent injustice through strategic manipulation.⁵²

Like Professor Silberman, I harbor no illusions that an ALI statute, including this feature in particular, would quickly be embraced. Indeed, there is reason to believe that the *lis pendens* provisions may have contributed to the surprising lack of enthusiasm for the project in its statutory form evinced at the ALI meetings in May 2003 by a member of the United States delegation to the Hague Conference, who expressed “ambivalence” in such a one-sided way as to suggest that the word has a special meaning in Washington, D.C.

One possible reason for opposition to uniform federal provisions requiring, in carefully prescribed circumstances, deference to parallel litigation first filed abroad is the feeling that—at least in the absence of reciprocity on the subject and in light of the realities of modern international forum shopping—the United States should not add to the handicap of a generous law of recognition and enforcement by refusing to allow domestic litigants and courts to run a race to judgment. As I have previously observed:

This argument is not without force. Yet, some of the costs of parallel litigation are visited on domestic parties and domestic courts. Moreover, the general faith in other legal systems evidenced by the United States’ generous judgment recognition practice surely has a firmer basis today than it did

§11 (Tentative Draft 2003) [hereinafter ALI Tentative Draft].

49. See Burbank, *Jurisdictional Equilibration*, *supra* note 7. I am an adviser to the ALI project in question.

50. See *id.* at 213-15.

51. The provision applies only when “a proceeding involving the same parties and the same subject matter has previously been brought and is pending in the courts of a foreign country.” See ALI Tentative Draft, *supra* note 48, §11(a); Burbank, *Jurisdictional Equilibration*, *supra* note 7, at 233-34.

52. See ALI Tentative Draft, *supra* note 48, §11(b).

100 years ago, as does the concept of an international system whose needs should be considered in the formulation and application of national law. These considerations suggest that an attempt to rely on a normative principle of dual jurisdiction would ring hollow. Unless the goal were to take back part of the territory surrendered by international recognition practice, such a crude rule would not be necessary to protect the interests that, according to that practice, are relevant. And such a goal would be hard to defend at a time when “[t]he need for courts to rely on each other in order to serve justice has been recognized in an increasing number of international civil litigation cases.”⁵³

To this response I would add only that the force of any general opposition to federal statutory *lis pendens* provisions is sapped by clever aspects of the ALI draft statute, according to which the judgment of a court that did not reciprocate by respecting a first-filed American action (that was not stayed or dismissed), or the proceedings in which were brought in order to frustrate adjudication in a more appropriate U.S. court, need not be recognized or enforced.⁵⁴

Another possible reason for ambivalence toward the ALI project in its statutory form, whether tied to the *lis pendens* provisions or more broadly inspired, is the fear that, at some point, it could weaken the bargaining position of the United States or otherwise make our negotiators’ lives more difficult in pursuing the remains of the day at The Hague, which are a modest but potentially significant effort to salvage from a decade of effort a double convention on jurisdiction and judgments in business-to-business transactions involving a choice-of-court clause.⁵⁵

It seems to me a wholly adequate response to such a concern that, if it were frankly articulated and supported with particulars, there would be ample time to see whether adjustments in the ALI draft statute were appropriate. An adjustment that seems to me sensible in any event is to make explicit that the proposed statutory *lis pendens* regime privileges a suit filed in a court that is designated as the exclusive forum for dispute resolution in a valid choice of court clause, whether or not that suit is filed first, with a corollary provision permitting non-recognition of a judgment

53. Burbank, *Jurisdictional Equilibration*, *supra* note 7, at 233 (citation omitted).

54. See ALI Tentative Draft, *supra* note 48, §5(b)(iv)-(v); Silberman, *The Impact of Jurisdictional Rules*, *supra* note 2, at 356-57.

55. See Hague Conference on Private Int’l Law, Draft on Exclusive Choice of Court Agreements, HcCH Work. Doc. 49e (Dec. 2003), <ftp://ftp.hcch.net/doc/workdoc49e.pdf> [hereinafter Hague Draft]; Brand, *supra* note 28.

of a court that proceeded in derogation of such a clause.⁵⁶

IV. CONCLUSION

Finding a path through existing jurisdictional conflict will not be easy. The sociological facts that underlie that conflict are not likely to change soon in consequential ways. In large part for that reason, it seems safe to conclude that the ambitious effort to craft a global convention on jurisdiction and judgments cannot succeed in the near term. Some observers hope that the much narrower project now occupying the attention of the negotiators at The Hague (business-to-business choice-of-court clauses) may one day serve as a springboard again to seek broader compromises. Yet, if that effort were made, the next generation of negotiators would surely confront abiding differences among litigants—in the role that litigation plays in their lives and their capacity to participate in the global litigation (or dispute resolution) market— suggesting that the board may have too little spring.

If this is correct, our hopes may have to rest on gradual (and formally unilateral) rapprochement, with the tools of jurisdictional equilibration even more important in a world without a treaty than they would have been to the success of any such effort.⁵⁷ Those hopes can be realized only if lawmakers, including courts, are open to adjusting their private international law rules respecting the public adjudication (and private resolution) of disputes so that the law, while always reflecting its place in a web of social institutions, is as dynamic and receptive to foreign influence as are the societies in which we live.

56. Attention should be paid to possible exceptions, such as that reflected in the current Hague draft where “the parties are habitually resident [only] in the State of the court seised, and the relationship of the parties and all other elements relevant to the dispute, other than the agreement, are connected with that State.” See Hague Draft, *supra* note 55, art. 5(f).

57. See Burbank, *Jurisdictional Equilibration*, *supra* note 7, at 206 (jurisdictional equilibration devices are “critically important to the success of any treaty that may be concluded”). Bilateral treaties are, of course, another alternative. The experience of a failed attempt to enter into such a treaty with the United Kingdom, “from a comparative-law perspective our most likely treaty partner,” is not encouraging, however. Burbank, *Federal Judgments Law*, *supra* note 30, at 1572.