I. INTRODUCTION

Time will tell whether the problems can be resolved that caused the United States to seek to put the proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters on a slower track. That the process has been put on a slower track should not be cause for regret in any country desiring a workable international agreement. Like reform of judicial administration in the United States, international law reform is "no sport for the short-winded." When speed is a goal, the result will probably be disappointing. To see the wages of inadequate opportunities for mutual education and understanding, we have only to look at the Hague Evidence Convention. It is fitting that, having led the rush on that occasion, the United States has called for the application of brakes on this one.

It may be that, gives the incentives of the major players to participate in the negotiations, a resolution satisfactory to the United States is critical to the success of the project as treatymaking. Such a resolution should not be necessary, however, to its success in enhance-
ing knowledge about, and understanding of, current approaches to jurisdiction and the recognition of judgments in other countries and the needs of the international legal order in the future. Synopses like the one at which this paper was first presented provide opportunities for scholars from countries with different traditions to debate each other and, through their writing, domestic and foreign audiences, including courts, about those approaches and needs.

Those who framed the Brussels Convention realized, as did the framers of the Full Faith and Credit Clause of the United States Constitution, that civil courts can be instruments of economic warfare and, conversely, that shared judgment recognition standards can be powerful facilitators of economic cooperation and integration. From this perspective, the proposed Hague Convention represents an attempt to translate lessons of regional enlightenment to a global audience and hence to add to the forces for economic cooperation the contributions of a public private international law. That is a very ambitious task, requiring statesmanship of a high order. Its success will also require a healthy measure of realism.

The proposed Hague Convention proceeds from a platform of recognition practice, set both in the United States and under the Brussels Convention, that does not permit general reexamination of either the choice of law or the adjudication on the merits in the rendering court and that, therefore, invades with great importance the jurisdiction of that court. In such a recognition system jurisdiction becomes, as Professor von Mehren has termed it, the "hallmark" of the fairness and impartiality of the adjudicative process in the rendering court.

Moreover, to the extent that it follows the Brussels model of a double convention, directly constraining the freedom of Contracting States to apply domestic jurisdictional law, the proposed Hague Con-


5. "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And 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.

6. See Hilton v. Guyen, 559 U.S. 13 (2009); Fed. S. M. mini-Judg. Recognition Act, §§ 3, 4, 13 U.S. 260, 268 (1982); Brussels Convention, supra n. 4, art. 29. But see id., art. 27(4); limited choice of law for preliminary questions concerning "the status or legal capacity of natural persons, rights in property arising out of a contractual relationship, wills or succession". Of course, both regimes permit a limited public policy defense to recognition. In addition to such a defense, any treaty emerging from the negotiations at The Hague might contain a provision permitting a Contracting State to decline to assume the convention's obligations with respect to other States (i.e., who have not participated in the negotiations) seeking to become parties. See Lusser, "A Canadian Perspective," 24 Brook. j. Int'l L. 21, 64-65 (1998).

vension seeks a measure of jurisdictional orthodoxy with effects be-
yond the international recognition and enforcement of judgments. It is thus
no surprise that the decision having been made to fashion a mixed
convention, one of the most difficult and contentious problems
remaining in the negotiations concern (1) the appropriateness of vari-
cous grounds of jurisdiction acceptable in the United States or under
the Brussels Convention and (2) the extent of the so-called grey
zone, the area under a mixed convention in which national jurisdic-
tional law, neither required nor forbidden under the proposed con-
vention, can be applied to cases within its scope but without
triggering any treaty obligation to recognize the resulting
judgment.

Compared to these problems, which test notions of jurisdictional
exorbitance and ultimate negotiating ambitions, the matters that I will
address—liens, pledges, antisuit injunctions and forum non con-
vienient—seem like details. Yet these matters, which I have gathered
under the rubric of jurisdictional equilibration, are nonetheless dif-

8. That is because prohibited grounds of jurisdiction cannot be used by a Con-
tracting State, in cases within the draft Convention's territorial scope, even if
the judgment could be enforced in that State. See Hague Conference on Private Int.
Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil

9. The U.S. proposal at the Hague Conference is for a convention model
that a convention model contains a "white list" identifying
approved grounds of jurisdiction. Jurisdiction referred to in the
contracting state and resting on an approved jurisdictional basis is entitled to recogni-
tion and enforcement under the convention. However, unlike a true convention,
due, the U.S. proposal involves contracting states to assume jurisdiction on other jurisdictional bases not listed in the convention. Judg-
ments resulting from the exercise of jurisdiction on such bases are not as-
sumed to be recognized under the convention, but a State may—unless the
convention expressly provides otherwise—grant recognition and enforcement
under its own law. The U.S. mixed convention proposal also contem-
plates a "black list" of inadmissible jurisdictional bases. With respect to mat-
ters covered by the convention, contracting states would be required to forgo
exercise of jurisdiction on these bases.

von Mehren, "Recognition and Enforcement of Foreign Judgments: A New Approach

10. See Hague Draft, supra note 8, art. 13.

11. See id., art. 27. The scope of the authority there conferred to apply rules of
jurisdiction under national law is expressly limited by the proposed convention's pres-
ence on choice of court agreements, appearance by the defendant, contracts con-
duced by consumers, inclusion of employment, exclusive jurisdiction, and
provisional and protective measures. It is also expressly limited by the prohibited
grounds of jurisdiction in draft Article 18. As the latter list expands, the size of the
grey zone contracts, and a positively mixed convention looks more like a double con-
vention. See Stat. Dept. Dep't Letter, supra note 2, at 6-5, 6-6. Arthur T. von Mehren,
Drafting a Convention on International Jurisdiction and the Effects of Foreign Judg-
ments Acceptable World-Wide Can the Hague Conference Project Succeed?, in case
with author) "the Convention's product remains, in spirit and approach, much more
a close-but double convention than a close-ended mixed convention.

12. The English word "equilibration" denotes a state of equilibrium or balance,
and achieving balance is the essential function I associate with the matters to be dis-
cussed. Our French colleagues may imagine a tightrope walker, an equalibrateur, a
ficult, and their satisfactory resolution is, I believe, critically important to the success of any treaty that may be concluded. For here are located devices easing the agony of foresight by which jurisdictions is protected or declined and its potential to yield an enforceable judgment fruitified or frustrated. 13

The prospect of an enforceable judgment concentrates the attention of litigants and their attorneys, shaping plaintiffs' choice of forum and sometimes leading defendants to take evasive action, whether by seeking to have the lawsuit dismissed or by filing a preemptive or competing lawsuit. 14 The prospect also concentrates the attention of courts and sometimes leads them to take evasive action, by dismissing or staying actions pending before them or enjoining litigants from pursuing actions pending or impending elsewhere. Such moves can be threats not only to a smoothly functioning system of judgment recognition but also to the system of jurisdictional allocation on which it is based. Fashioning rules of jurisdictional equilibration that attend to the reasons for these phenomena in a world without treaties and to the fact that no treaty can eliminate the impulses behind them will also require very considerable statesmanship and realism, not just about human behavior but about jurisprudential assumptions. The negotiations at The Hague present an opportunity for enlightened comparative procedural lawmaking, the results of which could prove a model for law reform in or among States from both of the dominant traditions represented there.

My plan is first to describe how the matters that concern me are treated in litigation in the United States and, more briefly, under the Brussels Convention, respectively, with attention to some of the jurisprudential assumptions underlying such treatment. Second, in the light of that background I propose to examine the treatment of these matters in the current draft of the proposed Hague Convention, with

13. On this view of jurisdictional equilibration, one should perhaps also consider provisional and protective measures. I do not do so here for a number of reasons. First, I do not wish unduly to lengthen this article. Second, although regulating these matters in some extent, the Brussels Convention leaves most questions to national law, see Brussels Convention, supra n. 4, art. 14, and it is the model adopted in draft Article 13 of the proposed Hague Convention. Finally, domestic United States law on the subject is unsettled. For a discussion of the last point and an argument that federal legislation is needed, see Ruback, "The Siller with the Sweet Tradition, History and Limitations on Federal Judicial Power—A Case Study," 75 Notre Dame L. Rev. 1291 (2000). The form that such legislation should take remains to be worked out, but it would sensibly combine the treatment of provisional and protective measures with the provisions on lis pendens, anticipatory recognizances and forms and conventions that I recommend below. See infra text accompanying nn. 133-33, 183-201.

14. Evasive action by defendants may also include dissipating assets or removing them from the jurisdiction. See supra n. 13.
attention to possible improvements. The improvements I have in mind include not just revisions to the draft convention. For this American scholar of international civil litigation, the prospects for changes in and the development of national law, under the influence if not the command of a private international law treaty, are among the most exciting aspects of the current project.15

II. JURISDICTIONAL EQUILIBRATION IN UNITED STATES PRACTICE

An understanding of domestic recognition practice in the United States is helpful to an understanding of what I have called "United States practice," by which I mean the practice obtaining in international cases. And so it is for the subject of my inquiry, "devices by which jurisdiction is protected or declined and its potential to yield an enforceable judgment fructified or frustrated."16 Of course, here as elsewhere in the American legal landscape, there is ambiguity in the use of the term "domestic,"17 and here as elsewhere there is a need to paint with a bread brush both that part of the domestic landscape that is relevant, which for these purposes is the territory of interjurisdictional cases, and United States practice.

The precise nature of the community to which the people of the United States aspired when they ratified the United States Constitution remains in dispute,18 although it is not disputed that the framers of the Constitution perceived and sought to avoid the corrosive effects that disregard of the judgments of sister states could have on the new nation.19 Yet, inspirational as it may be and has been, the text of the Constitution's Full Faith and Credit Clause is not very nourishing for one who seeks guidance on interstate recognition practice in the United States,20 and neither is nor the statute that, since


16. For this purpose, "national law" includes both the law in the United States for domestic and international interjurisdictional cases, and the interjurisdictional law of other States participating in the negotiations at The Hague, including (for member states) that contained in the Brussels Convention.

