

One Voice in Foreign Relations and Federal Common Law

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For most of the past century, those who followed foreign relations law believed that federal law, including that made by the federal courts in the absence of legislation and treaties, should govern the field. Anything else would burden political and economic ties with the rest of the world and stymie efforts to adapt the law to a rapidly changing international environment. Only in the last two decades has a revisionist perspective emerged, one that sees federal judicial lawmaking as more of a threat to, than a solvent for, successful foreign relations. Both the Supreme Court and the American Law Institute's new Restatement (Fourth) of the Foreign Relations Law of the United States show the influence of this revisionism, but many lower courts and the majority of legal academics continue to believe that one voice requires judicial control. This Article examines the underappreciated shortcomings of a federal common law of foreign relations and defends skepticism about enhancing the power of the federal judiciary in this field.

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I. INTRODUCTION

The Supreme Court, now and then, says that the United States must speak with one voice when dealing with the rest of the world.¹ The premise may seem compelling, but the implication that many have drawn from it is not. Prominent scholars, and several courts, have run with the one-voice idea, concluding that any law affecting the nation's foreign relations must be federal, rather than State, precisely so that the federal courts can control it.² Otherwise, they argue, various and self-serving State laws will, at the least, confuse other nations, and at the worst, harm federal policy while favoring parochial local interests. Where self-executing treaties and federal enactments do not exist, courts must fill the gap with federal common law and screen out State law. Otherwise the nation's voice will be incoherent, and U.S. foreign relations will suffer.³

Although a harmonious national voice might be the best way to conduct foreign relations, it does not follow that the federal judiciary is the best

1. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015); *Arizona v. United States*, 567 U.S. 387, 409 (2012); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 452 (1979); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976); *United States v. Pink*, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring). A prominent case discussed below that expresses the "one voice" concept without voicing it is *Zschernig v. Miller*, 389 U.S. 429 (1968). An analytically distinct problem is whether the one voice resides not only in the federal government, but in that government's executive branch. For fuller discussion, see David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 961-65, 968-76 (2014); Daniel Abebe, *One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs*, 2012 SUP. CT. REV. 233; Sarah H. Cleveland, *Crosby and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 984-89 (2001). This Article puts that issue aside and focuses only on the status of foreign relations law as federal, rather than State, law.

2. This Article capitalizes "State" when referring to one of the United States of America. This convention, used in the Fourth Restatement, seeks to avoid confusion between these States and those states that are subjects of international law, such as the United States. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES note at 2 (AM. LAW INST. 2018) [hereinafter FOURTH RESTATEMENT].

3. Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295; Jonathon I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805 (1989); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984). For more recent statements of the nationalist position, see MARTIN S. FLAHERTY, *RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS* (2019); MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* 272-75 (2016); Gary Born, *Federalizing International Law*, in *THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW* (Sarah H. Cleveland & Paul B. Stephan eds., forthcoming 2020) [hereinafter Born, *Federalizing International Law*]; William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L.J. 1559 (2018); Gary Born, *Customary International Law in United States Courts*, 92 WASH. L. REV. 1641 (2017); Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531 (2011). For an expression of reservations about the broadest conception of the one-voice position with respect to States by a scholar generally attracted to federal common law in foreign relations, see Cleveland, *supra* note 1, at 1001-06.

choirmaster. This Article uses the occasion of the publication of the Fourth Restatement of the Foreign Relations Law of the United States to defend the separation of the aspiration of policy coherence from the instrument of judicial control. It argues that concentrating authority in the federal judiciary to make foreign relations law in the absence of congressional enactments (either statutes or treaties) ignores both the capacity of the States to promote beneficial encounters with foreign actors and the tendency of the federal courts toward entropy, rather than coherence. The revisionist position, a critique of the nationalist position that surfaced two decades ago, provides a superior response to the challenges of managing the one voice in foreign affairs. This Article builds upon and extends that position in light of changes in the law and the world over the last two decades.

The 1987 Third Restatement of the Foreign Relations Law of the United States largely endorsed the nationalist position. Its most ambitious claim was that all international law qualifies as the law of the United States for purposes of the Supremacy Clause and the “arising under” prong of constitutional federal court subject-matter jurisdiction.⁴ In the absence of enacted federal law, it maintained, the federal courts are empowered, and indeed required, to make rules that oust State law so as to fulfill the international legal obligations of the United States. As to other, nonobligatory bodies of law that might affect foreign relations, the Third Restatement asserted that courts must be vigilant to ensure that the States not make law in a way that intrudes into foreign relations.⁵

After initially inspiring courts and scholars alike to pursue the one-voice idea, the Third Restatement later came under fire. A powerful revisionist critique emerged a decade after its publication.⁶ The Supreme Court began to

4. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111(1)-(3), 112(2) (AM. LAW INST. 1987) [hereinafter ‘THIRD RESTATEMENT’]; see also CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 151-53 (2d ed. 2015) (discussing background). *But see id.* § 111(3)-(4) (noting exception for non-self-executing treaties).

5. THIRD RESTATEMENT, *supra* note 4, § 1 reporters’ note 5; *cf. id.* § 481 cmt. a (noting State law normally governs recognition and enforcement of foreign court judgments, unless that law intrudes into foreign relations of United States).

6. The most influential statement of the revisionist critique was Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). Earlier scholarship pointing in the same direction includes Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986). Later work in the revisionist vein includes ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION (2017); John Harrison, *The Constitution and the Law of Nations*, 106 GEO. L.J. 1659 (2018); Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 GEO. L.J. 1825 (2018); Paul B. Stephan, *Inferences of Judicial Lawmaking Power and the Law of Nations*, 106 GEO. L.J. 1793 (2018) [hereinafter Stephan, *Inferences*]; Paul B. Stephan, *What Story Got Wrong – Federalism, Localist Opportunism and International Law*, 73 MO. L. REV. 1041 (2008) [hereinafter Stephan, *What Story Got Wrong*]; Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006); Julian G. Ku, *The State of New York*

limit the federal common law of foreign relations as it reined in more generally the lawmaking powers of the lower federal courts.⁷

The American Law Institute's (ALI) new Fourth Restatement follows the Court's lead. It takes no broad, categorical position. In particular, it does not address the controversial question of the status of customary international law in the U.S. legal system.⁸ It does confirm, however, that many important legal doctrines that affect the foreign relations interests of the United States rest on State law, unless and until the federal political branches enact something else. According to the Fourth Restatement, the existence of plenary federal power over foreign relations does not automatically translate into exclusive federal authority.

This Article argues that the Fourth Restatement not only captures the temper of the times, but that good functional arguments support its position. The growth of international commerce and connectivity since the 1980s has greatly increased pressure on the States to adopt laws that promote foreign contacts and business. Moreover, it has become apparent that a sprawling and diverse federal judiciary cannot pursue nationally uniform law except under stringent conditions that limit, rather than expand, judicial lawmaking discretion. The Supreme Court accordingly sees its task as inducing lawmaking by Congress and the executive. It pursues this goal by barring the lower courts from adopting stopgaps. In today's world, when it comes to coherent foreign relations law, federal common law is a bug not a feature.

This Article proceeds by comparing the Third and Fourth Restatements to illustrate both the rise of the nationalist position and its subsequent decline. It then shows how pressures generated by technological and economic changes have undermined the functional arguments that have supported the creation of federal common law to govern foreign relations. It explores tensions between the lower courts and the Supreme Court over the scope of

Does Exist: How the States Control Compliance with International Law, 82 N.C. L. REV. 457 (2004); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT'L L. 555 (2002); Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); Moore, *supra* note 1, at 991-95, 1012-14, 1017-23. Most of this scholarship focuses on the doctrinal and methodological problems presented in developing a federal common law of foreign relations, rather than the instrumental consequences of that step. *But see* Goldsmith, *supra*, at 1664-80; Stephan, *Inferences, supra*, at 1807-23.

7. As the Court's posture evolved, scholars began to reconsider the legitimacy of federal common law across different fields. *See, e.g.*, John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 139-40 (1998). The shift marked a general retrenchment from the exuberance for federal common law exemplified by Judge Friendly's famous article from the mid-twentieth century. *See* Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 383 (1964).

8. The gap is not accidental. The Reporters did not propose to the ALI that they address either the status of customary international law within the U.S. legal system or the existence of a general foreign relations preemption of State law. A possibility exists that the ALI may authorize an extension of the new Restatement at some future date, and those topics might then be addressed. *See* FOURTH RESTATEMENT, *supra* note 2, foreword, at XII.

judicial lawmaking, both through the development of federal common law and expansive interpretation of statutory authorities. It concludes that, at least in the field of foreign relations law, federal common law tends toward entropy rather than clarity. Finally, it charts the way ahead for further devolution of lawmaking authority away from the federal courts in foreign relations cases.⁹

II. THE POSSIBILITIES OF A FEDERAL COMMON LAW OF FOREIGN RELATIONS

The argument that the foreign relations of the United States belongs exclusively to the national government has a long history. Implementing it, however, presents difficulties. In an interconnected world, determining the boundaries of foreign relations is no simple matter. Moreover, one needs a mechanism to detect and enforce those boundaries. Adherents of the nationalist position rely heavily on the federal courts to do the latter. They would give the federal judiciary wide sway to imply rules inferred from the imperatives of foreign relations and to choose which rules of State law to displace.

This Part outlines the elements of the nationalist position expressed by the Third Restatement and also recounts the efforts of courts and scholars to extend the nationalist position even further in the immediate wake of the Third Restatement's publication. It then describes the revisionist response, led principally by the Supreme Court and to a limited extent endorsed by the Fourth Restatement. It looks at seven doctrinal pockets where the Third Restatement pushed for a one-voice outcome, also examining how the Fourth approached those areas. Overall, it depicts the revisionist position as ascending but not yet triumphant.

A. Introduction

The Supreme Court from time to time asserts that the Constitution meant to consolidate the country into a single entity as to foreign relations.¹⁰ Full

9. This Article concentrates on the one-voice justification for using federal common law as a substitute for State and foreign law in cases affecting foreign relations. It does not address critiques of contemporary foreign relations law based on the claim that it unduly limits access to justice. These arguments focus not on the source of law but on limits on access to federal courts for reasons that do not depend on the federal-State divide. *See, e.g.*, Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579 (2016); Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015) [hereinafter Bookman, *Litigation Isolationism*]; Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. REV. 2033 (2013); Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011).

10. Some instances go as far back as the nineteenth century. Louis Henkin's great treatise, which strongly supports the nationalist position, supplies epigrams by, among others, Chief Justices Marshall

articulation of the one-voice position, however, came only in the waning days of dual federalism in the 1930s. The Court sought to distinguish the “external powers” of the federal government, to which State authority was irrelevant, from the regulation of interstate commerce, a federal power that at the time the Court constrained significantly. Thus, *United States v. Curtis-Wright Export Corp.*,¹¹ a case involving the constitutionality of a criminal law that depended on an act of the executive to specify its proscription, famously expounded on the distinctive character of foreign relations under the Constitution:

The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states That this doctrine applies only to powers which the states had, is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.¹²

and Taney. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 227 (1972) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 228 (1824) (scope of foreign commerce power), and *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575-76 (1840) (power to extradite)). Keith Whittington has argued that even closer to the founding, the Supreme Court defended extensions of federal court jurisdiction that kept the States out of disputes that might harm U.S. foreign relations. KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT* 72-74 (2019) (discussing *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796), and *United States v. The Schooner Betsey and Charlotte*, 8 U.S. (4 Cranch) 443 (1808)). These early cases, however, did not involve judicially-created law but rather upheld the constitutionality of express congressional choices to assign jurisdiction over salient cases to the federal courts. Thus they do not provide support for judicial enforcement of the nationalist position in the absence of direction from the political branches. For more recent invocations of the “one voice” slogan see sources cited *supra* note 3.

11. 299 U.S. 304 (1936).

12. *Id.* at 315-17.

To a similar point, *United States v. Belmont*,¹³ a case involving the override of State property law by actions of the executive not based on legislation, proclaimed:

Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. . . . [The] complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.¹⁴

Foreign relations, this nationalist position maintained, were constitutionally exceptional in their exclusively national character.¹⁵

Behind these historical and constitutional claims were functional arguments. Not only had the framers intended the national government to have exclusive power in foreign relations, but they were wise to do so. Relations with other states require a single actor to represent the United States. Choices made with respect to the outside world affect the nation as a whole and have to be made by an actor that is accountable to the whole nation. Local interests cannot not be allowed to sabotage the general interests of the United States.¹⁶

B. *The Nationalist Position, the Third Restatement, and Modern Scholarship*

The Reporters for the Third Restatement added another layer to the nationalist position by stressing the special role of the judiciary in maintaining foreign affairs exceptionalism.¹⁷ Writing at a time when disillusionment with

13. 301 U.S. 324 (1937).

14. *Id.* at 331.

15. On the history of foreign relations exceptionalism in Supreme Court doctrine, see Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1911-19 (2015); see also G.E. White, *From the Third to the Fourth Restatement of Foreign Affairs: The Rise and Potential Fall of Foreign Affairs Exceptionalism*, in THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW, supra note 3; G.E. White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 46-145 (1999).

16. *E.g.*, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 453 (1979) (“California’s tax thus creates an asymmetry in international maritime taxation operating to Japan’s disadvantage. The risk of retaliation by Japan, under these circumstances, is acute, and such retaliation of necessity would be felt by the Nation as a whole California, by its unilateral act, cannot be permitted to place these impediments before this Nation’s conduct of its foreign relations and its foreign trade.”).

17. The Introduction observed:

In recent years, principally as a result of reinterpretations by the Supreme Court and adjustments by Congress, there has been some redistribution of power among the three branches of government, and some increased protection for the rights of the individual, in matters relating to foreign relations as well as in other matters.

the political branches and fear for legal protection of individual rights were high, the Reporters proposed constitutional innovations that would expand the role of the federal judiciary in making the law in matters that affect foreign relations.¹⁸ By federalizing international law and bolstering foreign relations preemption, the Third Restatement made it easier for the Supremacy Clause to oust State law.¹⁹ Extending constitutional protection to overseas aliens further ensured a central role for the courts as constitutional enforcers, in supervising the outward-facing acts of the political branches.²⁰

The Third Restatement gave only elliptical support to a well-established constitutional doctrine that expressly addresses the problem of State discrimination against outsiders, namely the dormant commerce clause doctrine. At least since the landmark case of *M'Culloch v. Maryland*, the Supreme Court has implied from the federal power to regulate interstate and foreign commerce a prohibition of State discrimination against this activity.²¹ Perhaps the Reporters preferred a broad rule of State disability and thus found the limitation to “commerce” too narrow. But for whatever reason the Third Restatement barely mentioned the doctrine.²²

In the wake of the Third Restatement, scholars proposed to extend the nationalist position even further. They called for the federal courts to seize from the States control over the various strands of private international law that, since *Erie Railroad Co. v. Tompkins*, had become State law.²³ This literature has many strands and cannot be summed up in a simple phrase. On the whole, however, it emphasizes the need for people engaged in transnational transactions to enjoy legal security and protection from localist prejudice that, it assumes, is best provided by the federal judiciary.