17. Supra text accompanying n. 13.


20. The framers sought "not merely to demand respect from one state for another, but rather to give us the benefits of a unified nation by altering the status of otherwise independent, sovereign states." Reese & Johnson, "The Scope of the Full Faith and Credit to Judgments," 49 Colum. L. Rev. 153, 161 (1949) (quoting Sherrer v. Sherrer, 234 U.S. 343, 346 (1914)).
1790, has implemented it by giving content to its command,\textsuperscript{21} speaks directly to the question of jurisdiction.

For almost half of the country's history, jurisdictional orthodoxy bred of a shared legal heritage, coupled with the power indirectly to police jurisdiction by denying recognition, sufficed.\textsuperscript{22} Thereafter, a federal constitutional law of substantive due process, whose content was initially borrowed from state law arrangements and justified in the territorial terms of public international law, ensured a measure of direct control, and it also had the effect of rationalizing the power of states to deny recognition.\textsuperscript{23} With federal checks over jurisdiction and recognition in place, and given the potential of the system to police state choice of law directly,\textsuperscript{24} the American law of full faith and credit could with relative equanimity forbid non-recognition because of disagreement about the rendering court's adjudication on the merits.\textsuperscript{25}

The influence of American interjurisdictional practice in shaping United States practice is undoubtedly due to a complex of structural, historical and cultural factors that defy brief summary. Having no choice on this occasion, I offer as a cause the fact that, at the founding, the states of the United States were regarded as distinct sovereignties and that the history of both interjurisdictional recognition and jurisdictional equilibration since the founding has been a history of accommodating the perceived needs of sovereignty under constitutional language long on aspiration but short on details. It was, I suggest, easier for such a country and its constituent states to treat other countries like other constituent states than it was or would see for countries without a history of and experience in accommodating internal sovereign claims.

This disposition to assimilate international to domestic interjurisdictional cases has been reinforced by the very powerful in

\textsuperscript{21} Act of May 30, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (1994)). In pertinent part the statute currently provides that state judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts . . . from which they are taken. Note that, although the constitutional obligation is imposed only on states, the statutory obligation extends to "every court within the United States" and thus to federal courts. See Burkhart, supra n. 17, at 50. A similar obligation exists to respect federal court judicial proceedings, and it can most plausibly be found in federal common law. See id. at 740-47.


\textsuperscript{23} See See Pennoyer v. Neff, 96 U.S. 714 (1878).

\textsuperscript{24} For many years, the Supreme Court of the United States appeared of two minds, see, e.g., New York Life Ins. Co. v. Dodge, 248 U.S. 367 (1918), and the other that it had nothing to do with choice of law. See Kryper v. Wilson, 242 U.S. 171, 176 (1916). The modern Court's approach exposes great latitude in the states to choose the governing law. See, e.g., Allstate Ins. Co. v. Hensley, 440 U.S. 578 (1981).

\textsuperscript{25} See Funtlesor v. Lum, 210 U.S. 230 (1908).
pulse of modern American procedural law, including for these purposes choice of law, to apply the same rules to all cases. American courts have pursued domestic doctrinal uniformity even when doing so resulted in international disuniformity, as in the interpretation of treaties.\(^{26}\)

The effects of this process of assimilation can be seen throughout the landscape of international litigation. The process itself helps to explain both the generous treatment accorded internationally foreign judgments in United States practice, which requires no elaboration, and the schizophrenic attitudes of American courts towards existing or potential litigation abroad, to which I now turn.

The capacious language of the Full Faith and Credit Clause of the Constitution could have been used to fashion a federal law of lis pendens for actions brought within the United States, as perhaps could the less capacious language of its implementing statute, at least in the service of wholly domestic lis pendens or "other action pending" doctrine in the state to which the federal obligation was owed. Notwithstanding some early movement in that direction, however, the obligation came to be tied to the existence of a judgment,\(^{27}\) with the courts of other states and the federal courts free to entertain parallel litigation even if such litigation would be barred in the courts of the state in which the first lawsuit was filed.\(^{28}\) In hindsight, the resulting system was calculated to promote forum shopping and a race to judgment. But hindsight should in this case acknowledge the impediments to forum shopping imposed for much of United States

\(^{26}\) See Burbank, supra n. 3, at 135-39.

\(^{27}\) See Burbank, "Where's the Beef? The Interjurisdictional Effects of New Jersey's Diligence Controversy Doctrine," 29 Rutgers L.J. 87, 110-12 (1996). "But Congress had no problem barring duplicative simultaneous litigation in the child custody area, and its action in that regard may be further support for the proposition that at least the "judicial proceedings" referred to in the Constitution need not have culminated in a judgment." Id. at 111 (footnote omitted). American readers will have noted that "lis pendens" for these purposes has to do with doctrine governing a court's response to parallel litigation rather than that of litigation on the marketability of property. See, e.g., 28 U.S.C. § 1666 (1994) ("Constructive Notice of Pending Action").

\(^{28}\) The reference to "parallel litigation" is intended to include both duplicative and related litigation and thus to reflect the fact that American courts today do not draw a sharp distinction between the two for purposes of jurisdictional equilibration devices. As Samuel Reaumont has suggested, this elision of matters that are treated separately in the Brussels Convention, see infra text accompanying nn. 70-72, is due to differences in doctrine and in jurisprudential assumptions, including with respect to the proper role of judicial discretion, the breadth and aggressiveness of preclusion law, and the importance accorded to comprehensive dispute resolution within one proceeding. See Reaumont, "Related Actions," 22 Notre Dame Int'l L. Rev. 203, 203 (1988).

For a thoughtful discussion of different ways to give content to the concept of "parallel litigation" for the purpose of implementing a "zero tolerance solution" to the problem of redundancy as between the federal and state courts in the United States, see Redahl, "Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem," 75 Notre Dame L. Rev. 1347, 1362-67 (2000).
history by jurisdictional law and the nature of the society whose needs it served.

On this view, the absence of a federal lis pendens obligation and the incentives created by a system of full faith and credit to domestic interjurisdictional judgments did not become seriously inconvenient until the needs of the society prompted changes in the federal law constraining state jurisdictional freedom. And on this view, the greater latitude to assert jurisdiction afforded the states by International Shoe 29 and its progeny dramatically enhanced the opportunities for interstate forum shopping and, coupled with loose federal control of state choice of law, 30 the incentives of both litigants and state courts to run a race to judgment, creating a market for litigation in which the voluntary extension of wholly domestic lis pendens doctrine to interjurisdictional litigation would constitute surprising self-restraint. 31

Under this model of litigation one would expect to encounter frequent attempts to preempt the recognition problem through the use of anti-suit injunctions. That such injunctions apparently do not plague modern interstate litigation may suggest limitations in the model, in particular the failure to capture behavior that is not self-regarding, and that is sure part of the explanation. But it may also reflect the bitter lessons of experience in a system that does not require recognition of antisuit injunctions and in which they therefore can proliferate. 32 Moreover, the self-regarding behavior of courts may affect the stay or dismissal rather than the jealous maintenance of litigation.

Courts through judges serve interests in addition to the interests animating domestic substantive law and the interests of litigants or their lawyers, including their own institutional interests. 33 When state legislatures directed state courts to take full advantage of the

31. For an unusual example see 735 Ill. Comp. Stat. 5/11 (West 1992); Burbank, supra n. 27, at 120 n.165; Redlich, supra n. 32, at 1330 n.30.
32. See, e.g., James v. Grand Trunk Western R.R., 14 Ill.2d 355, 153 N.E.2d 858, 860, cert. denied, 358 U.S. 915 (1958); Bagatelle (Second) v Conflict of Laws § 114, comment b (1988 rev.). The Supreme Court has not ruled on the question, but a recent decision strongly suggests that it will not require states to recognize antisuit injunctions issued by the courts of other states as a matter of full faith and credit. See Becker v. General Motors Corp., 622 U.S. 321, 324 n.9 (1988).

Although Professor Birnbaum notes that “over the years a large number of anti-suit injunctions have been directed against proceedings in sister-state courts,” 33 Professor Hamann, “The Use of Anti-Suit Injunctions in International Litigation,” 28 Colum. J. Transnat’l L. 559, 594–95 (1990), in all of the interstate cases he covers, it is difficult to find one decided less than sixty years ago. See id. at 594–95.

In comments on a draft of this article, Professor Birnbaum suggests that the most baffling interpretation of the full faith and credit obligation is that which has permitted state courts to issue sister-state antisuit injunctions in the first place.

constitutional freedom accorded by International Shoe and its progeny or the courts seized that advantage themselves, they were opening the courthouse door to additional litigation with which the state had very little connection and in which it might have no regulatory interest. Means of self-protection, of achieving balance in a system where federal constitutional and statutory law had proved inadequate to the task, were needed. Although not required by federal law, interstate lia- pendens remained available at the option of the individual states, but that doctrine operates only when another lawsuit is pending. Jurisdictional imposition is not so confined. Thus the doctrine of forum non conveniens given a scope of operation more wide-ranging than its previous employment would have suggested.

Those who are conversant with the history of forum non conveniens in the United States know that it became a real litigation force in that country as a result of decisions of the Supreme Court of the United States in the 1940's, decisions that involved federal courts but that were contemporaneous with the loosening of federal constitutional restraints on state court jurisdiction. They also know that, with the advent of a statutory transfer mechanism in 1948, the doctrine became irrelevant in federal litigation that could properly be lodged in another federal court. Finally, they know that, although the doctrine has not been embraced in all states, federal decisional law has proved a substantial continuing influence on the tenor of

34. For a discussion of the costs of linking or eliding state and federal constitutional law concerning jurisdiction to adjudicate, see Burbank, "Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?" 1 Tulane J. Int'l & Comp. L. 111 (1999).