C. Doctrinal Change and the Fourth Restatement

To test the status of the nationalist claim that celebrates the one-voice perspective, this Section compares the claims of the Third Restatement to

THIRD RESTATEMENT, *supra* note 4, at 4.

18. Paul B. Stephan, *Courts, the Constitution, and Customary International Law: The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States*, 44 VA. J. INT'L L. 33 (2003).

19. *Id.* at 43-45.

20. *Id.* at 45-47.

21. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *see also* *Dawson v. Steager*, 139 S. Ct. 698 (2019); *Buck v. Kuykendall*, 267 U.S. 307 (1925); *Welton v. Missouri*, 91 U.S. 275 (1875); *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1851); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Most of the cases have involved domestic commerce, but the Court at times has indicated that the State disability may be even greater with respect to foreign commerce. *Japan Line*, 441 U.S. at 448-49.

22. THIRD RESTATEMENT, *supra* note 4, § 412 reporters' note 7. This Reporters' Note did anticipate and deplore the trend away from *Japan Line's* broad rule of State disability. *Id.* (criticizing *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983)). The trend's consummation came in *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994), nearly a decade after publication of the Third Restatement.

23. *See* text accompanying *supra* note 3.

contemporary judicial practice as reflected in the new Fourth Restatement. The Third Restatement did not embrace the most ambitious version of the nationalist position, and the Fourth Restatement does not adopt the revisionist position in all respects. The Third Restatement proposed to discipline private international law through situational preemption, rather than completely federalizing the field. The Fourth Restatement does not address some of the Third's more ambitious proposals, such as the federalization of customary international law. A careful comparison of how the two Restatements treat specific subjects, however, reveals movement away from what an ambitious one-voice view would require. This movement in turn rests on changing doctrine, especially as espoused by the Supreme Court.

1. *Act of State Doctrine*

Perhaps no doctrine in foreign relations law generates greater confusion than act of state. The Supreme Court has both described and applied it inconsistently.²⁴ The British act of state doctrine almost never overlaps with its American counterpart.²⁵ Yet the one thing that is settled about the U.S. doctrine is that it has the status of federal common law that preempts inconsistent State law. *Banco Nacional de Cuba v. Sabbatino* contains the canonical statement of the doctrine:

[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.²⁶

24. John Harrison, *The American Act of State Doctrine*, 47 GEO. J. INT'L L. 507, 537-38 (2016).

25. The British as well as the Commonwealth countries that follow British common law have both a domestic and foreign act of state doctrine. The former, and to some extent the latter, looks to an American viewer more like sovereign immunity. The latter also overlaps substantially with the U.S. political question doctrine. On the specific issue of the validity of a foreign act of state, the only job of the U.S. doctrine, British law admits an international law override, which U.S. doctrine does not. The leading British cases include *Ukraine v. Law Debenture Trust Corp.*, [2018] EWCA Civ. 2026; *Mohammed v. Ministry of Defense*, [2017] UKSC 1; *Belhaj v. Straw*, [2017] UKSC 3; *Kuwait Airways Corp. v. Iraqi Airways Co. (No. 6)*, [2002] UKHL 19, [2002] 2 AC 883; *see also* CAMPBELL MCLACHLAN, *FOREIGN RELATIONS LAW* 523-45 (2014) (discussing British act of state doctrine).

26. 376 U.S. 398, 428 (1964). Congress promptly reversed this specific holding through enactment of the so-called Second Hickenlooper Amendment. Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1013 (codified at 22 U.S.C. § 2370(e)(2)); *see also* FOURTH RESTATEMENT, *supra* note 2, § 441 cmt. *b*, reporters' note 12.

The Court went out of its way to declare that the doctrine functioned as federal law that would preempt State law, even in the absence of any clear conflict between the Court's position and State law.²⁷

In assessing the scope and effect of the doctrine, the operative words are "will not examine the validity." Two ideas are implicit in this phrase. To say a court will not examine something may suggest a court will abstain from deciding a matter because of its delicacy and a lack of judicial competence. To say a court will not question the validity of a foreign official act, however, indicates something else. It means a court will treat the official act as binding in the sense that it provides a rule of decision for resolving a dispute that the court is competent to adjudicate.²⁸ The distinction matters for purposes of assessing the doctrine's status as federal common law. To the extent it permits a practice of abstention, it implies a general incapacity and potentially widespread application. To the extent it provides a rule of decision, it has clearer limits, and its federal status might seem less consequential.

Both the Second Restatement, finalized shortly after *Sabbatino* came down, and the Third, promulgated two decades later, emphasized the first prong. Each tracked precisely the *Sabbatino* language on refraining from examining validity, thus preserving its ambiguity.²⁹ Each also contained qualifications and elaborations suggesting that, like other abstention doctrines, act of state rested on judicial discretion and thus could be adjusted to reflect competing policy concerns.³⁰

In the interval between the Third and Fourth Restatements, the Supreme Court handed down *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*.³¹ The opinion said nothing about the status of the doctrine as federal common law, but it did clarify the scope of the act of state doctrine and squeezed out most, if not all, judicial discretion. The doctrine, the Court explained, is simply a rule of decision that applied only where the outcome of a case turns on the application of an official act of a foreign state.

Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign

27. *Sabbatino*, 376 U.S. at 423-25.

28. Harrison, *supra* note 244, at 519-22.

29. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (AM. LAW INST. 1965) [hereinafter SECOND RESTATEMENT]; THIRD RESTATEMENT, *supra* note 4, § 443.

30. *E.g.*, SECOND RESTATEMENT, *supra* note 29, § 41 cmt. c; THIRD RESTATEMENT, *supra* note 4, § 443 cmt. a (emphasizing judicial restraint).

31. 493 U.S. 400 (1990).

sovereigns taken within their own jurisdictions shall be deemed valid.³²

Where the issue before a court might impugn the integrity of foreign officials, but not the validity of their acts, the doctrine does not apply.³³

In response to the Court's change in emphasis, the Fourth Restatement offers a new description of the doctrine: "In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will assume the validity of an official act of a foreign sovereign performed within its own territory."³⁴ The word "refrain" disappeared from the text.

The shift from a soft rule of abstention to a hard rule of decision has implications for arguments about a federal common law of foreign relations. *Sabbatino* argued that allowing State courts to develop their own tests would undermine the national government's "pursuit of goals both for itself and for the community of nations as a whole in the international sphere."³⁵ Accordingly, it held that "an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."³⁶

Within a generation, this justification for federalizing the act of state doctrine became the foundation for a general push for the one-voice position. Almost anything that brushes up against international law (including the non-obligatory rules of private international law) or foreign relations more generally can be said to affect the relationships of the United States with the rest of the world. Federalization seemed the required response to a wide range of issues. The looseness of the abstention-based conception of the doctrine seemed to invite broader application of the underlying principles, while the precise holding in *Sabbatino* – that federal courts lacked the competence to develop customary international law that could override foreign acts of state – was mostly ignored.³⁷

The narrower and less discretionary doctrine that *Fitzpatrick* articulated and the Fourth Restatement embraces suggests limits more than expansion. Were the act of state doctrine about avoiding embarrassments to foreign

32. *Id.* at 409.

33. *Id.* at 409-10 (finding that a determination that a party paid a bribe to induce foreign officials to enter into a contract did not require a determination of the contract's validity under local law).

34. FOURTH RESTATEMENT, *supra* note 2, § 441(1).

35. *Sabbatino*, 376 U.S. at 423.

36. *Id.* at 425.

37. See sources cited *supra* note 3; see also Bradley & Goldsmith, *supra* note 6, at 828-31, 869-60 (describing and criticizing federalization argument). The English version of act of state, superficially similar to the U.S. version but in important respects significantly different, does allow derogations from the doctrine based on customary international law. See sources cited *supra* note 25.

officials that might interfere with foreign relations, one might expect it to extend to, for example, state-law tort claims based on fraud or similar misconduct implicating foreign officials. *Fitzpatrick* seems to foreclose that possibility. The validity constraint leaves States as well as federal litigants with considerable room to harass foreign actors in ways that might impair federal foreign policy.³⁸

The point is not that *Sabbatino's* decision to federalize the act of state doctrine is indefensible. Rather, the justifications given at the time no longer fit the doctrine as it has been clarified and, perhaps, reframed. At this late date, one might regard this part of *Sabbatino's* holding as sufficiently entrenched by *stare decisis* to ward off reversal. But the changes we have observed in the doctrine undermine the case for extending the federalization holding beyond the confines of act of state itself.³⁹

2. Federal Court Subject Matter Jurisdiction

Article III, Section 2 of the U.S. Constitution authorizes the exercise of the federal judicial power over cases “arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”⁴⁰ Section 1331 of Title 28 of the United States Code, a provision traceable to an 1875 enactment that implements, but does not precisely track, the constitutional provision, states the federal district courts shall have original jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.”⁴¹ Many scholars have maintained, and the Third Restatement asserted, that customary international law is part of U.S. law and therefore counts as the law of the United States for purposes of Article III.⁴² The Third Restatement further concluded that Section 1331 comprises cases based on customary international law.⁴³ This position would give federal courts the power to hear disputes that do not fit within the other categories of federal court subject-matter jurisdiction – mostly party diversity and admiralty, but a few special instances as well – even where the law in dispute is not based on the Constitution, any positive

38. The law of state immunity, which is statutory and clearly preempts State law, removes one category of lawsuits that might agitate foreign relations. FOURTH RESTATEMENT, *supra* note 2, §§ 451-64. But state immunity provides only limited protection to state-owned enterprises and none at all to private actors who transact with foreign states. *See infra* text accompanying notes 196-98.

39. *See* Harrison, *supra* note 6, at 1700-05; Wuerth, *supra* note 6, at 1850-54; *infra* text accompanying notes 200-05.

40. U.S. CONST. art. III, § 2.

41. Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (2012)).

42. *See generally* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687 (2002) (summarizing support for the claim).

43. THIRD RESTATEMENT, *supra* note 4, § 111 cmt. e.

enactment of Congress, or a treaty to which the United States is a party, as long as it counts as customary international law.⁴⁴

Caselaw in support of this position was scant at the time of the Third Restatement and has become scarcer since. *Sosa v. Alvarez-Machain*, a 2004 decision, hinted rather strongly that Section 1331 does not pick up cases based on customary international law.⁴⁵ The decision also indicated, in the view of at least some readers, that customary international law becomes the law of the United States for Article III purposes only when Congress, either expressly or implicitly, adopts a statute to that effect.⁴⁶ One thus can regard the statutory prong of the Third Restatement's position as defunct, and the constitutional prong as listing and taking on water, if still afloat.

The Fourth Restatement takes no position on this question. It notes cases arising under treaties satisfy Article III and observes that the Supreme Court has treated the statutory prong of "arising under" subject-matter jurisdiction more narrowly than it has the corresponding language of Article III.⁴⁷ It carefully avoids the question addressed in the Third Restatement and thus draws no conclusions from the indications of *Sosa*.

Other developments since the Third Restatement have shrunk the boundaries, if not the foundation, of the dispute. Perhaps the most important is the redefinition of the category of customary international law that might be thought as the law of the United States for Article III purposes. This comes in two forms. In the last two decades, courts and commentators have sharpened the distinction between that part of international law that represents good practice and cooperation, in other words comity, and obligatory public international law.⁴⁸ As to the one piece of international law

44. Article III, Section 2, paragraph 1 provides that the federal judicial power shall extend: to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The reference to diversity in text encompasses both domestic diversity – the seventh clause in Section 2, paragraph 1 – and alienage diversity – the sixth clause.

45. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 n.19 (2004).

46. *Id.* at 724-25; see also Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa*, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007) (explaining how *Sosa* ties federal common law to statutory authorization). One district court has endorsed the Bradley-Goldsmith-Moore gloss of *Sosa*. In re XE Servs. Alien Tort Litig., 665 F.Supp.2d 569, 579-80 (E.D. Va. 2009). But see William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19 (2007) (disagreeing).

47. FOURTH RESTATEMENT, *supra* note 2, §§ 301(2), 421 cmt. *d*.

48. *Gamble v. United States*, 139 S. Ct. 1960, 1975 n.12 (2019) (citing FOURTH RESTATEMENT, *supra* note 2, § 481 for the distinction between international law and international comity); William S.

that has had the most direct impact on the Article III debate, namely the customary international law of human rights, the Court has whittled down access to the federal courts to the point where the claim that these suits arise under federal law has become mostly irrelevant.

First, a disinclination to distinguish comity from legal obligation permeated the Third Restatement, as well as much of the scholarship asserting the federal common law claim. Examples abound, but I will discuss two here. As to the international law governing prescriptive jurisdiction, the Third Restatement declared a state otherwise having a legitimate basis to regulate “may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”⁴⁹ As to the exercise of in personam jurisdiction to adjudicate disputes, it declared “[t]ag’ jurisdiction, *i.e.*, jurisdiction based on service of process on a person only transitorily in the territory of the state, is not generally acceptable under int[e]rnational law.”⁵⁰

Each of these claims about what international law forbids was controversial at the time and provoked significant criticism, especially by foreign observers. No one disputed that exercises of prescriptive jurisdiction that fail to give due regard to foreign regulatory interests contribute to international disharmony or that tag jurisdiction puts defendants at a disadvantage and justifies a refusal to recognize judgments that emanate out of judicial proceedings commenced in that manner. What the critics believed was missing, however, was evidence that these common-sense policies were mandated by international law.⁵¹

Accordingly, the Fourth Restatement embraces the wisdom of these policies but rejects the assertion that they rest on an international legal obligation.⁵² It does not accept the argument of commentators such as Lea Brilmayer that private international law, also being international law, should be treated the same as customary international law.⁵³ Although it does not provide a general definition of what constitutes international law such as what one can find in the Second and Third Restatements, it generally focuses on state practice rather than scholarly commentary and distinguishes between

Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2120-24 (2015) (explaining distinction); Michael D. Ramsey, *Escaping “International Comity,”* 83 IOWA L. REV. 893 (1998) (criticizing concept of comity as lacking content); Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1 (1991) (same).