35. The courts were already open to some such litigation because of the traditional grounds of general jurisdiction on the basis of the presence within the state of the person ("tag jurisdiction") or of property ("attachment jurisdiction") at the time of service, and the development of general "doing business" jurisdiction for corporate and other business entities added to the burden. For these purposes, the importance of International Shoe and its progeny is the proliferation of choice resulting from their expansion of the opportunities for specific jurisdiction. For criticism of the Supreme Court's failure to inform due process analysis with a comparative and dynamic consideration of jurisdictional possibilities, see Burbank, supra n. 34, at 117-19.


38. See Act of June 25, 1948, ch. 666, 62 Stat. 669, 937 (codified at 28 U.S.C. § 1404(a) (1994) ("For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought."); Ravel v. Ross, 211 F.3d 509, 513 (9th Cir. 2000) ("The doctrine of forum non conveniens survives in federal court only when the alternative forum is in a foreign country.")
many states’ law whose reach includes cases that could, as well as those that could not, be lodged in another American court. 29

To the extent, therefore, that it is possible to speak of a modern American law of forum non conveniens, it has both a federal inspiration and a strong continuing federal influence. Moreover, although initially invigorated to deal with problems created by domestic litigation, the vagaries of its development have led to law for domestic cases being shaped, in those states that follow the federal lead, by the responses of federal courts to international civil litigation.

Ostensibly a tool to implement litigation convenience for litigants and courts, as formulated by the Supreme Court in the 1940’s, forum non conveniens doctrine invited attention to regulatory concerns, and hence to choice of law, through consideration of what the Court called “public interest factors.” 30 Ironically, such attention became essentially irrelevant in the context in which the doctrine was (re)born, because a change in the governing substantive law was held to be impermissible in diversity of citizenship cases that could be transferred under the mechanism enacted in 1948. 31 Yet, the presence or absence of a perceived domestic regulatory interest often seems critical to the result of a forum non conveniens motion in international cases. 32 Moreover, although the justification for treating foreign plaintiffs differently than domestic plaintiffs is framed in terms of inferences concerning litigation convenience, 33 judgments about regulatory interest are not very far beneath the surface, if beneath the surface at all. 34 As a result, the consequences of even dramatic changes in the substantive law may not defeat a forum non conveniens motion, 35 but choice of law concerns are hardly irrelevant.

The dynamic of doctrine applicable in domestic cases changing shape because of international litigation is not unique to forum non conveniens law. International civil litigation in the United States has involved doctrinal cross-fertilization between domestic and international cases. 36 Unfortunately, as the possibility of continuing use

34. See id. at 361-62, 360-61.
35. See id. at 367 (“The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry”).
by state courts of contemporary federal foreign non conventions doctrine may suggest, the models borrowed are not always appropriate, either in their original or in their transplanted contexts.

We have seen that, as between American state courts, there is no federally imposed obligation of lis pendens and that there are reasons for state courts to be sparing in the use of antisuit injunctions against litigation in other states. When the question is rather whether a federal court will dismiss or stay litigation before it because of, or enter an injunction against, parallel litigation pending elsewhere in the United States, different answers are likely depending on whether the other litigation is pending in a federal or state court. Although the differences can be explained, the answers are not immune to criticism. Moreover, the fact that both approaches have been borrowed for, and coexist in case law treating, the same problems in international cases is indefensible.

When parallel litigation is pending in two federal courts, something very close to a system of lis pendens operates, with a strong preference in favor of the first filed case. For these purposes federal courts consider themselves part of the same system of courts, even when different substantive laws would govern in the respective cases. They are not shy about implementing the first-filed preference through antisuit injunctions as well as dismissals or stays.47

When parallel litigation is pending in state and federal courts, on the other hand, the federal courts follow different roles.48 The ability of a federal court to dismiss a case in favor of state court litigation is constrained by that branch of the Supreme Court's abstention doctrine associated with the Colorado River case,49 while its ability to enjoin the continued prosecution of such litigation is constrained by the Court's interpretation of the federal Anti-Injunction Act.50 The former imputes a "virtually unflagging obligation"51 to federal courts to exercise the subject matter jurisdiction conferred by statute, toler-

47. See Landis v. North American Co., 299 U.S. 494 (1937) (stay); National Equipment Rental, Ltd. v. Fowler, 287 F.2d 43 (3d Cir. 1961) (injunction). True lis pendens or "other action pending" doctrine may be available when the cases are pending before the same federal court. See Chima v. Giant Food, Inc., 100 F. Supp. 2d 331 (D. Md. 2000); Sutcliffe Storage & Warehouse Co. v. United States, 101 F.2d 849 (1st Cir. 1947).


50. A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

ating a dismissal only in "exceptional circumstances." The latter confines their ability to protect their jurisdiction against pending state litigation by injunction to situations involving or analogous to those involving tangible property. The perceived jurisdictional constraint dissolves, and a federal court has broad discretion to dismiss (or stay) parallel litigation, in a case seeking a declaratory judgment.

When parallel litigation is pending in a federal court and in the court of another country, until such time as the Supremes Court provides guidance, the rules governing a motion to dismiss or stay and a motion for an antisuit injunction may depend on the federal circuit in which that federal court sits. It appears that a reason for such differences in circuit law on inters pendens and antisuit injunctions in international cases has been the choice of "domestic" models, the model of litigation entirely within the federal court system (federal-federal) or the interjurisdictional (federal-state) model. A court that follows the former model perceives that it has broad discretion to dismiss or stay parallel litigation in favor of litigation filed abroad and also to enjoin litigation abroad in favor of the case before it. A court that follows the latter model will dismiss or stay parallel litigation before it, and similarly will enjoin parallel litigation abroad, only in exceptional circumstances.

52. Colorado River, 424 U.S. at 813.
53. See Vendo Co., 453 U.S. at 641-42; In re Baldwin-United Corp., 770 F.2d 328, 337 (2d Cir. 1985); Feist, supra n. 39, at 1359. The text concerns the "in aid of jurisdiction" exception. Note, however, the two other exceptions to the Anti-Injunction Act's bar. See supra n. 50. For other limitations on the ability of a federal court to enjoin pending state litigation, see Feist, supra n. 28, at 1373-75.
55. See Born, supra n. 39, at 461-65, 470-75; Rurbank, supra n. 48, at 15-17. I do not mean to suggest that this is the only explanation for the differences among the circuits. Mr. Baumgartner has helpfully analyzed the cases from the perspective of "exclusive adjudication of a case in the forum in which the entire transaction or occurrence can be resolved." Baumgartner, supra n. 28, at 214. He continues:

[N]ot uninteresting that those federal decisions that favor a more restrained approach to antisuit injunctions in the United States happen to involve simple reversible situations with identical parties and causes of action. Perhaps, the prospect that the judgment in one litigation cannot be used as res judicata by or against all parties in the other significantly weakens the rule in favor of parallel proceedings. Id. at 215-16 (footnote omitted). Note that the federal-federal model would best enable "having all aspects of a dispute adjudicated in a single forum," which he recognizes is "a general policy of common law procedure, particularly of federal procedure in the United States." Id. at 216 (footnote omitted). It may not be an appropriate model in the international context, however. See infra text accompanying n. 62.
For different reasons, both Professor Redish and I have argued that the treatment of parallel federal-state litigation is inherent. 53 The perceived requirements of separation of powers appear to have been a source of the difficulty, coupled with failure by the Supreme Court adequately to distinguish among the circumstances in which a federal court may be asked to decline to exercise, or to postpone the exercise of, subject matter jurisdiction. The Court has recently distinguished the refusal to grant declaratory relief from abstention 50 and the power of a federal court to stay as opposed to dismiss an action. 51 These decisions suggest both that additional changes are necessary in the doctrine for federal-state cases and that, at least until such changes are made, it is not an appropriate model for international litigation. The federal-federal model is coherent, but in the absence of the unifying influences of a treaty, it is not obviously more appropriate for international cases. 52

III. JURISDICTIONAL EQUILIBRATION UNDER THE BRUSSELS CONVENTION

The extraordinary achievement of the Brussels Convention is apparent when one considers the tenor and variances of the national recognition law for international cases that it replaced in signatory States. Indeed, as Professor Walter and Mr. Baungartner have recently made clear, although the Brussels Convention has "cross-fertilized" the recognition doctrine that some States apply in cases outside its scope, even today there is a stark contrast between its regime and the law that some other States apply to non-Brussels foreign judgments. 63

In one sense, the contrast is not surprising, insofar as the traditional recognition laws of many countries "developed during a time of pronounced nationalism," yielding a "strict territorialist ap-
proach. As a result some States refused to recognize foreign judgments in the absence of a treaty, while others implemented a strong sense of sovereign prerogatives through practices and/or requirements that had the effect of one hand taking back what the other conferred. For nations desiring more favorable treatment, the answer lay in treaties. The Brussels Convention can thus be seen as the most ambitious of a "staggering number of treaties that the continental European states have concluded over the last 150 years."

More striking than the ambition of using a multilateral treaty to achieve the purposes of the European Community by liberalizing judgment recognition practice is the ambition, legal and political, of pursuing and successfully concluding a double convention. The signatory States thus secured agreement to displace national law with uniform rules concerning grounds of adjudicatory jurisdiction required to be afforded, as well as those prohibited, in cases within the convention's scope. It seems likely that the cominence of a shared tradition among the original signatory States eased the task, as to both the form and content of the jurisdictional rules prescribed. That legal tradition puts a very high premium on certainty and predictability in general and particularly as to adjudicatory jurisdiction. Moreover, it only grudgingly admits a role for judicial discretion, if it admits any such role at all. Both are reasons not to give a court vested with jurisdiction discretionary power to decline to exercise that jurisdiction, and they help to explain why the forum non conveniens doctrine is rejected in most of the civil law world and in the Brussels Convention.