49. THIRD RESTATEMENT, *supra* note 4, § 403(1).

50. *Id.* § 421 cmt. *e.*

51. Dodge, *supra* note 3.

52. FOURTH RESTATEMENT, *supra* note 2, §§ 405 reporters’ note 6, 407 reporters’ notes 3 & 6, 422 reporters’ notes 5 & 11, 484 reporters’ note 7.

53. Compare Brilmayer, *supra* note 3, at 315-22, with FOURTH RESTATEMENT, *supra* note 2, §§ 401 reporters’ note 2, 407 reporters’ note 5, 441 reporters’ note 9, 481 cmt. *a*, 489 reporters’ note 3 (private international law rules based on international comity are normally State law).

rules that carry a duty to comply, on the one hand, and menus for cooperation, on the other.

Both at the time of publication of the Third Restatement and since, the specific focus of debates over the relationship between Article III and customary international law has been a narrow slice of international law – that addressing human rights – and a specific subject-matter-jurisdiction statute – the so-called Alien Torts Statute (ATS), the present codification of a provision found in the Judiciary Act of 1789.⁵⁴ For a federal court to hear a claim made by an alien against a foreign defendant based on international human rights law, the controversy has to satisfy the “arising under” requirement of Article III.⁵⁵ The Third Restatement indicated that cases under the ATS fall under Article III’s arising-under authority and thus could be heard in federal courts even without party diversity.⁵⁶

Since publication of the Third Restatement, four Supreme Court decisions have undermined this position, even if they have not categorically repudiated it. *Argentine Republic v. Amerada Hess Shipping Corp.* rejected the argument that the ATS carves out an exception from the state immunity recognized under the Foreign Sovereign Immunities Act, even though the Third Restatement endorsed that claim.⁵⁷ *Sosa*, as noted above, indicated that the ATS does not itself satisfy the constitutional arising-under requirement. Rather, the majority argued, the ATS statute presupposes the existence of a limited class of international law torts that it implicitly incorporates into federal law. Significantly, *Sosa* rejected the position that all torts based on violation of any international law fall into the class covered by the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, decided nine years after *Sosa*, narrowed this class to cases that “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application.”⁵⁸ Finally, *Jesner v. Arab Bank, PLC* ruled that claims against foreign corporations categorically fail to satisfy the *Kiobel* test.⁵⁹

It is hard to find anything left to the ATS as an independent basis for federal court jurisdiction over international law claims. Two members of the

54. 28 U.S.C. § 1350 (1948) (corresponds to the Judiciary Act of 1789, § 9, 1 Stat. 73, 77). Research finds no case referring to this provision as the “Alien Tort Statute” before *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). The alternative formulation, “Alien Tort Claims Act,” appears to originate in *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978).

55. Statutory conferral of jurisdiction under 28 U.S.C. § 1350 would not suffice in this scenario unless constitutional authority also existed. The statement in text omits the exception for disputes to which an ambassador or similar minister of a foreign state is a party, in which case party diversity is irrelevant. Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 VA. J. INT’L L. 649 (2002).

56. THIRD RESTATEMENT, *supra* note 4, § 111 cmt. f.

57. 488 U.S. 428, 443 (1989); THIRD RESTATEMENT, *supra* note 4, §§ 454 reporters’ note 1, 457 reporters’ note 7.

58. 569 U.S. 108, 124-25 (2013).

59. 138 S. Ct. 1386, 1407 (2018). One Court of Appeals has tried to breathe life into the ATS after *Jesner*. *Doe v. Nestle*, 906 F.3d 1120 (9th Cir. 2018).

Supreme Court have indicated that it covers nothing that would not otherwise fit under the diversity prong of federal court subject-matter jurisdiction, putting aside the amount-in-controversy requirement.⁶⁰ To the extent this is so, the ATS cannot bolster the case for the status of customary international law as federal law for arising-under purposes.

In addition to cases involving public and private international law, courts and scholars have argued that the presence of a foreign relations element in a dispute might count as raising a federal question justifying federal court jurisdiction. They in particular have pressed a “one voice” conception of federal court subject-matter jurisdiction. The argument asserts that any issue that implicates “important foreign policy concerns” requires federal common law and thus triggers the “arising under” requirement for federal court jurisdiction.⁶¹ The Third Restatement indicated its approval of this extension of federal court power.⁶² The Fourth Restatement does not mention this doctrine and does distinguish between the general statute providing for “arising under” jurisdiction and the less exacting requirements of Article III.⁶³ Recent scholarship reports that the federal courts have not invoked foreign relations arising-under jurisdiction in recent decades, although it is too early to declare the concept definitively rejected.⁶⁴ In this critical doctrinal battleground, the Fourth Restatement suggests that the one-voice principle is deflated, if not yet empty.

3. *Forum Non Conveniens*

The doctrine of forum non conveniens permits a court to stay or dismiss a suit in favor of another forum. The doctrine applies not only to motions to defer to another U.S. forum, but also to foreign courts and tribunals.⁶⁵ The decision to defer or not to a foreign jurisdiction might be seen as implicating

60. *Jesner*, 138 S. Ct. at 1410 n.* (Alito, J., concurring in part and concurring in the judgment); *id.* at 1414-18 (Gorsuch, J., concurring in part and concurring in the judgment).

61. *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997); *Republic of Phil. v. Marcos*, 806 F.2d 344, 352 (2d Cir. 1986). *Torres* involved access to a federal court by a defendant seeking removal so as to invoke the federal doctrine of forum non conveniens. *Marcos* involved a suit filed against a former head of state. Both cases could be seen as extending the holding of *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1982), which had upheld the authority of Congress under Article III to base “arising under” jurisdiction on the presence of a potential defense codified by a federal statute. Harrison, *supra* note 6, at 1703 n.220. But in both *Torres* and *Marcos*, unlike *Verlinden*, only the general “arising under” jurisdictional statutes applied, and settled doctrine had barred their use when the federal-question issue served as a defense, rather than as a basis for the cause of action. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

62. THIRD RESTATEMENT, *supra* note 4, § 111 reporters’ note 4.

63. FOURTH RESTATEMENT, *supra* note 2, § 421 reporters’ note 3.

64. *Compare* Wuerth, *supra* note 6, at 1851 (noting desuetude), *with* Goldsmith, *supra* note 6, at 1636 (writing when cases were fresh).

65. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

the foreign relations of the United States, inasmuch as the doctrine requires a U.S. court to determine the adequacy of, and thus to pass judgment on, the alternate forum. A failing grade might provoke irritation and even retaliation by the foreign nation whose courts have been attacked.

Piper Aircraft Co. v. Reyno, the first Supreme Court decision to apply the doctrine in an international context, avoided the issue by leaving the question open.⁶⁶ It recognized that, in a diversity case, the *Erie* doctrine might require a federal court to determine what the State doctrine did, but also indicated that, if the doctrine involves a forum's internal housekeeping rather than a substantive rule of decision, *Erie* would be irrelevant. Thirteen years later, *American Dredging Co. v. Miller*, an admiralty case, held that a State court could refuse to apply the doctrine in spite of the federal nature of admiralty law.⁶⁷ Critical to the Court's decision was that the *forum non conveniens* issue is one of procedure rather than substance.⁶⁸

Because *American Dredging* involved a domestic, rather than a foreign, alternative forum, one cannot read it as definitively excluding the possibility that the doctrine might preempt State procedural law in instances where the interests of a foreign sovereign might be at stake. No case, however, has held that a State court must apply the federal *forum non conveniens* doctrine in these circumstances, and State courts have asserted their right to disregard that doctrine in international cases.⁶⁹ The Fourth Restatement accordingly recognizes that States may apply their own conception of the doctrine (including, in some jurisdictions, its abolition) even where the alternative forum is foreign.⁷⁰

4. *Choice of Law*

Under the Full Faith and Credit Clause of the U.S. Constitution and related legislation, the States must recognize and enforce the judgments of the courts of the other States.⁷¹ When it comes to the application of another

66. *Id.* at 248-49 n.13.

67. 510 U.S. 443, 453 (1994).

68. *Id.* at 453-54. For a later international case indicating that the doctrine, characterized as procedural rather than substantive, turns on the federal forum in which the case is heard, rather than the State jurisdiction in which the forum is located, see *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1314 (11th Cir. 2002).

69. *See, e.g.*, *Tananta v. Cruise Ships Catering and Servs. Int'l, N.V.*, 909 So. 2d 874, 881, 884 (Fla. Dist. Ct. App. 2004); *Coto v. J. Ray McDermott, S.A.*, 709 So. 2d 1023, 1029-30 (La. Ct. App. 1998); *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 434-35 (Tex. 1999); *Exxon Corp. v. Choo*, 881 S.W.2d 301, 303 (Tex. 1994).

70. FOURTH RESTATEMENT, *supra* note 2, § 424 cmt. *b* & reporters' note 2.

71. U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2012). An exception to this rule allows one State to refuse to honor another State's judgment where the first State lacked jurisdiction to issue its judgment. *Williams v. North Carolina*, 325 U.S. 226, 230 (1945).

State's law to a case over which its courts have jurisdiction, however, States enjoy a wide, even if not limitless, range of discretion as to which conflicts rules to apply.⁷² There is no clear evidence that involvement of the law of a foreign state, rather than of a sister State, materially affects that range.⁷³

One may contrast this *laissez faire* approach under national law with the evolving view of the Restatements as to the requirements of international law. The Second Restatement indicated that public international law provides some, if minimal, support for the rules of private international law:

Under the rules of the conflict of laws of states that have reasonably developed legal systems, a state may refuse to give effect to the rules of another on many grounds Even so, the rules of conflict of laws of states that have reasonably developed legal systems are not predicated on the proposition that a state may arbitrarily deny effect to the rules of another. They reflect an assumption that there must be some standards governing the matter. While these standards leave to states very broad freedom in deciding whether to deny effect to the rules of others, they ensure nevertheless a minimum measure of order in their legal relationships. A state would be in violation of international law if it disregarded these standards and proceeded to deny effect to the rules of another on a basis which was inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.⁷⁴

The Third Restatement arguably went a step further by seeing in international law an obligation for U.S. courts to defer to foreign rules in circumstances where the exercise of U.S. prescriptive jurisdiction was unreasonable.⁷⁵

The Third Restatement framed its account of reasonableness in choice of law as a general principle applicable to all exercises of prescriptive jurisdiction. Its Reporters' Notes, however, looked exclusively at limitations on the application of federal law. Perhaps, in light of the Reporters' views about the strong preemptive effect of foreign relations law on the States, they did not think it possible that an unreasonable exercise of State prescriptive

72. FOURTH RESTATEMENT, *supra* note 2, § 403 reporters' note 4; Paul B. Stephan, *Competing Sovereignty and Laws' Domains*, 45 PEPP. L. REV. 239, 292-95 (2018).

73. Stephan, *Inferences*, *supra* note 6, at 1805. When exercising the discretion accorded them under the Constitution and federal statutes, States may come to different choice of law outcomes when considering application of the law of a foreign state, rather than a sister State. RESTATEMENT (THIRD) OF THE LAW OF CONFLICTS § 1.04 cmt. *d* (AM. LAW INST., Council Draft No. 2, 2017).

74. SECOND RESTATEMENT, *supra* note 29, § 9 cmt. *a*.

75. THIRD RESTATEMENT, *supra* note 4, § 403.

jurisdiction could be constitutional, whatever the role of international law. But the Third Restatement did not make this argument.⁷⁶

The Fourth Restatement, in contrast, sharply distinguishes between public international law, which it portrays as obligatory, and private international law, which it sees as resting on nonbinding if benign principles of international comity. In keeping with this distinction, it characterizes the reasonableness-in-prescriptive-jurisdiction principle as a rule of interpretation of federal statutes based on prescriptive comity, not as an obligation of international law.⁷⁷ It further endorses the principle that State exercises of prescriptive jurisdiction face no international law limits that do not apply to the national government.⁷⁸

It appears, then, that the Fourth Restatement eliminates the question whether the customary rules of international conflicts might function as federal common law that binds the States by denying that this category qualifies as international law. Framing this point as a syllogism, it rejects the minor premise that would have engaged the major premise equating international law with federal law.

5. *Choice of Forum*

Contractual choices of forum come in two types. One designates an arbitral tribunal, the other a particular nation's courts. Under U.S. law, agreements to arbitrate disputes with an international dimension come under a treaty (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) and a statute (Chapter Two of the Federal Arbitration Act).⁷⁹ Both these instruments are uncontroversially federal and thus should preempt State law.⁸⁰ The United States has signed, but not yet ratified, a treaty that would do the same for choice of forum contracts governing international civil or commercial matters.⁸¹ A dispute over the manner of its implementation,

76. The Third Restatement in particular nowhere discusses the Supreme Court's jurisprudence on the constitutional limits of State exercises of prescriptive jurisdiction. *See infra* text accompanying note 2066.

77. FOURTH RESTATEMENT, *supra* note 2, § 405; Dodge, *supra* note 51.

78. FOURTH RESTATEMENT, *supra* note 2, §§ 404 reporters' note 5, 406 reporters' note 4. Unlike the Third Restatement, the Fourth Restatement does indicate that the Constitution imposes distinct limits on the extraterritorial application of prescriptive jurisdiction by the States. *Id.* § 403 reporters' note 4.

79. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 1, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38; 9 U.S.C. §§ 201-08 (2000).

80. A dispute does exist as to the self-executing status of the New York Convention. If it is not self-executing, then there would be no preemption. RESTATEMENT OF THE U.S. LAW OF INT'L COMMERCIAL AND INV. ARBITRATION §§ 1-1, reporters' note k, 1-6, reporters' note a(iv) (AM. LAW INST., Proposed Final Draft, Apr. 24, 2019); Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT'L L. 115, 115-16 (2018).