Yet, even when States aspire to more than community and have the confidence and collective political will to agree upon a closed list of jurisdictional bases, the choice of forums remains important to litigants, and even a double convention cannot prevent the filing of lawsuits in inappropriate forums or in multiple forums, although it surely reduces their incidence. A regime seeking to avoid judgments that are denied recognition because they are irreconcilable with domestic judgments or rendered in conflict with a grant of exclusive jurisdiction also needs either a requirement or authority for a Contracting State to stay or dismiss litigation in favor of potential or existing litigation elsewhere. It requires jurisdictional equilibration devices.

66. Id. at 5.
67. Id.
68. See von Mehren, supra n. 11.
70. See Brussels Convention, supra n. 4, art. 27(3) & (5) (recognition denied in the event of certain irreconcilable judgments); id., art. 38 (recognition denied if judgment conflicts with, inter alia, exclusive jurisdiction provisions).
And so, Article 19 of the Brussels Convention requires that a court of a Contracting State "declare of its own motion that it has no jurisdiction" of a claim concerning "a matter over which the courts of another Contracting State have exclusive jurisdiction by virtue of Article 16." Where actions are brought in different Contracting States, Article 21 gives strict precedence to the court first seised to the extent that they involve the same cause of action and are between the same parties,70 while Article 23 does the same "[w]here actions come within the exclusive jurisdiction of several courts."71 For related actions, Article 22 permits any court other than the court first seised to stay its proceedings ("while the actions are pending at first instance"), and, upon application of a party, to decline jurisdiction if the court first seised has jurisdiction over both and consolidation is permitted.72

An appreciation of experience under Articles 21 and 22 of the Brussels Convention can perhaps best be gained, and it can be gained most economically, by considering the differences between those provisions and the comparable provisions of the proposed Hague Convention, which were drafted in the light of that experience.73 A few observations may, however, usefully precede, by framing, that discussion.

Experience with interjurisdictional lis pendens in Europe, both prior to and independent of the Brussels Convention, reveals a close link between that doctrine and recognition practice,74 a link that is obscured by Article 31's requirement that the court second seised decline jurisdiction as soon as "the jurisdiction of the court first seised is

70. Article 21 of the Brussels Conventions provides:
Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall, if of its own motion, stay its proceedings until such time as the jurisdiction of the court first seised is established.
Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

71. Article 23 of the Brussels Convention provides:
Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

72. Article 22 of the Brussels Convention provides:
Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.
A court other than the court first seised may also, on application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.
For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

73. See infra text accompanying nos. 85-112. To the extent reported decisions are a guide, there appears to be little experience under Article 23.

74. See Baumberger, supra n. 26, at 205-06; Pauwels, supra n. 63, at 28.
established." The same experience indicates awareness, not apparent from the text of the Brussels Convention, that the doctrine fosters a race to the courthouse which may be part of a litigation strategy wholly unconcerned with, and perhaps fearful of, adjudication on the merits and that it should therefore be relaxed in circumstances of undue delay.76

If Article 21 of the Brussels Convention may for such reasons be thought insufficiently progressive even within Europe, Article 22 was venturesome indeed. For, although the laws of many countries on the continent address the problem of related litigation that is wholly domestic, as reported by Mr. Baumgartner, "these code provisions have not found their way into transnational practice the way the doctrine of ipsa pendens has."77 In considering possible reasons for this, he suggests the traditional civil law concerns about courts surrendering jurisdiction and exercising discretion.77 More interesting, I believe, are his empirical observation that "the stay in favor of related actions does not seem to be used very often in purely domestic proceedings,"78 and his jurisprudential speculation that "[a] further reason for the reluctant use of related-action stays may lie in a procedural philosophy that views a civil proceeding more as an efficient adjudication of the plaintiffs' claim than as an equitable resolution of a dispute or, as in the United States, of an entire 'transaction or occurrence'."79 This philosophy, he suggests, may help to explain why there are so few published opinions involving Article 22 of the Brussels Convention from the European Court of Justice or "the courts of the Convention's civil law member states."80 There are limits to the power of a treaty both to cross-fertilize domestic law and to alter jurisprudential assumptions.

Even the most painstaking efforts of expert drafters cannot prevent interpretative dissonance. When the effort involves languages that are to serve as authoritative prescriptions in countries to which they are foreign, the risk is greater. It is greater still when those prescriptions are silent on questions necessarily and obviously included within their scope. The risk becomes a virtual certainty when the languages are brought into service in countries from different le-

76. See Baumgartner, supra n. 28, at 205-09. Note, however, that both the Sagano and San Sebastian Conventions did address the problem of the court first seized deciding that it did not have jurisdiction after the court second seized had declined jurisdiction, with the possible running of the applicable limitations period, by distinguishing between a stay and declining jurisdiction. See Kenott, "Lia Abi-
Pandrea: A View from the UK" in The European Area in Civil and Commercial Mat-
ters (R. Footman, A. Noyce, H. Tagaras & N. Watté, eds. 1999), at 114. This change is now reflected in the text of the Brussels Convention, quoted supra n. 70.
77. Baumgartner, supra n. 28, at 207.
78. Id. at 207-10.
79. Id. at 210 (footnotes omitted).
80. Id.
gal traditions. It is thus no surprise that a need was soon acknowledged to enable the European Court of Justice to reduce the interpretative noise by making binding interpretations of the Brussels Convention.81

Finally, although the lis pendens provision in Article 21 of the Brussels Convention may appear "rigid, mechanical and crude"82 to common law eyes, in recent years the costs of discretionary justice within a highly entrepreneurial adversarial system have become apparent.83 The negotiations at The Hague are taking place at a time when signals from both domestic law and other international initiatives point towards a rapprochement between the jurisprudential assumptions of the common law and civil law traditions with regard to the proper roles of rules and discretion, and of judges and lawyers, in seeking procedural justice.84

IV. THE PROPOSED HAGUE CONVENTION, THE ROAD AHEAD AT THE HAGUE AND PROGRESS IN NATIONAL LAW

A. Lis Pendens and Antisuit Injunctions

1. The Proposed Hague Convention

The proposed Hague Convention's lis pendens provisions, contained in draft Article 21,85 are an excellent example of the fruits of "enlightened comparative procedural lawmaker, . . . which could

81. As originally adopted, the Brussels Convention "did not give the European Court jurisdiction to interpret its provisions; consequently, a protocol was signed in Luxembourg on 3 June 1971 to make provision for preliminary references." Hartley, "Interpretation to the Brussels Jurisdiction and Judgments Convention," in V Collected Courses of the Academy of European Law, Book 1, at 229 (1990) (footnote omitted). For the protocol, see 1978 O.J. (L304) 50. On the preliminary reference procedure, see Koen Lenaerts & Dirk Arts, Procedural Law and the European Union ch. 6 (Robert Bray, ed. 1999).
85. Draft Article 21 provides:
1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 or 12.
2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.
3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.
prove a model for law reform in er among countries from both of the
dominant traditions represented at The Hague]. The draft provi-
sions sensitively reflect experience under the Brussels Convention,
greatly improving the treatment of the subject in that treaty, and
they reflect as well experience under common law systems, appropri-
ating a common law device in order to impart greater flexibility.

As described previously, the Brussels Convention treats the sub-
ject of lis pendens briefly and, from a common law perspective, rig-
idly. As a result both the European Court of Justice and national
courts have been given a load of interpretative work that has tested
jurisprudential assumptions of the civil law tradition. The proposed
Hague Convention has profited from the evidence furnished by those
cases and, although following the basic preference for the court first
seised, has sensibly resolved many of the problems they reveal. In
taking this approach, the drafters have not only advanced the goals of
certainty and predictability. They have provided greater hope of uni-
formity for a regime that lacks a mechanism to ensure it.

Thus, for instance, the drafters at The Hague have acknowledged
the difficulties arising from the Brussels Convention’s failure to de-
fine the critical determinant of precedence, when a court is seised, a
gap that the European Court declined to fill when it held that the
matter was to be determined by national law.87 So also, recognizing
from experience under the Brussels Convention that the condition re-
quiring the proceedings to be based “on the same causes of action”
could greatly limit the scope of the provision’s application,88 the

4. The provisions of the preceding paragraphs apply to the court second
seised even in a case where the jurisdiction of that court is based on the na-
tional law of that State in accordance with Article 17.
5. For the purpose of this Article, a court shall be deemed to be seised—
a) when the document instituting the proceedings or an equivalent doc-
ument is lodged with the court, or
b) if such document has to be served before being lodged with the court,
when it is received by the authority responsible for service or served
on the defendant.
[As appropriate, universal time is applicable.] 6. If in the action before the court first seised the plaintiff seeks a determina-
tion that it has no obligation to the defendant, and if an action seeking sub-
stantive relief is brought in the court second seised—
a) the provisions of paragraphs 1 to 5 above shall not apply to the court
second seised, and
b) the court first seised shall suspend the proceedings at the request of a
party if the court second seised is expected to render a decision capa-
bile of being recognised under the Convention.
7. This Article shall not apply if the court first seised, on application by a
party, determines that the court second seised is clearly more appropriate to
resolve the dispute, under the conditions specified in Article 22.
86. Supra text accompanying nos. 14-15.
88. See, e.g., Case C-144/88, Grenchen Maschinenfabrik KG v. Yulumbo, 1987
drafters at The Hague included the qualifier "irrespective of the relief sought." Indeed, they went much further, drawing on experience in common law jurisdictions suggesting that precedence should not in some circumstances be given to cases in which the plaintiff seeks only declaratory relief, and crafting a provision that reversing the normal rule where (1) such relief is sought in the court first seised, (2) "an action seeking substantive relief is brought in the court second seised" and (3) "the court second seised is expected to render a decision capable of being recognized under the Convention."