81. Hague Convention on Choice of Court Agreements art. 3, June 30, 2005, 44 I.L.M. 1294.

and in particular whether to leave to the States the right to adopt necessary laws or instead to displace State law with federal rules, has held up its ratification.⁸²

The courts seem to accept fully that there is no general federal common law governing the interpretation and enforcement of contractual clauses choosing a foreign court as a forum. The Supreme Court's leading case, *The Bremen v. Zapata Off-Shore Co.*, applied admiralty law to uphold such a contract.⁸³ Admiralty law is generally thought of as a specific kind of federal law, but not as general federal common law.⁸⁴ Cases extending *The Bremen* outside of admiralty mostly have looked to the law of the forum to determine the validity of such clauses. In cases where a federal court has subject-matter jurisdiction (normally because of diversity), the courts have regarded the issue as a procedural one subject to federal law, rather than as a substantive issue to which State law (including State choice of law rules) must apply under *Erie*.⁸⁵ No court has held that there exists a federal common law governing the validity of choice of forum contracts that binds State courts.

The Third Restatement noted the shift in U.S. law in favor of enforcement, but did not indicate the source of law bringing about that result.⁸⁶ The Fourth Restatement, in contrast, declares that, "[i]n State court, the enforceability of a clause choosing a foreign court is governed by State law."⁸⁷ Moreover, in disputes over the interpretation, rather than the validity, of such a clause, the Restatement indicates that the law governing the contract, which almost never would be federal law, applies.⁸⁸

6. Recognition and Enforcement of Foreign Judgments

The treatment of the status of foreign judgments in the United States by the Third and Fourth Restatements illustrates the shift away from federalizing private law rules with foreign relations implications. As a general matter, State

82. See Peter D. Trooboff, *Implementing Legislation for the Hague Choice of Courts Convention*, in FOREIGN COURT JUDGMENTS IN THE UNITED STATES LEGAL SYSTEM 131, 138, 146 (Paul B. Stephan ed., 2014); see also David P. Stewart, *Implementing the Hague Choice of Court Convention: The Argument in Favor of "Cooperative Federalism"*, in FOREIGN COURT JUDGMENTS IN THE UNITED STATES LEGAL SYSTEM, *supra* at 147, 147-48.

83. 407 U.S. 1, 9-11 (1972).

84. Stephan, *Inferences*, *supra* note 6, at 1800-02.

85. E.g., *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 650 (4th Cir. 2010). *But cf.* *Abbott Labs. v. Takeda Pharm. Co.*, 476 F.3d 421, 423 (7th Cir. 2007) (clause governed by the law governing the rest of the contract). See generally Rachel Kincaid, *Foreign Forum-Selection Frustrations: Determining Clause Validity in Federal Diversity Suits*, 4 STAN. J. COMPLEX LITIG. 131, 156-64 (2016) (defending treatment of the issue as procedural for purposes of *Erie*).

86. THIRD RESTATEMENT, *supra* note 4, §§ 421 reporters' note 6, 482 reporters' note 5.

87. FOURTH RESTATEMENT, *supra* note 2, § 424 reporters' note 6. Conversely, "[i]n federal court, the enforceability of a clause choosing a foreign court is governed by federal law." *Id.*

88. *Id.*

law, and in the majority of States a statute based on a model law produced by the Uniform Law Commission, governs the recognition and enforcement of money judgments issued by foreign courts.⁸⁹ The Third Restatement did not reject this allocation of authority, but proposed a limitation. It maintained:

Ordinarily, a decision of a State court granting or denying recognition to a foreign judgment is not subject to review by the United States Supreme Court, unless the decision raises questions under the United States Constitution, for example, intrusion into the foreign affairs of the United States⁹⁰

This represented a specific instance of a general stance of the Third Restatement. It embraced the dictum of *United States v. Belmont* that, “[i]n respect of . . . our foreign relations generally, state lines disappear. As to such purpose the State . . . does not exist.”⁹¹ As a result, even entrenched rules in areas traditionally regarded as exclusive State enclaves, such as intestate succession or recognition of foreign judgments, could be ousted where smooth foreign relations demanded.

The Fourth Restatement, while not repudiating the Third, sets a different tone. In the interval, Congress had enacted a law, the SPEECH Act, that federalized a narrow slice of the law governing foreign judgments.⁹² The Reporters responded. In line with the Third, it observes that the “recognition and enforcement of foreign judgments in the United States are generally governed by State law.”⁹³ A reporters’ note elaborates:

[I]t has been accepted that, in the absence of a federal statute or treaty, State law governs the enforcement of foreign-country judgments There are two principal exceptions to the general rule that the recognition and enforcement of foreign judgments are governed by State law. First, the federal SPEECH Act, 28 U.S.C. §§ 4101-4105, governs the recognition and enforcement of foreign defamation judgments in both federal and State courts Second, the preclusive effect of foreign judgments with respect to federal-law claims is governed by federal law The United States is not party to any

89. Recognition and enforcement of non-U.S. arbitral awards, by contrast, are governed by the New York Convention and the Federal Arbitration Act. RESTATEMENT OF THE U.S. LAW OF INT’L COMMERCIAL AND INV. ARBITRATION, *supra* note 80, § 1.9(b).

90. THIRD RESTATEMENT, *supra* note 4, § 481 cmt. *a*. The comment cited § 1 reporters’ note 5 of that Restatement, which in turn advanced *Zschernig v. Miller*, 389 U.S. 429, 432 (1968), as authority that State law that “intrudes” in foreign relations is unconstitutional. *See* THIRD RESTATEMENT, *supra* note 4, § 1 reporters’ note 5.

91. 301 U.S. 324, 331 (1937); THIRD RESTATEMENT, *supra* note 4, § 1 reporters’ note 5; *supra* text accompanying notes 13-14.

92. 28 U.S.C. §§ 4101-05 (2010).

93. FOURTH RESTATEMENT, *supra* note 2, § 481 cmt. *a*.

treaty requiring the recognition and enforcement of civil judgments . . . Customary international law imposes no obligation on states to give effect to the judgments of other states.⁹⁴

The Fourth Restatement gives no indication that a simple “intrusion” of a State rule in foreign relations might bring about its invalidity. As with private international law, the Fourth Restatement’s treatment of foreign judgments avoids the international-law-as-federal-law issue by finding no international law and does not propose applying a general principle of foreign relations preemption to crowd out State law. The next section expands upon the latter point.

7. *General Preemption*

Defending the “one voice” of the United States in foreign relations requires more than mobilizing the resources of the national government, the federal judiciary in particular, to enforce international law. It also requires suppressing aspects of State law that add noise to the signal that the national government seeks to send to the rest of the world. This logic would support a robust preemption doctrine that invalidates State law not only when it contradicts federal law, but also when it complicates foreign relations in the absence of positive federal law.

Preemption doctrines overlap with, but operate independently of, the dormant commerce clause.⁹⁵ Both have the functional effect of reserving an area of law for exclusive federal lawmaking, with the consequence that any relevant State law is invalid. Preemption typically presumes a federal enactment that, under the Supremacy Clause, bars any inconsistent State law. The hard question then becomes what counts as inconsistency.⁹⁶ In *Zschernig v. Miller*,⁹⁷ the Court applied preemption even to matters that may not fit into the constitutional conception of foreign commerce, which limits commerce clause preemption.

The kind of preemption on which the Third Restatement focused, and the extension of which most foreign relations scholars have advocated, instead posits an area of law that, independent of the presence of any federal enactment, drives out State law. The argument relies heavily on *Zschernig*, where a self-executing treaty ousted State rules with respect to real estate but

94. *Id.* § 481 reporters’ note 1.

95. *See supra* text accompanying notes 21-22.

96. *See, e.g.,* *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 421-27 (2003); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-74 (2000). An older example is *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941) (invalidating State alien registration law because federal statute had occupied the field). *See* FOURTH RESTATEMENT, *supra* note 2, §§ 308 cmt. *c*, 403 reporters’ note 5.

97. 389 U.S. 429 (1968).

not personal property.⁹⁸ The majority interpreted the State rules as an effort to take part in the Cold War and thus an impermissible interference with the federal government's exclusive authority over foreign relations.⁹⁹

The Third Restatement broadly embraced the idea that any State law that interfered with foreign relations was subject to preemption, citing *Zschernig* repeatedly as a template to be employed and extended. As part of its depiction of the modest role of States in the field of foreign relations law, it proclaimed:

Supremacy implies that State law and policy must bow not only when inconsistent with federal law or policy but even when federal authority has shown a purpose, by “preemption” or “occupying the field,” to exclude even State activity that is not inconsistent with federal law or policy.¹⁰⁰

The reference to “policy” ensured that issues touching on matters in which the national executive might be engaged, even in the absence of any positive law, would come within foreign relations preemption. The Restatement said little about what counted as impermissible intrusion into this field, but invited the federal courts to do much.

Because of the limited mandate that its reporters received, the Fourth Restatement does not propose any general approach to federal preemption of State law. Its passing references to the doctrine, however, suggest a more modest scope. It notes that the more recent decisions of the Court have based preemption on inconsistency with positive federal enactments, rather than with intrusion as such. It observes that the emerging doctrine “suggests that States may act within the areas of their traditional competence even if the action has foreign policy implications, as long as no conflict with federal law exists.”¹⁰¹ It recognizes the validity of preemption when a federal enactment

98. *Id.* at 432-33 (following *Clark v. Allen*, 331 U.S. 503, 516-17 (1947)). Justice Harlan, concurring in the judgment only, would have extended the preemptive effect of the treaty to personal property and thus avoided the question of categorical preemption. *Id.* at 445-51 (treating *Clark* as expressing erroneous dicta about treaty's scope).

99. “It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. . . . The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy.” *Id.* at 440-41.

100. THIRD RESTATEMENT, *supra* note 4, § 1 reporters' note 5 (citing *Zschernig*). Other references to *Zschernig* include *id.* §§ 208 reporters' note 4, 302 cmt. *d*, 326 reporters' note 2, 402 reporters' note 5.

101. FOURTH RESTATEMENT, *supra* note 2, § 403 reporters' note 5. For suggestions of *Zschernig*'s growing obsolescence, see *Garamendi*, 539 U.S. at 419-20 (“It is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions, but the question requires no answer here.”); Ernest A. Young, *Foreign Affairs Federalism in the United States*, in OXFORD HANDBOOK OF COMPARATIVE INTERNATIONAL LAW 259, 268 (Curtis A. Bradley ed., 2019); Bradley, *supra* note 4, at 622 n.153, 628; see also *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (plurality opinion) (“Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win

expresses an intent to occupy a particular field, but does not depict foreign relations law as such as broadly ousting State law.¹⁰² In particular, it rejects the invocation of any presumption regarding the preemptive effect of self-executing treaties.¹⁰³

8. *Summary: The Decline of One Voice as a Basis for Judicial Power*

Thirty years out from the Third Restatement's call for federalization of foreign relations law, the project seems endangered. The twin pillars of the nationalist position – insisting on the importance of a coherent, monolithic body of law to govern foreign relations and assigning the task to achieve this to the federal courts – have eroded, notwithstanding the enthusiastic support of many in the legal academy. The Supreme Court, generally unimpressed with arguments for increasing the lawmaking discretion of the federal courts, has not treated foreign relations law as different. It has both resisted the federalization of the unwritten portion of public international law and ignored academic arguments for federalizing areas traditionally seen as part of private international law. The presence of a foreign relations element in a controversy no longer results in preemption that automatically invalidates State law.

The direction of change seems clear, but what will result remains uncertain. Each element of the drift away from the nationalist position might be explained on the basis of particular factors, rather than as indicating a general trend. We do not yet know how much of the law affecting foreign relations will remain for the States to make in the absence of enacted federal law, nor what standards will guide the preemptive scope of federal enactments.

In the face of this uncertainty, how might the law evolve? The next two Parts make functional arguments against development of foreign relations law by the federal judiciary in the absence of guidance from the political branches. They indicate that the risk of leaving these matters to State lawmaking is not as great as supporters of the nationalist position suppose, and that the likelihood that the federal courts will do better is scant.

III. LAW IN THE ERA OF GLOBALIZATION: CENTRALIZED VERSUS DISTRIBUTED LAWMAKING

preemption of a state law; a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law.').

102. FOURTH RESTATEMENT, *supra* note 2, § 308 cmt. *c*.

103. *Id.* § 308 reporters' note 2. This conclusion, whatever its accuracy as a statement of the Court's current views, has drawn criticism. See DAVID L. SLOSS, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE (2016); Carlos Manuel Vázquez, *Four Problems with the Draft Restatement's Treatment of Treaty Self-Execution*, 2015 B.Y.U. L. REV. 1747, 1749.

A. Competing Visions of Foreign Relations Lawmaking: A Theoretical Framework

Underlying the debate between the nationalist and revisionist positions in foreign relations law are profoundly different, if unstated, assumptions about how lawmaking works. The nationalists imagine a welter of State and local actors that seek to exploit the network of global economic and political connections for parochial gains. The federal judiciary, in contrast, will express a common commitment to reasoned application of unifying principles and a devotion to the rule of law. The Supreme Court serves as the repository of these principles and a guardian of the commitments. It monitors subordinate courts, both federal and State, to detect defections as well as to resolve good-faith disagreements over how these ideals cash out in particular cases. It imposes order through its decisions, which function as commands both in the particular – its disposition of cases – and the general – its announcement of rules and reasons that bind lower courts. For the judiciary, foreign relations law is centralized and functions through a command-and-control system that depends on the lower court’s obedience to orders and principled adherence to Supreme Court precedent.

The revisionist position does not deny that State and local lawmakers are selfish and have the potential to threaten national interests. It posits, however, broad economic and political forces that can rein in their potential for mischief. These actors must balance short-term gains from opportunistic rules that favor local interests against the cost of discouraging outsiders from investing in and doing business with local actors. This view posits that, under certain specified conditions (sufficiently long time horizons, limited gains from opportunism, significant losses from lost contacts), a substantial portion of State and local lawmakers will pursue generally desirable outcomes, rather than parochial interests.¹⁰⁴

B. Foreseeable Disputes and the Provision of Law

When people enter into relationships that they know might lead to conflicts, they can take precautions through contracts and distribution of assets. Sophisticated, repeat-player actors can select jurisdictions for resolution of their disputes (choice of forum) as well the rules that the jurisdiction will apply (choice of law). They also can locate their assets and

104. For a summary of these arguments in the context of “race to the top” regulatory regimes, see Paul B. Stephan, *Regulatory Cooperation and Competition: The Search for Virtue*, in *TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 167, 170-74 (George A. Bermann, Matthias Herdegen & Peter L. Lindseth eds., 2000).

people so as to stay away from problematic jurisdictions that present unacceptable legal risk (asset partition).¹⁰⁵

This general feature of law applies directly to the States. Widely used legal tools, such as choice of law and choice of forum contracts as well as asset partitioning achieved through limited liability entities, reward jurisdictions that supply law that transactors want by channeling transactions in their direction, and punish jurisdictions that surprise and disturb transactors through boycotts. Where jurisdictions prefer to host transactions and the assets and people involved in them, they have a reason to respond to such incentives. Tax revenues and positive externalities to transactions, including local employment and the supply of other inputs to support transactions, provide these reasons.

A complicating factor within the United States is the general portability of State court judgments as a result of the Full Faith and Credit Clause of the Constitution.¹⁰⁶ Renegade States can prey on outsiders by applying local laws that impose disproportionate burdens on them as long as the outsider has a constitutionally sufficient presence in the jurisdiction. The beneficiaries of this predation then can take the judgments to places within the United States where the outsider has attachable assets. To the extent potential victims of State prejudice cannot avoid those jurisdictions, the incentives not to predate are dampened.

Perhaps for this reason, the Supreme Court over the last thirty years has adjusted the constitutional law governing in personam jurisdiction to tighten the rules for suing an outsider in a particular jurisdiction. A State can permit lawsuits based on any and all claims against a defendant only if that person is “at home” in the forum.¹⁰⁷ A forum also can host suits against other defendants if the claim arises out of the defendants’ reasonably sufficient contacts with the forum.¹⁰⁸ Recent decisions, although not as clear as one might desire, indicate some movement toward greater restraints on State assertions of this jurisdiction. Scholars have criticized the most recent

105. See Paul B. Stephan, *Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 VA. L. REV. 17, 55-64 (2014) (describing mechanisms for controlling legal regimes applicable to transactions).

106. The Full Faith and Credit Clause of the Constitution provides: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. CONST. art. IV, § 1. Congress in turn exercised its authority by adopting legislation currently codified in 28 U.S.C. § 1738 (2019), which states judicial proceedings of any court of a State, territory or Possession “shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”

107. *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); FOURTH RESTATEMENT, *supra* note 2, §§ 422 cmt. *c* & reporters’ note 4.

108. *Walden v. Fiore*, 571 U.S. 277 (2014); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011); FOURTH RESTATEMENT, *supra* note 2, §§ 422 cmt. *c* & reporters’ notes 6-7.

decisions as unduly restricting access to U.S. courts for victims of injuries caused by foreign businesses.¹⁰⁹ What the critics miss, however, is that these restrictions align the incentives of States to provide and apply law with the interests of persons who want to transact with each other across national boundaries.

Of course, the benefits from fixing the alignment problem may not justify other costs from restricting access.¹¹⁰ Some disputes arise out of situations where people did not intend to interact with each other, as when one person creates a risk of harm to third parties outside of any preexisting relationship. Because injurers and victims do not have the opportunity to negotiate, they must fall back on State-supplied liability rules under circumstances where the State may have an incentive to favor one side or the other, rather than to offer optimal rules that distinguish desirable from harmful risk-taking.¹¹¹ This scenario is considered below.

C. *Third-Party Victims and the Market for Law*

Concern about discriminatory State law might flow from either of two scenarios. A State might impose an unexpectedly high liability on a foreigner for injuries inflicted on its occupants. An example is the extraordinary billion-dollar judgment imposed by a Mississippi trial court on a foreign investor, an event that led to a treaty claim against the United States.¹¹² Alternatively, it might protect a local actor from liability for injuries inflicted on foreigners.¹¹³ In either case, instrumental incentives might not suffice to reduce the incidence of these forms of State opportunism.

These possibilities make a case for some rule regulating State discrimination against foreigners. Arguably such a doctrine already exists, at least where the State misconduct has an impact on what current law capaciously regards as “commerce.” The dormant foreign commerce clause at a minimum invalidates State discrimination against foreign interests.¹¹⁴ It is an open question whether it limits States more when transactions involve

109. Bookman, *Litigation Isolationism*, *supra* note 9, at 1091-93; Born, *Federalizing International Law*, *supra* note 3; *see also* William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1229-32 (2018).

110. For arguments in favor of maximizing the opportunity of victims for access to justice that do not rest on the one-voice principle, see sources cited *supra* note 9.

111. Paul B. Stephan, *The Political Economy of Choice of Law*, 90 GEO. L.J. 957, 964-67 (2002).

112. Loewen Grp. Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award, (June 26, 2003). For analysis of the case and what it represents, see Paul B. Stephan, *Redistributive Litigation-Judicial Innovation, Private Expectations, and the Shadow of International Law*, 88 VA. L. REV. 789, 811-12, 835-37 (2002).

113. This is the classic criticism of Delaware’s law of corporate governance. ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932). For a rebuttal, see ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993).

114. *See supra* text accompanying notes 21-23.

aliens.¹¹⁵ And the Justices disagree whether it also invalidates State measures that lack an evident discriminatory purpose but that somehow “burden” commerce.¹¹⁶

To want a stronger dormant foreign commerce clause, one must believe either that States engage in subtle forms of subversion of foreign relations that the dormant commerce clause cannot police or that their localist interests harm foreigners in areas that fall outside the scope of that clause. As noted above, a concern that neither the positive or negative commerce clauses might extend to interstate succession may have motivated the *Zschernig* majority to frame its decision as a preemption case.¹¹⁷ More recent cases also indicate some instability about the limits of commerce for purposes of Article I of the Constitution.¹¹⁸ Presumably the category of “foreign relations” to which the *Zschernig* preemption doctrine applies eliminates this concern.

What is interesting about the Court’s more recent foreign relations preemption cases is their focus on the inconsistency of State law with an act of the federal government, rather than the conduct of foreign affairs as such. In *American Insurance Association v. Garamendi*, it invalidated a California law that undermined no formal enactment, but rather undercut decisions made by the executive in the course of implementing that branch’s exceptional authority to resolve property and contract disputes between foreign states and U.S. nationals.¹¹⁹ The inconsistency perceived to exist between Massachusetts’s Myanmar sanctions and the national ones was tangible but not overwhelming.¹²⁰ These cases may suggest that the Court’s reluctance to apply

115. Compare *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994), *with id.* at 331 (Scalia, J., concurring in the result) (prescribing limited rule for preemption that does not distinguish between foreign and interstate commerce).

116. In his first Term on the Court, Justice Scalia launched an attack on extending the dormant commerce clause (both interstate and foreign) beyond instances of discrimination. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987) (Scalia, J., concurring in part and concurring in the judgment); *Tyler Pipe Indus., Inc. v. Washington State Dep’t of Revenue*, 483 U.S. 232, 254 (1987) (Scalia, J., concurring in part and dissenting in part); *Am. Trucking Ass’ns v. Scheiner*, 483 U.S. 266, 303 (1987) (Scalia J., dissenting). He remained faithful to this position for the remainder of his life. Although no majority fully embraced his position, the Court moved in that direction over the ensuing decades. See, e.g., *Dep’t of Revenue v. Davis*, 553 U.S. 328 (2008).

117. *Supra* text accompanying note 97.

118. Compare *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (Commerce Clause does not permit universal mandate to purchase health insurance), *with Gonzales v. Raich*, 545 U.S. 1 (2005) (Commerce Clause does apply to intrastate consumption of marijuana for medical purposes). See generally Barry Cushman, *Federalism*, in *THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION* 185, 222-23 (Karen Orren & John W. Compton eds., 2018) (reviewing history of Commerce Clause jurisprudence).

119. *Garamendi*, 539 U.S. at 420-21.

120. Compare *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (basing preemption of State sanctions law on conflict with a federal statute regulating the same subject). The *Garamendi* majority emphasized that the case involved presidential authority to make “executive agreements to settle claims of American nationals against foreign governments.” *Garamendi*, 539 U.S. at 415-16 (relying on *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (holding that the President may enter into such agreements without express congressional authorization)). *Crosby*, by contrast did not involve the claims-settlement function.

categorical foreign affairs preemption stems from the doctrine's open-ended nature, not a preference for State lawmaking as such. Where the national government has spoken, even if more by mumbling than with precision, the Court acceded to the recruitment of the federal courts to implement the decisions of the political branches, even at the expense of the States.

Finally, one might argue that a focus on discrimination misses the point. States might impede foreign relations simply by disagreeing about substantive rules, creating legal confusion that can impair foreign relations even if not motivated by animus to outsiders or protection of residents. The one-voice concept assumes that uniformity is valuable and that State law will be various. An ambitious form of *Zschernig* preemption can meet this need, if need it is, by imposing uniform federal rules.

The legal uncertainty produced by variations in the applicable law, however, matters only in contexts where people take law into account when planning their affairs. People undoubtedly can expect that unanticipated contacts between actors and third parties that produce harm will occur. But, insurance aside, law offers few ways to manage in advance such legal risk. Even decisions about insurance coverage are limited by uncertainty about what kinds of claims might originate where. Actors, including those involved in transnational transactions, presumably know that they will face sanctions if they harm people. They often have some ability to avoid risky activity. Managing the location of risk, however, may be more challenging than adjusting its overall level. And absent some ability to anticipate where harms will occur, variation in law among localities should not be much of a factor in influencing how people behave, except for extreme and surprising outcomes that induce boycotts.

D. Distributed Lawmaking and Foreign Relations: The Evidence

If State interference with foreign relations is a problem, we should expect to see both federal efforts to suppress such conduct and instances where States adopt laws that burden transnational transactions. A review of actual legal practice does not uncover such acts. Congress occasionally adopts laws that exclude States from acting in particular areas, but more commonly it only prohibits discrimination against foreign nationals. Instances of State hostility to foreigners are rare, while efforts to adopt uniform legal standards to encourage more transactions with foreigners, both business and personal, are common.

1. Federal Actions to Limit State Authority

Legislation that expressly ousts the States from regulating categories of transnational transactions is unusual. An important instance where Congress did this is Chapter 2 of the Federal Arbitration Act, which implements U.S. obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹²¹ Even here there is a debate over the possible survival of residual State authority.¹²² More often, ousting occurs when courts find an implicit exclusion of State activity through inferences drawn from legislation, often while invoking the one-voice slogan.¹²³

Some federal enactments use an alternative strategy of formalizing the non-discrimination rule already imposed by the dormant foreign commerce clause.¹²⁴ Many U.S. treaties dealing with trade, commerce, and investment contain a rule of national treatment.¹²⁵ This norm sets no minimum standard for the legal rights of aliens, but rather requires that the same rules apply to nationals of the obligated (or host) state and nationals of the other states protected by the treaty. For the United States, such provisions bind the national government to a rule that, through the dormant foreign commerce clause, already applies to the States.

An emerging pattern in some U.S. treaties addressing private international law is to encourage cooperative federalism.¹²⁶ One approach is to invite States to adopt a conforming law that meets certain requirements, with a federal template serving as a backstop in the absence of a State enactment.¹²⁷ Instances of this approach include the UNCITRAL Model Law on Electronic Commerce and the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.¹²⁸ In implementing both these international instruments, the United States endorsed a model law crafted by the Uniform Law Commission and adopted by the States.¹²⁹ A federal statute lays down minimal legal requirements that apply in the absence of a State enactment, which in turn are superseded once a State adopts the

121. 9 U.S.C. §§ 201-08 (2000).

122. *See supra* note 80.

123. *See supra* note 1011.

124. *See supra* text accompanying notes 21-24.

125. John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 318-21, 353-56 (2013).

126. *See* Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131 (2017).

127. *See* Stephan, *What Story Got Wrong*, *supra* note 6, at 1051-59.

128. G.A. Res. 51/162, annex, Model Law on Electronic Commerce (Jan. 30, 1997); Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, Treaty Doc. 110-21. By way of contrast, for the Hague Securities Convention, the United States determined that it would regard the treaty as self-executing, resulting in federal law that displaced certain provisions of Articles 8 and 9 of the Uniform Commercial Code. S. Treaty Doc. No. 112-6, at VIII (2012) (enacted); H.R. Res. 4511, 114th Cong., 162 CONG. REC. S6195 (2016).

129. Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000); Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 301, 128 Stat. 1919 (2014).

uniform law.¹³⁰ Implementation of the Hague Convention on Choice of Court Agreements, a treaty that the United States has signed but not ratified, might follow a similar path.¹³¹

Finally, some private international law treaties defer to State lawmaking by making it easy to escape the treaty regime. The most prominent example is the Convention on the International Sale of Goods, a multilateral instrument that displaces portions of domestic sales law.¹³² By its terms, the Convention allows the parties to opt out of its application.¹³³ In the United States, most lawyers and sophisticated international businesses try to avoid the Convention, favoring instead either State law or that of another country.¹³⁴ Where the Convention applies to actual contracts, it does so typically because parties (and their lawyers) were unaware that an unadorned reference to the law of some State runs the risk of renvoi, a mechanism by which State law is treated as selecting the Convention to govern the transaction.¹³⁵

To summarize, the federal government, and in particular Congress, has not been reluctant to collaborate with the States to develop law governing international transactions that affect foreign relations. Rather than insisting on uniform federal law administered by federal courts, Congress on occasion endorses the distribution of lawmaking. This practice may not establish the inevitability of distributed lawmaking in foreign relations, but it does demonstrate its possibility.

2. State Laws Addressing Foreign Commerce

Even more significant than the occasional expressions of federal deference to State lawmaking are State choices to make law that meets the

130. 15 U.S.C. §§ 7601-10 (2003) (allowing reverse preemption by Uniform Electronic Transactions Act); 42 U.S.C. § 664 (1981) (allowing reverse preemption by Uniform Interstate Family Support Act).

131. Stewart, *supra* note 82, at 155-58.

132. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3.

133. In particular, it allows states to opt out of Article 1(1)(b) of the Convention, which would apply the rules of the Convention in instances where the rules of private international law would lead to the application of the law of a contracting state even where parties to the contract do not all have places of business in a contracting state. The United States took advantage of this election to avoid application of the Convention in instances where the parties might not have expected it. 132 CONG. REC. 29879 (1986).

134. John F. Coyle, *The Role of the CISG in U.S. Contract Practice: An Empirical Study*, 38 U. PA. J. INT'L L. 195, 216-31 (2016).