The last quoted qualification from draft Article 21(6)(a) implements a broader rule that itself constitutes an advance in the proposed Hague Convention, again reflecting experience under the comparable provision in the Brussels Convention. For, under draft Article 21(1), the obligation of the court second seised to suspend proceedings arises only if the court first seised has jurisdiction and is expected to render a judgment capable of being recognized under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 or 12."

This provision, which responds to the authority to apply national jurisdictional law under a mixed convention, also answers a question apparently (and surprisingly) still open under the Brussels Convention, to wit, whether its pendens applies when the court second seised has exclusive jurisdiction. Indeed, it appears to be partially redundant in that regard, since judgments based on a ground of jurisdiction which conflicts with Articles 4 and 12 are among those denied recognition and enforcement under draft Article 26. Moreover, by permitting the court second seised to consider whether a judgment of the court first seised is "capable of being recognized under the Convention," this provision appears to affirm the power of the court second

seised independently to determine the jurisdiction of the court first seised. If so it answers a question suggested by the condition, "if the court first seised has jurisdiction," and does so, except perhaps for instances of exclusive jurisdiction, contrary to the solution worked out under the Brussels Convention.92

A strict lis pendens regime is most palatable where, as in the Brussels Convention, there is also a close jurisdictional system in which participating States have confidence. The required confidence concerns not only the likelihood that the jurisdictional standards will ensure an appropriate relationship between the forum and the defendants), but, where neither a choice of law test nor reexamination of the merits (révision au fond) is permitted, also an appropriate relationship between the forum and the matter in controversy. To the extent that required jurisdictional bases do not inspire such shared confidence and/or that other jurisdictional bases are permitted, a safety valve is needed that permits the equilibration of competing jurisdictional claims by means other than a strict first-filed (or first-seised) rule.

The proposed Hague Convention contains such a safety valve, borrowed from the common law, providing in draft Article 21(7) that the convention's lis pendens rule is inapplicable "if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute under the conditions specified in Article 22."93

Two other, conceptually linked, advances over the comparable provisions in the Brussels Convention should be noted. Whereas under Article 21 of the Brussels Convention, the court second seised is required to decline jurisdiction "where the jurisdiction of the court first seised is established,"94 under draft Article 21 of the proposed Hague Convention, suspension and declining jurisdiction are treated separately, with the latter required only when the court second seised is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention." In addition, draft Article 21(3) permits the court second seised, upon application of a party, to "proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or

92. See Case 251/89, Overseas Union Insurance Ltd. v. New Hampshire Insurance Co., [1991] E.C.R. 1/341 (1991). Note, however, that in connection with recognition, although draft Article 27(1) provides that "the court addressed shall verify the jurisdiction of the court of origin," in doing so it is "bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default" under draft Article 25(2).

93. Draft Article 22 is set forth infra at n. 165. Note, however, that draft Article 21 as a whole, and hence this provision, does not operate where the court first seised is exercising jurisdiction under national law pursuant to draft Article 17.

94. See supra n. 75 and accompanying text.
if that court has not rendered such a decision within a reasonable time." These aspects of the proposed Hague Convention constitute an important hedge against the risks of strategic behavior that are inevitable in any system of jurisdictional equilibration and an important protection of a court's ability to do justice against the demands of efficiency and consistency.95

2. The Road Ahead at The Hague

This is an impressive record of progress that should inspire confidence in anyone suggesting additional refinements. One matter should not be controversial, although it may resist solution because of technical difficulties and differences in national law. Unless the addition of the condition, "irrespective of the relief sought," and its French counterpart in draft Article 21(1) is thought to cover the matter, the proposed Hague Convention imports from the Brussels Convention the ambiguity raised by the use of different conditions in the English and French versions ("same causes of action" in the English version and "les mêmes causes et le même objet" in the French version), ambiguity that has engaged the attention of the European Court on more than one occasion and to which that tribunal assigns some importance.96


96. For sentences of such provisions in Swiss (as of 1987) and Italian (as of 1996) law, see Beaum Guantanamo, supra n. 28, at 205-06.

97. The French language version of draft Article 21(1) provides:

Lorsque les mêmes parties sont engagées dans des procédures devant des tribunaux d'Etats contractants différents et que ces procédures ont la même cause et le même objet, quelles que soient les préétions des parties, le tribunal saisi en second lieu suspend la procédure si le tribunal premier n'est pas compétent et qu'il est prêvu que le tribunal rendra un jugement susceptible d'être exécuté en vertu de la Convention dans l'Etat du tribunal saisi en seconde instance, sauf si ce dernier est exclusivement compétent et que ce dernier juge.

tional Litigation 32 (2000) (Principle 4.1 of the Leicester/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters) ("proceedings involving the same parties and the same subject-matter"); id. at 37 ("les demandes ayant le même cause . . . entre les mêmes parties").
More controversially, one might question the decision to exclude from the operation of draft Article 21 situations in which the court first seised is exercising jurisdiction under national law as permitted by draft Article 17. The recognition check in draft Article 21(1)(dei
teilig "under the Convention") might be thought to provide adequate
protection to the court second seised. Moreover, acknowledging that an
interejurisdictional lis pendens provision can only reach so far
without ignoring or affecting domestic law, including procedural and
res judicata law, it is worth asking whether draft Article 21 goes as
far as it properly can and should go in other respects to advance
shared interests in efficiency and consistency. Thus, experience
under the Brussels Convention might at least counsel elaboration of
the concept of "same parties." And should concern for the integrity
of national procedural law prevent this provision from reaching
claims that are in fact compulsory counterclaims in the court first
seised?

One answer to the last question might be that draft Article 21 is
less concerned with efficiency than with the prevention of irreconcilia-
ble judgments (consistency). But even if that is a plausible account of
the Brussels regime, both the departures from that regime that I
have described above and the fact that the proposed Hague Conven-

98. For example, an American might be tempted to formulate a lis pendens provi-

sion so as to comprehend claims that the defendant in the court first seised has

against the plaintiff that arise out of the same transaction or occurrence, taking ini-

tiation from Fed. R. Civ. P. 13(a)'s definition of a compulsory counterclaim. One prob-

lem with such a broad formulation is that other States may not countenance

counterclaims, or require that they be asserted, and any such provision would there-

fore operate so as to upset the policy judgments implicit in their normal rules of proce-

dure in the cases to which it applies. A second problem is that even a legal system

that is aggressive in requiring the assertion of counterclaims, like the American fed-

eral system, recognizes that there must be limits to the compelled loss of choice

of forum, and the perceived need for such limits is likely to be more inistent in the

international context.

99. See Case C-351/96, Drust Assurance SA v Consolidated Metallurgical Indus-


191 (2000); Kennett, supra n. 75, at 109-11.


1999); supra n. 98.

101. If in these respects the Special Commission may be thought to have kept its am-

bition too well under control, that cannot be said about draft Article 21(1)(e), pursuant

to which "even if all the parties are habitually resident in [a Contracting State]" Arti-

cles 21 and 22 shall apply where the court is required to determine whether to decline

jurisdiction or suspend its proceedings on the grounds that the dispute ought to be
determined in the courts of another Contracting State. As a result, a United States
court adjudicating a case involving only United States parties would be required to
apply the Convention's lis pendens provision if it were second seised, and its forum
non conveniens provisions if the alternative forum advanced were in another Con-
bracting State.
tion does not, while the Brussels Conventions does, contain a separate article on related actions, deprive it of persuasive force.

Of course, this line of reasoning raises perhaps the most difficult question for one who admires this aspect of the work at The Hague but who desires to make a constructive contribution to the process as it goes forward. Why is it that the current draft does not contain a provision on related actions comparable to Article 22 of the Brussels Convention? Granted that the co-existence of Articles 21 and 22 in the latter has posed some serious interpretative problems for the European Court and for national courts, and acknowledging again the progress that draft Article 21 represents, it is still a provision of quite limited scope, hardly adequate to meet the strategic ingenuity of modern litigants or otherwise to eliminate the inefficient consumption of scarce judicial resources. It does not appear that draft Article 22 of the proposed Hague Convention could, even if it was intended to, serve the purpose. Moreover, particularly in light of extensive discussion of mechanisms for judicial cooperation during the deliberations of the Special Commission, it seems a shame that perhaps the best vehicle for the development of experience along those lines is absent from the proposed convention.

As experience under the Brussels Convention demonstrates, it is not easy wholly to banish antisuit injunctions from a legal culture

102. See supra text accompanying nn. 70-72; infra text accompanying nn. 103-06.
105. Draft Article 22, which is set forth in full infra n. 163, permits suspension/ dismissal only "in exceptional circumstances," only if "it is clearly inappropriate for [the court seised] to exercise jurisdiction," and only if "a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute." These conditions are cumulative and to be taken seriously. See Nygh & Poer, supra n. 97, at 99. The second of them in particular deprives the provision of utility for the consolidation of related actions. Compare the proposal for a "consolidation of a narrowly defined lex pendens rule and a widely defined related actions rule modelled on forum non conveniens," Beaumont, supra n. 90, at 101, which the author suggested "might prove a negotiable compromise in the Hague even if it cannot be achieved in the Brussels and Lugano revisions." Id. See in that regard Leven/London Principle 4.3, supra n. 97 (where related actions are pending, "either court may suspend or terminate its proceedings and refer the matter to the alternative court . . . provided that the actions can be consolidated in the alternative court").
106. See Hague Conference on Private Int'l Law, Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Working Document No. 144 B, 8-10 (Nov. 20, 1998) (hereinafter Working Document No. 144 B); Catherine K/Desktop, Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Preliminary Document No. 9, at 40-44 (1998) (hereinafter Preliminary Document No. 2). Note also Leven/London Principle 5.2, supra n. 97, providing for direct communication between courts, when permitted by the respective States, and corresponding States to "permit their courts to make, and respond to, such communications".)
accustomed to them.\textsuperscript{107} Moreover, even in a closed jurisdictional system that relies primarily on a strict lis pendens regime, and even where binding interpretation of governing jurisdictional and lis pendens law is possible, antisuit injunctions may have a (very) limited role to play. Duplicative litigation may reflect more than a litigant’s attempt to secure a more favorable forum in a world of choice. It may represent an attempt to evade a grant of, or an agreement to submit to, exclusive jurisdiction in another tribunal. It may also represent an attempt to wear down the opponent, to prevail without prevailing on the merits.\textsuperscript{108} In both situations, the potential of ultimate correction pursuant to the binding interpretation of a central tribunal may not suffice to deter, as under the Brussels Convention, and neither may the ability of the court that possesses exclusive jurisdiction to continue to judgment, as under the proposed Hague Convention.\textsuperscript{109}

In both situations, therefore, there is an argument to be made in favor of limited power in a court properly vested with jurisdiction to enjoin the abuse. The fact that some countries participating in the negotiations at The Hague may regard antisuit injunctions issued unilaterally by the courts of another country as an infringement of territorial sovereignty should not deter the effort, since agreement in the treaty would solve the problem, at least to the extent that agreed standards were determinate. Moreover, the absence of a tribunal empowered either to resolve differences between signatory States or to issue interpretations binding on them suggests that the need is greater than it is under the Brussels Convention. Perhaps, however, the subject of antisuit injunctions is too controversial to broach in negotiations, leaving their availability or not to national interpretation, which will be influenced by national legal culture, tradition and rules.\textsuperscript{110}

\begin{thebibliography}{9}
\item \textsuperscript{109} See Hague Draft, supra n. 8, art. 21(1); supra text accompanying n. 90-Si. For some of the means to facilitate uniform interpretation of the proposed Hague Convention, see Preliminary No. 9, supra n. 106, at 44-45; Seckel, supra n. 68, at 1226 n.16.
\item \textsuperscript{110} As Mr. Reamgartner has pointed out, this could lead to serious mischief if common law countries interpreted the convention as simply not dealing with anti-suit injunctions and civil law countries took the view that they were preempted. See Letter from Samuel P. Reamgartner to Stephen B. Burbank, supra n. 97, at 3-4.
\end{thebibliography}
3. Progress in National Law

When one looks to see what lessons those who have been considering changes in the Brussels regime have drawn from the experience under that convention to date, and what if anything they have drawn from the deliberations at The Hague, one learns only that "the case on which an action is 'pending' for the purposes of Article 21 is defined autonomously, and a mistake in the framing of the related actions rule in the Brussels Convention has been corrected." If nothing else were changed, in this respect at least it would be hard to avoid the conclusion that an opportunity had been missed. Let us hope that more will be done to bring the Brussels Convention's provisions on lis pendens in line with experience and to inform them with comparative insight. Let us hope, moreover, that the United States can profit from both, as well as from recent scholarship on domestic law.

The Supreme Court's recent decisions distinguishing a federal court's power to refuse declaratory relief from its power to abstain and, within the domain of abstention, distinguishing a stay from dismissal, suggest that the "exceptional circumstances" requirement of Colorado River abstention may have been responsive to the separation of powers concerns to which those distinctions speak. They also suggest that, so long as a federal court desiring to give precedence to parallel litigation pending in a state court stays rather than dismisses the case before it, such concerns are satisfied and thus that exceptional circumstances should not be required for that reason.

Except in the case of an exclusive jurisdiction clause that "has been manifestly breached according to the law applicable in the courts of both states," the Leuven/London Principles do not permit anti-suit injunctions where the respective states are parties to a convention providing common jurisdictional rules or where the court from which an injunction is sought "is satisfied that these Principles will be applied by the court which proceedings have been instituted." See supra n. 97.


112. Cf. Festman, supra n. 90, at 169 (remark[ing] failure of Commission proposals to clarify the problem of exclusivity within Article 17).


114. See Burbank, supra n. 48, at 16-17. In Moses H. Cone Memorial Hospital v. Mercury Const. Corp., 460 U.S. 1 (1983), the Court applied Colorado River's "exceptional circumstances" test in concluding that the District Court's stay (not dismissal) of the federal action was inequitable. That decision long antedated the rationalization of precedent in Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996), and as an action to compel arbitration, it would not have been subject to the prohibition on dis-
In a recognition system that mandates application of the preclusion (res judicata) law of the rendering court and subjects that law to very modest federal checks, as does the Full Faith and Credit statute, a stay may appear, ex post, functionally indistinguishable from dismissal. The ex ante difficulties of predicting the extent of duplication and the likelihood and extent of potential preclusion may provide some functional support for the stay alternative, as may potential limitations bars in the absence of a tolling rule. Moreover, even for separation of powers purposes one should perhaps distinguish between situations in which a federal court yields, or yields provisionally, to a state court seized of parallel litigation and a situation in which a federal court refuses for other reasons to adjudicate a case, no other litigation has yet been filed and the federal plaintiff is therefore forced to file a lawsuit in state court.

Professor Redish has called for a "zero tolerance solution to the duplicative litigation problem." His effort is concerned with federal courts law and is acknowledged as preliminary. He is agnostic about the scope of application of the regime he favors, the standards for determining forum preference, and about whether the regime should be implemented by decisional or statutory law. Although he does not discuss the federal-federal context, the changes he proposes in federal law governing both dismissal and antisuit injunctions for paralysis that Quackenbush discerned for common law damages cases. In any event, there were reasons other than concern about separation of powers that supported the result, if not the test. See further infra n. 114 and accompanying text.

124. See Burford, supra n. 17, at 797-909.


127. Congress' extension of the constitutional litigation of full faith and credit to the federal courts and its use of state preclusion law as the referent necessarily means that federal litigation can be cut short by a state court judgment. At least in cases governed by substantive state law, it is difficult to see why a federal court's unlikelihood to run the race to judgment with parallel state court litigation should be thought any different. It is more difficult to reconcile with the larger statutory context the action of a federal court which, rather than responding to a motion stimulated by state court litigation, creates the need for such litigation by refusing to adjudicate a case within its statutory subject matter jurisdiction, and, where that is true, the functional similarities of a stay and a dismissal may dwarf any theoretical distinctions. See Note, supra n. 115. Cf. Federal Reserve Bank of Atlanta v. Thomas, 2000 U.S. App. LEXIS 15288, at *86 (11th Cir. July 31, 2000) ("It is an abuse of discretion . . . to dismiss a declaratory judgment action in favor of a state court proceeding that does not exist."). But see Aetna Casualty & Surety Co. v. Ind-Cord Electric Co., 139 F.3d 419 (4th Cir. 1998).

128. Redish, supra n. 28.

129. See id. at 1362-67.

130. See id. at 1374-75.

131. See id. at 1276-78.

132. See supra text accompanying n. 47.
allel litigation between the federal and state courts could substanti-
ally assimilate the two contexts, removing both supposed
separation of powers and federalism roadblocks, and leaving the de-
velopment of lis pendens and antisuit injunction jurisprudence free to
focus on litigant convenience and institutional needs.

Although I share Professor Redish's view that current federal
law in this area is incoherent, I suspect that his proposed "zero
tolerance solution" goes both too far and not far enough. Thus, it is
not clear to me that the circumstances in which a federal court should
decline to dismiss or stay duplicative litigation in favor of state court
litigation are always circumstances in which an antisuit injunction
would be appropriate. In other words, zero tolerance may be too
little tolerance of parallel litigation even within the United States. In
addition, recognizing that state courts represent half of the problem
of federal-state parallel litigation and much more than that when the
problem is defined to account for all of the litigation in the United
States, I do not see the wisdom in baking less than half a loaf, partic-
ularly if preheating the oven will require overcoming legislative iner-
tia. Agreeing that the Supreme Court's interpretation of the "in aid
of jurisdiction" exception in the Anti-Injunction Act has been unfortu-
nate, I nonetheless doubt that federal, state or interjurisdictional
interests would be best served by a system that relied on injunctions
rather than reciprocal forbearance pursuant to uniform federal law.

I am inclined to believe, in other words, that, having inspired
those who negotiated the Brussels Convention to emulate our full
faith and credit approach to the recognition of judgments, we can
benefit by seeking to emulate, if not precisely to replicate, that Con-
vention's approach to the problem of equilibration when there is par-
allel litigation, as refined and improved in the proposed Hague
Convention. It is time to implement the Full Faith and Credit
Clause, the grants of judicial power in Article III, and federal stat-
utes conferring subject matter jurisdiction, with legislation that pro-
vides federal lis pendens standards, binding in state and federal
courts alike, whose decisions interpreting and applying those stan-
dards can be reviewed by the Supreme Court. The standards

124. See Burbank, supra n. 45, at 14-17.
125. Cf. SNI Aeropadale v. Lee Kui Jia, [1987] 3 All E.R. 510 (P.C. 1987); Work-
tribunals deciding both of these cases were at pains to distinguish the standards gov-
erning a forum non conveniens dismissal or stay from those governing issuance of an
antisuit injunction. See Beaumont, "Green Britain," in Declining Jurisdiction, supra
n. 63, at 260-81.
126. See supra text accompanying nn. 50, 59; Redish, supra n. 26, at 1371. See
also Hoffman, "Removal Jurisdiction and the All-Writ Act," 148 U. Pa. L. Rev. 401,
127. Changes in current law regarding the timing of appellate review may be nec-
should not usually permit parallel litigation, and they should make it impossible ever again to suggest that normative thinking about American law supports such litigation generally. At the same time, pace Professor Redish, the standards should not implement any general preference for federal or state courts, or order in a multi-factored "case-by-case form of systemic and/or litigant 'interest analysis,'" as opposed to a defensible preference for the court in which litigation seeking a coercive (that is, not declaratory) remedy was first filed.