135. *Id.* at 214-15, 234-38. An example of what might be called an ambush by renvoi leading to application of the Convention is *Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F.Supp.2d 1142, 1150 (N.D. Cal. 2001). The general inclination to avoid the Convention confirms what the theoretical literature predicts, namely that the Convention reflects the preferences of treaty-makers to achieve an international instrument but not that of consumers of sales law, who largely prefer legal certainty to legal uniformity. Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 INT'L REV. L. & ECON. 446 (2005); Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999).

needs of transnational actors. Some of these efforts entail adoption of uniform laws to promote harmonized law. Others involve cooperation with private entities to support standardized contracts that dominate particular business sectors.

An important example is the recognition and enforcement of foreign judicial judgments. A majority of States have adopted model laws to regulate parts of this field, namely the 1962 Uniform Foreign Money-Judgments Recognition Act, supplemented by the 2005 Uniform Foreign-Country Money Judgments Recognition Act.¹³⁶ The American Law Institute promulgated a proposed federal statute in 2006 that would have displaced State law in this field.¹³⁷ Some scholars have argued that the courts should go further by adopting a body of federal common law that would preempt these statutes even in the absence of congressional action.¹³⁸ Congress, however, has let State law continue to apply, except in the case of foreign defamation judgments.¹³⁹

In areas where there are no uniform laws, States have either adopted piecemeal enactments or used common law to address similar problems affecting foreign transactions. The application of forum non conveniens doctrine, like the recognition of foreign judgments, is an area that requires U.S. courts to assess the qualities of foreign courts.¹⁴⁰ When a court decides whether to dismiss a suit over which it has jurisdiction in favor of a foreign judicial system, the doctrine instructs it to consider the adequacy of the proposed foreign forum.¹⁴¹ These decisions might be seen as affecting foreign relations because a U.S. court, as a predicate to rejection of a motion to dismiss, might denounce a foreign country's judicial system. The Supreme Court, however, has indicated that the choices whether to use the doctrine and how to define its content depends on the law of the forum, not binding federal common law.¹⁴²

136. FOURTH RESTATEMENT, *supra* note 2, part IV, ch. 8 intro. note. These statutes apply only to money judgments, but State law governs the impact in U.S. courts of non-money judgments as well. *Id.* § 481 cmt. *a* & reporters' note 1.

137. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (AM. LAW INST. 2006).

138. Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 257 (1991); Brilmayer, *supra* note 3, at 319-20; Henkin, *supra* note 3, at 1558-59; *see also* John N. Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 262-63.

139. Securing the Protection of our Enduring and Established Constitutional Heritage Act, 28 U.S.C. §§ 4101-05 (2010); FOURTH RESTATEMENT, *supra* note 2, §§ 483(c), cmt. *g*.

140. *See supra* text accompanying notes 65-68. Deciding whether to recognize a foreign judgment is a retrospective inquiry, while the forum non conveniens doctrine considers prospectively whether a foreign court will provide an adequate alternative. Stephan, *supra* note 105, at 26-28.

141. As to motions in a federal court to dismiss in favor of another federal court, a federal statute has displaced the doctrine. 28 U.S.C. § 1404(a); *see also* FOURTH RESTATEMENT, *supra* note 2, § 424 reporters' note 1.

142. FOURTH RESTATEMENT, *supra* note 2, §§ 424 cmt. *B*, reporters' note 2.

In addition, issues about the choice of law to apply to a dispute turns on the law governing the underlying claim. Federal rules of choice of law, which largely rest on federal common law due to the absence of legislative guidance, apply to federal claims, while State or foreign state law governs the rest. A court is free to consider the customary practices encapsulated in private international law as a means of determining the content of a sovereign's choice of law rules, but it is not obligated to do so.¹⁴³

Turning from secondary rules allocating jurisdiction to primary ones imposing a substantive standard to regulate conduct, one is struck by how much international finance and commerce relies on the laws of U.S. States. This begins with the Uniform Commercial Code, which every State has adopted (only Louisiana omits the chapters on sale of goods, leases, and bulk sales). Moreover, every State gives effect to the standardized terms that prevail in important international transactions such as sales of goods (the Incoterms), letters of credit (the Uniform Customs and Practice for Documentary Credits), and derivatives and swaps (the ISDA master agreements).¹⁴⁴ Goods and services worth trillions of dollars a year cross the U.S. border in transactions that rely almost entirely on State, and not federal, law.

One cannot disprove that U.S. engagement with the rest of the world might have been even greater, but for this reliance on State law. By almost any tangible indicator, however, the last fifty years has seen remarkable growth in these contacts. Over this time, a period in which U.S. GDP has grown by a factor of 3.78 (inflation adjusted), exports grew by a factor of 6.98 and imports by 8.63.¹⁴⁵ Other indicators, such as size of capital flows and the level of international travel involving the United States, underscore the point.¹⁴⁶ The portion of commercial and private life that involves foreign relations has grown enormously under legal regimes that reject the one-voice idea of federal common law.

Perhaps even more significantly, the mix of functions lumped together as “the internet” – email transmission, the world wide web, cloud storage, and the like – depends mostly on State law for those transactions that have a nexus with the United States. The Internet Corporation for Assigned Names and Numbers (ICANN), the entity that regulates the domain-name registry and other aspects of internet governance, is chartered under California charitable corporation law. Whether one thinks of the cyberworld as a force for good or

143. RESTATEMENT OF THE LAW (THIRD) CONFLICT OF LAWS § 5.01 cmt. *c* (AM. LAW INST. Council Draft No. 2, 2017).

144. *See* Eternity Glob. Master Fund Ltd. v. Morgan Guar. Tr. Co., 375 F.3d 168 (2d Cir. 2004) (explaining and enforcing master agreement of International Swaps and Derivatives Association); Stephan, *supra* note 135, at 746, 780-84 (Incoterms and UCP).

145. For the underlying data, see U.S. Census Bureau, Foreign Trade, Historical Series, <https://www.census.gov/foreign-trade/statistics/historical/gands-1.pdf> (last visited Nov. 11, 2019).

146. *Id.*

evil, its presence and operations have taken on the force that they have without resort to uniform federal law.¹⁴⁷

On balance, then, the States seem to have a good track record in supplying law to support the growing engagement of the United States with the rest of the world. One might, of course, object to the terms of that engagement. One might indict the modern global economy as promoting income inequality, oligarchy, and deep social instability. For purposes of the one-voice controversy, however, it seems sufficient to observe that responsibility for these economic, social, and political problems falls on the federal and State governments alike. It does not seem as if one is undermining the other.

IV. FEDERAL COMMON LAW: THE PATH TO ENTROPY

Advocates of the nationalist position assume that the development of federal common law, initiated by the lower federal courts and shepherded by the Supreme Court, will trend towards order and reason. A single voice in foreign relations would not make much sense if that voice were incoherent. In this Part, I explore the structural features of federal common lawmaking that frustrate coherence and make entropy a more likely outcome.¹⁴⁸ I then illustrate that argument with examples of failures by the federal courts to advance the development of a useful federal common law of foreign relations.

A. Explanations for Judicial Entropy

Several structural features of federal courts and federal litigation factor into an assessment of the prospects for a coherent jurisprudence of foreign relations law. The system as a whole promotes the entrenchment of the policy commitments of judges appointed at different times and with heterogeneous preferences. The mix of preferences of lower court judges are unlikely to match those of the Supreme Court.¹⁴⁹ The Supreme Court in turn is likely to reach outcomes that reflect the process of cycling, moving back and forth among outcomes based on irrelevant factors, rather than consistent expressions of policy commitments. The combination of lower court diversity and highest court cycling is more likely to produce entropy than consistent outcomes and clear intellectual leadership.

147. JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD (2006).

148. To be clear, entropy connotes the state where information is absent. Entropy is the opposite of order. See generally CLAUDE E. SHANNON & WARREN WEAVER, THE MATHEMATICAL THEORY OF COMMUNICATION (10th prt. 1964) (canonical statement of information theory).

149. See Paul B. Stephan, *The Political Economy of Extraterritoriality*, 1 POL. & GOVERNANCE 92, 95 (2013) (discussing strategies used by Supreme Court to cope with discordant lower courts).

First, a focus on the policy commitments of judges, as distinguished from other credentials such as professional status and position in elite institutions, has unquestionably shaped the selection process in the last several decades. High profile and deeply politicized debates over Supreme Court nominations, from Haynsworth and Bork to Thomas and Kavanaugh, have increased the salience of judicial nominations generally. Both parties face pressure to choose younger and more reliable (in the policy sense) nominees, leading to an arms race in which each justifies its choices as a reaction to the other's.¹⁵⁰

This process segments the lower federal courts based on somewhat predictable policy preferences that affect judicial decision-making. In the absence of clear guidance from the political branches or clear doctrinal rules to curb judicial discretion, this segmentation influences the development of federal common law, especially with respect to foreign relations. Litigants will seek out those judges whose preferences align with their preferred outcomes, skewing the distribution of initial outcomes somewhat in the direction of the preferences of those who can select to the forum.¹⁵¹

As the number of judges in the lower courts grow, the potential for segmentation increases. In 1969, the year the Court decided *Zschernig*, the federal judiciary contained 76 appellate judges and 320 district court judges.¹⁵² At the beginning of 2019, the corresponding numbers are 166 and 545.¹⁵³ This increase in the rolls of the lower court judiciary during a period when the political salience of nominations increased has reinforced the policy-preference heterogeneity of those who produce federal common law.

Second, litigants will be able to predict which venues are more likely to generate the outcomes that they want in cases with especially high political salience, an attribute of some and perhaps many foreign relations cases. Until they learn which judges will be assigned to their case, litigants will know only probabilities, but variation in the composition of the district courts as well as the courts of appeals is evident to sophisticated litigators.

Reinforcing the significance of observable policy preferences in foreign relations cases is the relatively free rein of plaintiffs to choose the forum in cases where defendants are subject to in personam jurisdiction in multiple places.¹⁵⁴ Suits against federal officials based on actions with national

150. For a review of the literature on the observability of the policy preferences of individual judges, see Joshua B. Fischman, *Reuniting 'Is' and 'Ought' in Empirical Legal Scholarship*, 162 U. PA. L. REV. 117 (2013).

151. Rules that allocate particular judges to particular cases after the court acquires jurisdiction will dampen this effect where the pool of available judges contains a range of policy preferences.

152. Hand counted based on information contained in West Federal Reporter. The numbers include senior judges but not retired judges or Article III judges serving on specialized first-instance courts.

153. *Id.*

154. In spite of Supreme-Court-instituted shrinkage of in personam jurisdiction in recent years, *supra* text accompanying notes 107-09, the forum selection opportunity remains significant for a wide range of cases.

consequences, for example, offer a wide range of target forums.¹⁵⁵ As a result, litigants with a preference for particular outcomes can, by exercising their wide forum selection power, influence the likely outcome of a significant portion of foreign relations cases in the lower courts.

None of these problems would matter if the Supreme Court exercised effective supervision over the lower courts. With discipline from above, incoherent or idiosyncratic moments in the development of federal common law would matter only until the Court intervened and provided clear guidance that the lower courts then would accept. The Supreme Court could lead, and the lower courts follow, on a straight path towards a single voice in foreign relations.

Persuasive theoretical and practical reasons explain why it is unlikely that the Supreme Court can provide this kind of guidance. Frank Easterbrook, writing as a young legal academic, provided the basic insight nearly forty years ago: Supreme Court voting satisfies the conditions for the application of the Arrow Impossibility Theorem[please note correction of cite].¹⁵⁶ He observed that, where the decision of cases implicate more than two options and Justices do not agree among themselves as to the order of preference of those options, a majority of the Court will not be able to arrive at consistent outcomes absent rigid adherence by a stable majority to a rule of complete deference to precedent.¹⁵⁷ When cases present multiple outcomes about which the individual Justices have inconsistent and nontransitive preferences, the Court is condemned to some combination of cycling (transparent inconsistency in outcomes), path dependency (excessive deference to undesirable precedents), and strategic voting that will exacerbate the prior two tendencies.¹⁵⁸ As long as each Justice gets to vote, at some point relies on preferences that rank permitted options in some order, and lacks the ability to impose the preferred

155. *E.g.*, *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (citizenship questions on census); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (country-based restrictions on admissions to United States); *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018) (rules for asylum status); *Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018) (rescission of DACA), *cert. granted*, 139 S. Ct. 2779 (2019); *San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018) (federal sanctions on sanctuary cities), *cert. granted*, 139 S. Ct. 953 (2019); *Juliana v. United States*, 339 F. Supp. 3d 1062 (D. Or. 2018) (right to effective action against global warming), *rev'd*, 2020 WL 254149 (9th Cir. 2020) (lack of standing); *Dep't of Homeland Sec. v. New York*, 589 U.S. ____ (2020) (Gorsuch, J.) (concurring in the grant of a stay but developing a critique of nationwide injunctions); *see also* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 424-45 (2017).

156. Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982). For the source of the theorem, for which Arrow won a Nobel Prize, see KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 92-120 (2d ed. 1963); Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950).

157. Easterbrook, *supra* note 156, at 814-23.

158. *Id.*

ordering on other Justices, the Court as a whole cannot achieve consistency. As Easterbrook puts it, “There is . . . no way out.”¹⁵⁹

Empirical evidence indicates that individual Justices sort themselves out along at least two axes, substantive and methodological.¹⁶⁰ They vary along both an axis that reflects the values of particular interest groups (such as pro-business versus pro-consumer) and another that reflects methodology (such as formalist versus purposive interpretation).¹⁶¹ The methodological commitments need not, and as observed do not, work as proxies (and perhaps masks) for substantive preferences.¹⁶²

Unless there is a stable cohort of a majority of Justices who over a significant period vote according to common substantive and methodological commitments, the Court’s decisions will conform to the Impossibility Theorem. Given the heightened politicization of appointments to the Court and the increased effort to expose preferences up front, it seems highly unlikely that a stable majority will emerge for the proposition of following all precedents. It seems more likely that the ongoing arms race over these appointments will produce Justices who come to the Court with a critical take on its jurisprudence, given the pressure on political sides to contest the status quo. That the appointments increasingly go to younger people means that these tendencies will endure well into the future.

Absent a sea change in the current political context surrounding Supreme Court appointments, one should expect inconsistent outcomes of cases that engage significant substantive and methodological commitments. Much of the federal common law of foreign relations meets this description. First, the context is fraught. Foreign relations by definition requires a decisionmaker to imagine the impact of rules and outcomes on persons who are in some sense strangers and free from the decisionmaker’s control, such as foreign governments. The impulse to build discretion into these rules in the face of this uncertainty is powerful. And discretion begets legal rules that lend themselves to bending and shading in light of the actor’s policy preferences.

Second, the range of possible legitimate policy preferences is great. Some rules, such as federalization of the international law of human rights, would create more opportunities for victims of injustices, triggering the sympathies of those seeking to lift up the oppressed. So would rules increasing judicial discretion as to choice of law, as well as shrinking discretion as to forum-non-conveniens dismissals. The reverse would please those Justices who worry

159. *Id.* at 822.

160. Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671 (2016); Joshua B. Fischman, *Do the Justices Vote Like Policy Makers? Evidence from Sealing the Supreme Court with Interest Groups*, 44 J. LEGAL STUD. S269 (2015).

161. Fischman, *supra* note 160, at S271-73; Fischman & Jacobi, *supra* note 160, at 1689-97.

162. Fischman, *supra* note 160, at S282-87; Fischman & Jacobi, *supra* note 160, at 1699-08.

about undemocratic or selfish behavior by the plaintiff's bar and what they might see as excessive risks for business. At the same time, formalists would prefer the kinds of rules that could be framed in clear and precise terms, while purposivists would prefer nuanced balancing by judges who wisely employ discretion across the board.¹⁶³ One can imagine many other dimensions of policy disagreement in the field – sympathy for the executive versus defenders of congressional prerogative, proponents of federalism versus nationalism, cosmopolitans versus nationalist populists, skeptics of bureaucratic power versus those inclined to defer to apolitical technical expertise, social justice warriors versus pragmatic conservatives. What matters for purposes of the Arrow Impossibility Theorem is that it is highly unlikely a stable cohort of five Justices will find themselves aligned in one place defined by where their preferences fall across these various axes.

This, at least, is what theory predicts: The Supreme Court will be unable to communicate with the lower courts in terms that will herd their work in the direction of a coherent federal common law of foreign relations. Rather than representing one voice, the federal courts will promote discord and confusion. The best that one might hope is that the courts will do such a bad job of supplying legal rules that they will compel Congress to step in.

B. Evidence of Judicial Entropy in the Federal Common Law of Foreign Relations

Case histories cannot confirm a theory's validity, but they can illuminate it and increase our suspicion that it might be right. This Section recounts two episodes where the Supreme Court sought to dispel confusion in the lower courts over questions of significant practical importance to the foreign relations of the United States. One involves the development of a federal common law of compensation for injuries caused by violations of international law, the other the development of the choice of law rules applicable to financial instruments issued by international banks. Both stories should give advocates of the nationalist position considerable pause.

1. International Law Enforcement Through Federal Tort Remedies

As discussed above, civil suits based on egregious violations of international human rights law burst on the scene in the United States at the end of the Carter presidency, cementing the legacy of an administration that

¹⁶³ See generally John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) (explaining difference).

had promised to put human rights at the center of U.S. foreign policy.¹⁶⁴ The idea that U.S. law provided a tort remedy to anyone who suffered from a violation of international law, in particular unwritten customary international law, exploded in the lower courts over the next two decades.¹⁶⁵ After sending an initial signal of skepticism in the form of a unanimous decision rejecting a lower court's ruling that these suits overrode the statutory immunity from suits that foreign sovereigns enjoy, the Court decided three cases on the scope of this litigation, each decision made by a more badly divided court than its predecessor.

Argentine Republic v. Amerada Hess Shipping Corp.,¹⁶⁶ the first case to address the federal common law of international torts, produced a unanimous opinion.¹⁶⁷ Then the Court split 6-3 in *Sosa v. Alvarez-Machain*,¹⁶⁸ the first case to address the scope of a federal common law of international law torts, with a minority arguing that the statute did not authorize the development of substantive rules of international law torts.¹⁶⁹ *Kiobel*, decided nine years later, exposed a deepened divide. Four Justices endorsed a strong presumption against recognizing any claim that did not have a connection to U.S. territory, four argued for a multi-factor balancing test to determine which international law claims would justify federal court enforcement, and Justice Kennedy propounded a formula that maximized the discretion of courts to accept or reject claims.¹⁷⁰ *Jesner v. Arab Bank, PLC* produced an even more fragmented outcome with no majority agreeing on the reasons for dismissing a claim brought against a foreign bank operating in the United States.¹⁷¹ Four Justices rejected the holding wholesale.¹⁷²

164. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (recognizing federal cause of action); SAMUEL MOYN ET AL. *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 150-61* (2010) (human rights and Carter administration); *supra* text accompanying notes 57-59.

165. Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1613, 1636-37 (2011) (describing litigation).

166. 488 U.S. 428 (1989) (no implied exception to foreign sovereign immunity for cases based on Alien Tort Statute).

167. Justice Blackmun, joined by Justice Marshall, did not join the portion of the opinion holding that none of the Act's exceptions to immunity applied to the case. *Id.* at 443-44.

168. 542 U.S. 692 (2004).

169. *See* Stephan, *Inferences*, *supra* note 6, at 1803-04.

170. 133 S. Ct. 1659 (2013); FOURTH RESTATEMENT, *supra* note 2, § 404 reporters' note 3.

171. 138 S. Ct. 1386 (2018). Justice Kennedy took the position that the applicability of international law to corporations was insufficiently established to justify a federal common law rule of liability. *Id.* at 1399-1402. Chief Justice Roberts and Justice Thomas concurred, although Justice Thomas wrote separately to express his skepticism about this federal common law more generally. *Id.* at 1408 (Thomas, J., concurring). Justices Alito and Gorsuch wrote separate opinions explaining why they were inclined not to recognize this body of federal common law, although they indicated different methodological grounds for doing so. *Id.* at 1408-12 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1412-19 (Gorsuch, J., concurring in part and concurring in the judgment).

172. *Id.* at 1419-37 (Sotomayor, J., dissenting). These were the same dissenters as in *Kiobel*. Justices Breyer and Ginsburg had joined the *Sosa* majority opinion, which expressed more caution about developing the federal common law of international torts than did the Sotomayor dissent in *Jesner*.

One might infer from these cases that a majority of the Court has accepted the proposition that this body of federal common law no longer serves its purpose and should come to an end. The Court's irresolution, however, has allowed the lower courts to push back. For example, the Ninth Circuit has accepted that, under the Court's jurisprudence, foreign nationals cannot bring a claim against a foreign corporation for injuries suffered outside the United States.¹⁷³ At the same time, it held that contributions of funds by a U.S. corporation that enable the carrying out of overseas atrocities by others, particularly foreign corporations with which it is affiliated, do provide a basis for a federal common law tort claim.¹⁷⁴

In these cases, one can find support for (1) a formalist argument that federal tort claims should rest on a clear statutory basis, (2) a purposivist argument that federal courts should look to international law to develop a system of remedies for atrocities; (3) a substantive argument that the federal common law of international torts should not extend beyond events for which the United States as a nation bears some responsibility; (4) a substantive argument that corporations should not be subject to accountability for international torts in the absence of clear international law; and (5) and (6), the reverse of (3) and (4). No majority has emerged in support of any of these six positions, leaving it to the shifting composition of the Court, rather than principled reasons, to determine the outcome of future cases. Aware of this indeterminacy, the lower courts have seen themselves free to embrace any of the six possible outcomes, recognizing that reversal is possible but by no means assured.

Whether one views the federal common law of human rights violations through the lens of managing the legal risk of transnational businesses or that of vindicating victims of injustice, this is not a satisfactory state of affairs. The federal common law of international torts has consumed the time and energy of scores of courts and hundreds of lawyers, not to mention inspiring vast scholarship. Yet we seem further way from knowing the applicable rules than we were in 1980, when the field emerged.¹⁷⁵

2. *The Choice of Law Governing Eurodollar Certificates of Deposits*

173. *Doe v. Nestle, S.A.*, 906 F.3d 1120, 1124 (9th Cir. 2018), *amended by* 929 F.3d 623 (9th Cir. 2019). The Supreme Court has called for the views of the Solicitor General. *Nestle USA, Inc., v. Doe*, 88 U.S.L.W. 3221 (U.S. Jan. 13, 2020) (No. 19-416).

174. *Id.* at 1124-26. For a full attack on the Supreme Court's jurisprudence and a call for the courts to reverse course, see FLAHERTY, *supra* note 3, at 239-40.

175. Relatedly, the efforts of the Supreme Court to read the international law governing armed conflict into the Due Process Clause of the Constitution have produced similar dissensus. See Thomas B. Nachbar, *Executive Branch Policy Meets International Law in the Evolution of the Domestic Law of Detention*, 53 VA. J. INT'L L. 201, 241-43 (2013).

Beginning in the 1960s, international banks (both foreign banks and foreign branches or subsidiaries of U.S. banks) began holding U.S. dollars in establishments outside the United States.¹⁷⁶ A fairly simple standardized transaction for doing this is the certificate of deposit, a contract pursuant to which a depositor transfers money to the bank in exchange for a promise to return the deposit plus interest on a stipulated date. Normally all goes well, but on occasion the depositary bank fails to repay the money on time. Legal issues then arise.

Because these transactions typically occur in large volumes on the basis of terse electronic communications, few express terms accompany them. To determine whether a breach has occurred, one must turn to the defaults provided by the relevant law of contract. But choosing which law to apply is not obvious. By industry practice, all overseas dollar transactions clear through banks under the supervision of the Federal Reserve Bank of New York. One might look to the law of the depositary (location of the debtor), but that begs the question of the identity of the debtor. It could be the bank that initially incurred the liability (an offshore bank, even if owned or controlled by a U.S. entity), but also the clearing bank that promised to provide the dollars to satisfy the obligation (a New York bank under Reserve Bank supervision). The legal issues, in other words, require a choice of law that can affect the outcome.

Even though the Eurodollar certificate-of-deposit transactions, seen collectively, entailed huge sums, the banks had left these legal issues unresolved. The so-called Third World debt crisis of the early 1980s disturbed their peaceful slumber. A growing number of foreign countries adopted currency controls that barred or discouraged local banks from exporting dollars. Depositors sued, forcing courts to decide whether, in the absence of contractual provisions on point, the law of the local bank or the law of place where the transaction cleared (New York) applied and determined whether a breach had occurred.

Seeking legal clarity that could apply globally, the banks petitioned the Supreme Court to settle the question.¹⁷⁷ The Court could have adopted a special federal choice of law rule for these transactions, given that the issue affected the liability of members of the Federal Reserve system. It could have inferred a rule from an existing Federal Reserve regulation that treated offshore certificates of deposits as not the liability of an affiliated domestic

176. Peter S. Smedresman & Andreas F. Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 N.Y.U. L. REV. 733 (1989). The term “Eurodollars” arose to apply to these offshore currency holdings long before the European Union developed the euro as its common currency. To be clear, Eurodollars have nothing to do with euros, or indeed with Europe. Although the market emerged in Europe, dollars held anywhere in the world outside the United States are considered Eurodollars. *Id.* at 735.

177. *Id.* at 765-66.

bank for purposes of assessing the latter's safety and soundness.¹⁷⁸ Or it could have decided, as a matter of federal common law, that the choice of law rule in effect at the place of deposit or the place of clearing would apply.¹⁷⁹ Either approach would have provided global legal stability and certainty, allowing the banks to proceed with some confidence.

Faced with the most consequential private international law question presented to it in the postwar era, the Court failed utterly.¹⁸⁰ Rather than choosing the law to apply or a choice of law methodology, in *Citibank, N.A. v. Wells Fargo Asia Ltd.* the Court remanded to the Second Circuit for further findings.¹⁸¹ Only Justice Stevens, in dissent, proposed a rule to resolve the case, although his brief opinion did not identify what choice of law process he had used.¹⁸² The Second Circuit, taking its cue from the Court, issued a one-off decision that focused on the peculiar facts of the case and declined to choose a rule that might apply under any other circumstances.¹⁸³

This story had a happy ending, but only because of the federal judiciary's failure to resolve the issue and the focused concern of a powerful interest group. Responding to pressure from the banks, Congress adopted a statute allocating liability for nonperformance due to foreign currency controls.¹⁸⁴ Going forward, a statute supplied a rule, eliminating a gap that federal common law might have filled.

An optimist might look at the end of the story and conclude that federal common law works even when it fails. If the issue is sufficiently important, judicial bungling will drive Congress to respond. The virtue of federal common law here might be its function as an information-forcing default that provokes Congress to speak up, rather than as a source of coherent rules.¹⁸⁵

But costly mistakes that invite correction are not thereby cost-effective. Granting the relevance of information-forcing defaults, one must ask what is

178. Federal courts have subject matter jurisdiction over cases to which a national bank is a party. 12 U.S.C. § 632 (2019). The Court might have inferred from that jurisdictional grant the power to create federal common law. Stephan, *Inferences*, *supra* note 6, at 1803-04.

179. *See, e.g.*, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 739-40 (1979) (incorporating Article 9 of U.C.C. as applicable federal common law); Stephan, *supra* note 72, at 279-80.

180. Stephan, *Inferences*, *supra* note 6, at 1814-15.

181. 495 U.S. 660, 673-74 (1990) (ordering the Second Circuit to determine which law applies as well as its content).

182. *Id.* at 674-75 (Stevens, J., dissenting).

183. *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 936 F.2d 723 (2d Cir. 1991), (holding that, as Philippine Central Bank had authorized some dispersals of dollars, the question of whether a currency control regulation would excuse nonperformance did not arise in the case), *cert. denied*, 505 U.S. 1204 (1992).

184. Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 326(a), 108 Stat. 2160, 2229 (codified as 12 U.S.C. § 633 (2012)) (freeing parent from foreign subsidiary's liability due to foreign government's regulatory actions "unless the member bank has expressly agreed in writing to repay the deposit under those circumstances").

185. *See generally* Paul B. Stephan, *Bond v. United States and Information-Forcing Defaults: The Work that Presumptions Do*, 90 NOTRE DAME L. REV. 1465, 1466-68 (2015) (describing general theory of information-forcing defaults and its application to federal court-Congress relationship).

the least costly means of drawing the attention of Congress to the need for a better rule. Judicially abetted confusion and uncertainty is not necessarily superior to dispersed decision-making by State lawmakers. As the previous section demonstrated, State actors in most cases have some incentives to adopt rules that encourage greater and more fruitful contacts with the rest of the world. The litigants who bring claims to federal courts do not, or at least not to the same extent.