Because federal constitutional law places such minimal restraints on both jurisdiction and choice of law in the United States, while federal constitutional and statutory law so strictly constrain the freedom to deify recognition, a "safety valve . . . that permits the equilibration of competing jurisdictional claims by means other than a strict first-filed (or first-sued) rule" should be part of the suggested federal lis pendens statute. Such a provision would constitute, as it were, a limited but mandatory federal doctrine of forum non conveniens, to be considered apart from any broader proposal to federalize forum non conveniens law.

For a suggestion that the Pull Faith and Credit Causes might ground both a rule prohibiting interstate suitsuit injunctions and a rule of lis pendens, see Burrows, supra n. 32, at 902-04 n.58. As he points out, "[t]he lis pendens rule raises provoking races to the courthouse, it should at least avoid a more fraudulent race to judgment." Id. at 663 n.58.

128. Note that the definition of "parallel litigation" is likely to differ for the domestic, as opposed to the international, interjurisdictional context. See supra n. 26. Even domestically, however, acknowledgment of differences in procedural and precision rules should probably result in a definition that does not seek to impose on the country as a whole the broadest conceptions of litigation efficiency and consistency. See Hurst, supra n. 27, at 196-197; supra n. 50, infra text accompanying n. 1. See Redish, supra n. 48, at 153-55. This is not the only example of the phenomenon of something that under current conceptions must be tolerated because of the perceived requirements of federalism being transmogrified into a normative good.

See Burbank, supra n. 74, at 113.

130. Redish, supra n. 38, at 1374. Of course, neither a preference for federal court nor a preference for state court would serve to resolve problems of interstate parallel litigation, with which the proposed statute would also deal. See see infra n. 192.

131. See supra text accompanying n. 92-93. If the categorical lis pendens treatment of declaratory relief cases under the proposed Hague convention is deemed too broad, see supra n. 89, infra n. 149, the overbreadth can be cured through the application of this limited forum non conveniens safety valve.

132. See supra text accompanying n. 178-201. Just because we may be struck with multi-factored case-by-case analysis as the basis of decision in one corner of the law, but see infra n. 200, does not mean that we should sweep it into others, even if they are adju nctive. Moreover, there probably is a greater need for flexibility, and hence discretion, in international than in domestic cases. I am here advocating, for wholly domestic cases, a rule that presumptively favors the court in which the few coercive suit is filed, with statutory specification of the considerations that might lead to an other choice. Redish about what really motivates most forum non conveniens motions—and it is not litigation convenience—should prompt Congress not simply to ape the doctrine that formally governs the resolution of such motions when specifying exceptions to the statutory lis pendens rule. If so, it would be "a limited . . . federal doctrine of forum non conveniens" in more than one sense.
proposed Hague Convention, because applicable only where parallel litigation was pending interjurisdictionally. Unlike the proposed Hague Convention provision, it would be mandatory, and federal appellate review would be available to ensure that a federal state court did not ignore or seriously misapply the governing standards.

If even a closed jurisdictional system backed up by strict lis pendens doctrine cannot deter evasive action that inflicts substantial costs on litigants and courts, the proposed federal lis pendens statute should permit but strictly control the grant of antiaut injunctions. Whether as aspect of the statutory controls should be a requirement that the litigant seeking the injunction in the (few) situations permitted first seek a stay from the other court is worth consideration. Any such requirement might also have to negate the possibility of preclusion arising from the first court’s decision on the statutory requirements. Moreover, careful attention would be required to the alternatives of asymmetric treatment of federal and state courts, on the one hand, and reversal of current law barring in almost all cases state court injunctions against federal litigation on the other.

How then should American courts respond to parallel international litigation in the absence of a treaty or in cases that are not within the scope of any treaty concluded? I have sketched a model for a federal solution to parallel interjurisdictional litigation within the United States, one that is based on a federal statute binding on federal and state courts alike. Federal legislative power to dictate a national solution for international cases is as clear as it is for domestic interjurisdictional cases, and whichever serves as the lead in the effort to move Congress to action, the argument from legislative inertia

133. See Hague Draft, supra n. 8, art. 21 (7); supra text accompanying n. 93.

134. Other problems of appellate review aside, see supra n. 127 and accompanying text, any forum non conveniens provision is likely to present serious obstacles to effective review—See American Deposit Co. v. Miller, 510 U.S. 443 (1994). These problems could be reduced if there were, as I advocate, statutory specification of the considerations that could lead to deference of the first filed rule and if those specifications did not simply repeat current forum non conveniens doctrine. As Allan Stein has helpfully observed:

Particularly where the forum choice turns on regulatory choices, there is absolutely no reason for appellate deference under an abuse of discretion standard. Moreover, effective appellate review of forum choices must be interlocutory. The final judgment rule here is an undermining of coherent policy as the standard of review.

Letter from Allan Stein to Stephen Burbank 1 (Sept. 22, 2000).

135. See supra text accompanying nn. 105-09.

136. Cf Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986) (state court ruling on preclusive effect of prior federal litigation itself entitled to full faith and credit in proceeding seeking injunction from federal court otherwise permitted under the abstention exception to the Anti-Injunction Act).

extends to all litigation contexts where there is a plausible national need. The federal courts at least have used inappropriate domestic models to deal with parallel international litigation in the past, inconsistently treating litigation in Italy as if it were litigation in another federal court or in a state court. The models used have been inappropriate either because their extension to international cases lacked normative justification, or because the model itself was incoherent in the context in which it was initially used, or for both reasons. Having suggested the unitary treatment of parallel inter-jurisdictional litigation that is wholly domestic, I turn to the question whether it would be an appropriate model for international litigation.

The generous recognition treatment of internationally foreign judgments characteristic of American law for more than a century has represented a remarkable act of faith, one that has been tested, if only because put in relief, by the discriminatory provisions of the Brussels Convention and that would be tested again if proposed changes were implemented eliminating the mechanism by which the United States could escape such discriminatory treatment. A due process check on jurisdictional exorbitance can provide no greater assurance internationally than it does in domestic inter-jurisdictional litigation. Moreover and as an anterior matter, it is not clear whether, in a judgment recognition world that comprehends vastly different cultures and legal traditions, standards of adjudicatory jurisdiction can properly be taken as the hallmark of fairness and impartiality of the rendering court. Due process also does not provide much protection against procedural unfairness, and a truly limited public policy defense is hardly a replacement for choice of law control. Whatever the force of these concerns as to recognition practice, they do suggest that, in the absence of a treaty, international cases should not be assimilated to domestic cases for purposes of his

139 See Brussels Convention, supra n. 4, at 4; von Mehren, supra n. 9, at 278-79; Hartley, supra n. 81, at 231-39. The scope of potential discrimination was, of course, increased with the Lugano Convention.
140 Article 53 of the Brussels Convention "allows a Contracting State ... to enter into a convention ... with a non-Contracting State ... in which it undertakes not to recognize judgments given in other Contracting States against a defendant domiciled or habitually resident in the other party to the convention ... in those cases in which the judgment-giving court only had jurisdiction on one of the grounds expressly outlawed by Article 3 of the Convention." Hartley, supra n. 51, at 233 (footnote omitted); see also Zekoll, supra n. 68, at 1389 n.33. The proposed Council Regulation of the Commission of the European Communities would eliminate that authority prospectively. See Proposed Council Regulation, supra n. 108, at 26, 51. This would be a result far different from that urged by the United Kingdom's representatives, namely, abolition of the underlying discrimination. See Beament, supra n. 90, at 192-04. Discussion at the Symposium suggested that this proposal is highly controversial and may not be part of any final regulation.
pendens and antiseuit injunctions, whether in case law as it develops
in the federal and state courts, or under the proposed federal lis
pendens statute.
So long as the inquiry concerns the content of a proposed federal
statute, an important concern that may attend unilateral judicial
lawmaking for international cases need not detain us. Congress
and the President are competent to decide whether and when dis-
missing or staying litigation in the United States in response to, or
enjoining, parallel litigation abroad, would well serve the nation's in-
terests. Indeed, the fact that federal and state courts are currently
making such decisions, and doing so inconsistently, is one argument
for legislation as the vehicle of change.
An argument can be made that, at least in the absence of reci-
procity, American courts should not in general defer to parallel litiga-
tion abroad. The argument would probably acknowledge that it is too
late in the day to reverse the historic generosity of American courts in
recognizing internationally foreign judgments. Indeed, it might well
rely on that proposition, as well as the realities of modern interna-
tional forum shopping, for the normative stance that the United
States should not further handicap itself and its people by refusing to
enter the race to judgment.
This argument is not without force. Yet, some of the costs of par-
allel international litigation are visited on domestic parties and do-
mestic courts. Moreover, the general faith in other legal systems
evidenced by the United States' generous judgment recognition prac-
tice surely has a firmer basis today than it did 100 years ago. So does
the concept of an international system whose needs should be consid-
ered in the formulation and application of national law. These con-
siderations suggest that an attempt to rely on a normative principle
of dual jurisdiction would ring hollow. Unless the goal were to take
back part of the territory surrendered by international recognition
practice, such a crude rule would not be necessary to protect the in-
terests that, according to that practice, are relevant. And such a goal
would be hard to defend at a time when role need for courts to rely
on each other in order to serve justice has been recognized in an in-
creasing number of international civil litigation cases.
Assuming then that some rule of deference is appropriate, the
existence of litigation in different countries that may follow different
procedural rules and reflect different legal traditions counsels cau-
tion or modesty in giving content to the concept of parallel litigation.
This is one justification for the very narrow scope of Article 21 of the

141. See Burzank, supra n. 3, at 158-39.
142. See Lowendaal, "Forum Shopping, Antiseuit Injunctions, Negative Declarations
143. Lussier, supra n. 6, at 60.
Brussels Convention and the narrow scope of Article 21 of the proposed Hague Convention.