3. Relative Entropy: Federal Courts Versus the Political Branches

The preceding Sections have sketched the reasons why increasing the discretion of federal courts to displace State law that affects foreign relations may have greater costs than benefits. Even if one concedes the tendency of the federal judiciary toward entropy, a final issue is whether the federal courts sow relatively more confusion in foreign relations than do the States or the federal political branches. The Arrow Impossibility Theorem provides an analysis of democratic decision-making, that is to say choices made by actors who are accountable to voters. Easterbrook's insight was to show that it also applies to the Supreme Court, even though the Justices do not face after-the-fact democratic accountability for their decisions. It should be regarded as axiomatic that, whatever forces push the Court toward entropy, they work with even greater effect on State legislatures, Congress, and the executive.

One can reframe the question as whether, on average, the entropy generated by the federal courts in the particular field of foreign relations is likely to be greater than that produced by democratically accountable actors. Three arguments support an affirmative answer. The first focuses on inputs, that is the institutional structure that channels information to decisionmakers. The second considers flexibility, that is the institutional structure that allows a decisionmaker to change direction in the face of new information. The third rests on the virtues of political accountability. All three indicate that the federal judiciary is particularly disabled when it comes to carrying out foreign relations.

First, federal judges, unlike political actors, do not have direct and current access to information relevant to foreign affairs. Aside from general resources that any engaged person can find, federal judges depend on the advocates who appear before them to inform them about the outside world. Judges cannot commission studies or order briefings by specialists in the public and private sector. They are prisoners of those who seek action (or inaction) from them to a greater extent than actors in the political branches. State legislators, executive officials, and members of Congress face lobbying, but they do not depend exclusively on it. In contrast, judges hear only from lobbyists in the form of litigants.

Second, by convention in the U.S. legal culture, decisions are meant to be sticky. The power that judges wield depends fundamentally on their capacity to be persuasive. Stability is one component of persuasiveness. The absence of stability is what defines arbitrariness. Thus courts are expected to overrule their precedents only with caution, and ideally with advance warning. Periods of sudden transformations in judge-made law are problematic, even where they seem necessary.¹⁸⁶

In the abstract, stability might be a desirable feature in foreign relations, but other considerations apply. In the increasingly interconnected and dangerous modern world, flexibility and nimbleness can be essential. Dramatic surprises can shock the system – think of Nixon’s trip to China or the 9/11 attacks. Pragmatic decision-making might need to disregard general principles.¹⁸⁷

At the end of the day, the particular weakness of the federal courts when addressing foreign relations is what many might see as their particular strength – their lack of political accountability. Economic, political, and social pressures give the States incentives to cooperate with the outside world. Nothing similar disciplines judges who prefer the parochial interests of the litigants who appear before them to the general national welfare. The point is not that federal judges as a class are parochial, but rather that life tenure has as a necessary if incidental consequence an inability to weed out those who are.

V. DOCTRINAL IMPLICATIONS

If the case for the nationalist position in foreign relations law is, if not discredited, at least impaired, one must ask what foreign relations law would look like in the absence of federal common law. This Part speculates how this step would shape the future of the one-voice ideal in foreign relations law. It also looks at positions that the Fourth Restatement might take, were the American Law Institute to extend the mandate of the project. It does not consider whether particular areas might need legislation or a ratified treaty to make the world a better place

186. Whether the transformations are as necessary as they might seem, and the direction of causation between Supreme Court decision-making and social change, are deeply contested issues. For one influential view, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 454-59 (2004).

187. For a discussion of the relationship between legal rules and optimal flexibility in the context of foreign relations, see Paul B. Stephan, *Constitutionalism and Internationalism: U.S. Participation in International Institutions*, in OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 375 (Curtis Bradley ed., 2019).

A. Public International Law as Federal Common Law

As noted above, Article III, Section 2 of the Constitution states that the judicial power of the United States extends to cases arising under “Treaties made, or which shall be made,” under the authority of the Constitution and the laws of the United States.¹⁸⁸ The Supremacy Clause provides that “all Treaties made, or which shall be made, under the Authority of the United States,” shall be part of the supreme law of the land binding the “Judges in every State.”¹⁸⁹ As to self-executing treaties, then, the question is settled: All courts, the federal included, must use the provisions of such treaties as binding rules of decision.¹⁹⁰ But what of general international law that is obligatory but not grounded in a treaty? If international law is part of our law, as the Supreme Court occasionally says, is it part of our law as binding federal law?¹⁹¹

Let us suppose that the Third Restatement was wrong on this point, and that the revisionist scholars have a better understanding of what the framers thought they were doing when they adopted Article III and the Supremacy Clause.¹⁹² Suppose that an extension of the current Fourth Restatement were to adopt this conclusion.¹⁹³ What this would mean is that the obligatory rules of general international law – the rules that do not depend only on treaties for their existence – might apply in any given case if the forum’s choice of law rules require, but not automatically and not in the presence of an otherwise applicable rule of State law. International law would be part of our law in the sense that it would be on the menu of possible rules that could apply if an applicable choice of law rule so permitted, but they would not come under the particular choice of law rule found in the Supremacy Clause.

Note what this conclusion does not entail. A court might still refer to these rules as an interpretive mechanism, so as to better divine a lawmaker’s intent as well as to avoid putting the United States in violation of its international obligations.¹⁹⁴ But because international law does not generally impose on states an obligation to vindicate the interests of victims, as

188. U.S. CONST. art. III, § 2; *see also supra* text accompanying note 40.

189. *Id.* art. VI, cl. 2.

190. Thus the first statute on the federal courts provided that “the laws of the several states, *except where the constitution, treaties or statutes of the United States shall otherwise require or provide*, shall be regarded as rules of decision” in judicial trials. Judiciary Act of 1789, § 34, 1 Stat. 73, 92 (codified as 28 U.S.C. § 1652) (emphasis added); *see also* FOURTH RESTATEMENT, *supra* note 2, § 310 (distinction between self-executing and non-self-executing treaties).

191. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (“[L]aw of nations . . . is part of the law of the land.”).

192. *See supra* text accompanying note 6.

193. The terms of references of the Fourth Restatement did not extend to this question, but the American Law Institute has left open the possibility of the project’s extension. *See supra* note 8.

194. FOURTH RESTATEMENT, *supra* note 2, § 406 (compliance with international law as a rule of interpretation).

distinguished from the obligation of states not themselves to violate the rules of international law, a court would not have to rectify injuries traceable to international law violations, absent an express treaty obligation or a domestic command to do so. A court could refer to international law to determine the authorities that a U.S. official might possess or the limitations that a federal statute might impose on private actors, but international law on its own would not empower a court to compensate those injured because of its violation.

To focus on a longstanding statutory question on which the Third Restatement took a strong position, the courts might end up completing their drift away from *Sosa* and conclude that there is no federal common law of international torts. Three Justices on the Supreme Court already have expressed their preference for this outcome, and it would not be inconsistent with other positions taken by Chief Justice Roberts and Justice Kavanaugh to anticipate that they might go along.¹⁹⁵ Whether a thin majority might stabilize into an entrenched position will depend on many factors. It is not unreasonable, however, to expect Congress to prefer a definitive closing down of litigation to continuance of the present confused status quo.¹⁹⁶

But it is not true that shutting down the federal common law of international torts will be a complete loss for victims of abuse. Perhaps surprisingly, not according international law the status of binding federal common law might open up some litigation opportunities that international law might close. International law also provides defenses to claims that could shut down lawsuits seeking to vindicate victim's rights. Not making these defenses binding federal law would increase the likelihood that such suits might succeed.

At present, U.S. statutory law limits suits against foreign states, but not against foreign officials.¹⁹⁷ The Court has suggested that federal common law might fill that gap.¹⁹⁸ If international law were understood as supplying immunity from suit even for claims based on grave violations of human rights law – a proposition that enjoys some support from international authorities – then a federal court might be obligated to dismiss human-rights suits.¹⁹⁹ If

195. *See supra* text accompanying notes 168-172.

196. The Ninth Circuit's latest ruling imposes liability on domestic corporations that their foreign competitors do not face. *See supra* text accompanying notes 173-74. Were this result to prevail more broadly, lobbying by potential defendants might induce a legislative reaction.

197. *Samantar v. Yousuf*, 560 U.S. 305 (2010) (Foreign Sovereign Immunities Act does not apply to natural persons).

198. *Id.* at 325-26.

199. *Jurisdictional Immunities of the State* (Ger. v. It.; Greece intervening), Judgment, 2012 I.C.J. 99 (Feb. 3) (immunities extend to claims based on grave violations of international humanitarian law); *Case Concerning the Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3 (Feb. 14) (immunities of certain state officials); *Jones v. Ministry of Interior of Saudi Arabia* [2006] UKHL 26 (same as to torture when defendants include officials). One U.S. Court has rejected this conclusion. *See Samantar*, 699 F.3d 763 (no immunity as to jus cogens claims).

international law does not constitute federal law, it becomes easier to keep these suits alive.

B. *The Act of State Doctrine as Federal Common Law*

The Fourth Restatement does not challenge *Sabbatino*'s determination that the act of state doctrine enjoys the status of federal law.²⁰⁰ Although *Kirkpatrick* narrowed the doctrine's scope, it did not revisit the federal-law question.²⁰¹ If the Court were to reconsider the nationalist position across the board, it is not clear that this branch of federal common law can survive. The problem is that *Sabbatino*'s arguments for federalizing the doctrine largely track the claims of the one-voice principle.²⁰²

Would downgrading its status as federal law radically undermine the doctrine? The answer is far from clear. Congress reversed the case's specific holding as to expropriations of property soon after the decision.²⁰³ Moreover, the Court itself acknowledged that the States had shown no signs of rejecting its pre-*Erie* decisions, whatever their legal basis.²⁰⁴ One might recast the doctrine as imposing a general rule of decision in cases that turn on the validity of foreign official acts. This rule could operate without requiring the federal judiciary to serve as its exclusive expounder and enforcer.

John Harrison has proposed a choice of law approach that avoids treating the act of state doctrine as binding under the Supremacy Clause while compelling the States to accept foreign acts of state applied within that state's territory as conclusively valid.²⁰⁵ He notes that any State legal act purporting to overturn the validity of a foreign act of state within that state's territory necessarily must constitute an extraterritorial exercise of prescriptive jurisdiction. Longstanding doctrine, however, holds that the constitutional system limits State attempts to legislate with respect to foreign activity.²⁰⁶ States thus might be required to accept the validity of foreign acts of state not under the Supremacy Clause, but rather because the Constitution disempowers them from substituting their own law.

200. FOURTH RESTATEMENT, *supra* note 2, § 441 cmt. b.

201. *See supra* text accompanying notes 31-33.

202. *See supra* text accompanying note 35.

203. *See supra* text accompanying note 26.

204. *Sabbatino*, 376 U.S. at 423-25.

205. John Harrison, *International Law in U.S. Courts Within the Limits of the Constitution*, in THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW (*supra* note 3).

206. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); FOURTH RESTATEMENT, *supra* note 2, § 403 reporters' note 4; BRADLEY, *supra* note 4, at 199 & n.163.

C. *Foreign Relations as a Basis for Categorical Preemption*

It has been clear for two centuries that State law that unduly interferes with the federal authority is invalid.²⁰⁷ The hard question, for which the Court's jurisprudence provides more noise than information, is what should count as undue interference. The Third Restatement, riding *Zschernig* for all it was worth, proposed "intrusion" as the standard for foreign relations law.²⁰⁸ This approach would render suspect a wide range of State lawmaking.

In the twenty-first century, the Court has expressed some reservations about the *Zschernig* approach, but it has not yet repudiated it.²⁰⁹ Instead it has sought to anchor preemption of State law to particular acts or policies adopted by the federal government.²¹⁰ Were disenchantment with the one-voice premise to prevail, one might anticipate an express repudiation of the "intrusion" test. What might replace it, however, is uncertain.

Even if *Zschernig* were to be interred, the courts still would have to decide whether only an enactment involving Congress can invalidate State law, or whether interference with legitimate foreign policy initiatives of the executive suffices to trigger preemption.²¹¹ This question blends issues of federalism with those of separation of powers. A critic of executive power logically could embrace a strong preemption doctrine but insist on a link to an act of Congress; a friend of the executive could endorse a limited doctrine but still invalidate State law that obstructs legitimate executive acts. This is, in short, a three-dimensional problem of the sort that the Supreme Court will find difficult to address consistently.²¹²

Other questions would include what counts as interference and how much is too much. At the end of the day, what the demise of the one-voice premise might do is motivate the courts to decide these cases with less suspicion of the potential mischief of State law. Other considerations undoubtedly will apply in particular cases, and context may dominate general principles. But removing one confounding factor from the equation should count as progress, even if solutions remain less than perfect.

VI. CONCLUSION

207. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

208. *See supra* text accompanying notes 5, 91, 100.

209. *Id.*

210. *See supra* text accompanying note 96.

211. *Compare Garamendi*, 539 U.S. at 424 (executive branch policy in core foreign relations area sufficient to preempt State law), *with Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 328-31 (1994) (executive branch policy insufficient to preempt State law regarding taxation of international transactions).

212. *See supra* text accompanying notes 156-62.

The idea that a state should organize its foreign relations in such a way as to maximize its influence with the rest of the world and to minimize the possibility of misunderstanding and friction seems inherently appealing. Certainly the framers of the U.S. Constitution, recognizing the uncertain legitimacy of their republican project in the eyes of European monarchs and the range of hostile forces arrayed against their new nation, would have pursued these goals. What this Article questions is not this principle as such, but rather the inference that it demands assumption of authority by the federal judiciary to exercise lawmaking powers.

The premise of this Article is that lawmaking by the federal courts is different from lawmaking by the States or interventions by Congress and the executive. Both the States and the federal political branches might make unwise decisions and complicate foreign relations. But they also both face countervailing pressures against doing so and have the capacity quickly to correct their mistakes. The federal judiciary, seen as a complex and divided system, lacks both the ability to combat tendencies toward incoherence and the capacity to respond in a timely way to the challenges of a complex and dangerous world.

Getting past the one-voice rationale for a federal common law of foreign relations will not transform the field. As the Fourth Restatement indicates, the courts have been moving in this direction for some time. Rather, getting past this illusion will enable the federal judiciary, as well as those who seek its services and study its behavior, to avoid a significant distraction from its proper function. Getting the law of foreign relations right is hard enough without pursuing a chimera.