For these purposes, the focal point of difference is likely to be the content of domestic preclusion law, including in particular the scope given to the operation of claim preclusion, the treatment of counterclaims, and the existence and scope of issue preclusion. These matters, in turn, may reflect, although they do not exhaust the relevance for these purposes of, domestic procedural rules on such matters as joinder of claims and parties. Although consideration of changes in the law on lis pendens for domestic interjurisdictional cases can reasonably assume substantial homogeneity as to such matters, that is not true internationally. And United States lis pendens practice should no more impose on foreign institutions than should United States judgment recognition practice.144

At least, a lis pendens provision for international cases, taking inspiration from the proposed Hague Convention, should require the second cited American court to assure itself that a recognizable judgment was in prospect.145 This element, which is not necessary for domestic interjurisdictional litigation, would enable the American court to satisfy itself that the expense and delay of parallel litigation could be avoided, and that it would be fair to do so, by inquiring whether the basis of jurisdiction in the foreign court met minimum standards and, ex ante, that there was no systemic or insuperable situational barrier to the fair conduct of proceedings abroad and no likelihood of a judgment manifestly incompatible with American public policy. It would also involve engagement with the law of preclusion applicable to the foreign litigation. Finally, since ex ante predictions about recognition and delay are more difficult in the international context, the provision should require a stay, with dismissal to follow, if appropriate, upon presentation of a judgment eligible for recognition.146

145. The inspiration derived should extend to other matters not mentioned in the text. Thus, an international lis pendens provision should qualify the obligation to defer to the first-filed case by including a limited forum non conveniens check, but one that conferred greater discretion than that for lis pendens in wholly domestic cases. See supra note 132. Whether it should follow the proposed Hague Convention in carving out actions for declaratory relief depends on the view taken of the potential of such actions "to level the forum shopping playing field." Letter from Allan Stein to Stephen Burbank, supra n. 134, at 2. For a more nuanced treatment, see Levenson, London Principles 4.1 & 4.3, supra n. 97.
146. See supra text accompanying nn. 59-62, 94, 117. Regulation by statute would meet any separation of powers concern that attended dismissal of litigation involving legal (as opposed to equitable) claims from federal court in deference to litigation abroad. In Posner v. Rosas Ins. Co., Ltd., 179 F.3d 1209, 1222-23 (11th Cir. 1999), the Court of Appeals held that the restrictions on abstention announced in Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996), did not apply to "international litigation." With respect, the court's reasoning confuses the grounds of the putatively applicable
American courts and scholars are prone to ignore or dismiss the interplay in sovereignty with which many other countries involve procedural mechanisms that operate extraterritorially. As a result, perceived American imperialism may have an intellectual dimension. In any event, one of the many matters as to which such a difference of view is likely converges injunctions entered against litigation abroad. Some Americans may comfort themselves with the notion that the order is directed to a litigant within the court's jurisdiction, resuscitating a distinction akin to the distinction between in personam and in rem actions that has been thoroughly discredited in other contexts. Others take the view that an antisuit injunction has inescapable extraterritorial implications, which is the view taken in the interpretation and application of the federal Anti-Injunction Act.

Precisely because antisuit injunctions as international litigation are reasonably perceived to operate extra-territorially and to constrain courts as well as litigants, their issuance should be governed by a federal statute binding on federal and state courts alike. Moreover, respect for other nations' courts care in specifying the circumstances in which an international antisuit injunction can be issued, as do the risks and costs of error when courts dabble in comparative law. Here existing law governing parallel federal-state litigation, however incoherent for the context for which it was developed, may in fact be an appropriate model, at least insofar as it would permit an injunction to protect the American court's jurisdiction (the so-called anti-antisuit injunction). American courts should also have the power to prevent a manifest attempt to evade important national policy, but perhaps only in those situations where the policy in question would not be adequately protected through the denial of recognition. Finally, the federal-state model also suggests as appropriate internationally, in the absence of a treaty governing recognition, power in the American court to enjoin the continuation of litigation abroad when that is necessary to protect or effectuate a judgment that it has rendered.

Factual doctrine with the basic separation of powers limitations that, rightly or wrongly, the Quackenbush Court set out to vitiate and enforce.

147. See Burden, supra n. 3, at 112-23 (service of process and waiver of service).
151. See Laker, 731 F.2d 809. For the influence of the federal-state model, see id. at 926.
152. See Laker, 731 F.2d at 931; Chins Trade & Development Corp. v. M.Y. Choong Yong, 857 F.2d 55 (2d Cir. 1988).
153. See Laker, 731 F.2d at 926-27. Note, however, that the same concerns which caution modesty in the definition of parallel international litigation, see supra text
B. Forum Non Conveniens

1. The Proposed Hague Convention

It is commonplace to link the forum non conveniens doctrine to the need to discipline jurisdictional law (including, in the United States, federal venue law) that reaches too far. As the above summary of American developments suggests, there is force in the observation. Those who make it should admit the possibility, however, that American jurisdictional law does not have a monopoly on overreaching and that the limitations of foresight can call forth a similar need in other systems. Even such a hallowed jurisdictional ground as domicile may benefit from the equilibration that forum non conveniens or some similar device can provide, and functionally similar jurisdictional equilibration may already occur without invocation of the dreaded Latin phrase. Just as by substituting "inquiring" for "inquisitorial," "the bad becomes the good," so it may be that changing forum non conveniens to "circumstances for declining jurisdiction" lowers a red flag and allows those from different legal traditions to be candid about what courts really do—the discretion that dares not speak its name—and the measure of equilibration flexibility that is appropriate in a jurisdictional system that is hybrid both because it combines standards from different traditions and because it is neither closed nor open.

Of course, judgments about both jurisdictional overreaching and the acceptable limits of foresight are culturally contingent. Recalling the persistence of attention to regulatory interest in American forum non conveniens cases, one can perhaps identify a normative basis for judgments about overreaching from the American perspective that is broader and more faithful to actual practice than litigation convenience simpliciter. According to this view, the failure of American law to integrate jurisdictional and choice of law doctrine to recognize the practice that permits neither a choice of law test accompanying no. 143-44, should restrain the use of anti-suit injunctions to export specifically American notions of claim or issue preclusion.

Consideration of experience under the Brussels Convention may also suggest scope for a carefully defined power to expel litigation abroad that is, and is intended to be, oppressive. See supra text accompanying no. 107-10.

144. See supra text accompanying nos. 10-46.

145. A question mind assumes that the need to have discretion to decline to exercise jurisdiction must be because the country has over broad, or overbroad, rules of jurisdiction. However, it may simply be the case that it is impossible to devise rules of jurisdiction which will always lead to an appropriate court hearing the case. Even the archetypically flat jurisdiction rule, the domicile of the defendant...can lead to an inappropriate forum. See infra text accompanying no. 143-44, note 40 (footnotes omitted).

146. See, supra note 40. In particular, the question mind assumes that the need to have discretion to decline to exercise jurisdiction must be because the country has over broad, or overbroad, rules of jurisdiction. However, it may simply be the case that it is impossible to devise rules of jurisdiction which will always lead to an appropriate court hearing the case. Even the archetypically flat jurisdiction rule, the domicile of the defendant...can lead to an inappropriate forum. See infra text accompanying no. 143-44, note 40 (footnotes omitted).

147. See supra note 40. In particular, the question mind assumes that the need to have discretion to decline to exercise jurisdiction must be because the country has over broad, or overbroad, rules of jurisdiction. However, it may simply be the case that it is impossible to devise rules of jurisdiction which will always lead to an appropriate court hearing the case. Even the archetypically flat jurisdiction rule, the domicile of the defendant...can lead to an inappropriate forum. See infra text accompanying no. 143-44, note 40 (footnotes omitted).
nor reexamination of the merits, renders it important to consider domestic regulatory interests before jurisdiction is surrendered. Jurisdictional standards that more broadly implemented domestic regulatory interests should diminish the need for this equilibration decree.\textsuperscript{158}

It would be surprising if the jurisdictional standards in the current draft of the proposed Hague Convention, some of which seem more responsive to what Americans would regard as choice of law than to jurisdictional concerns,\textsuperscript{159} did not "more broadly implement[] domestic regulatory interests" than American state jurisdictional law based on the federal constitutional floor of due process.\textsuperscript{160} From the American perspective there is still a need for an escape device, however, even if only because the proposed convention preserves some freedom to apply national jurisdictional law that is neither required nor prohibited (the gray zone again). It will also be useful in some cases if the final product contains, as does the current draft, jurisdictional bases that not only over-reach but may be exorbitant as a matter of due process.\textsuperscript{161} Thus, whether or not forum non conveniens is redundant in domestic cases,\textsuperscript{162} a provision for declining jurisdiction under the proposed convention may be important to the ability of the United States faithfully to comply both with the treaty and with domestic constitutional law.

In this light, Article 22 of the current draft\textsuperscript{163} is an important provision from the American perspective, and it could have a salutary

\begin{footnotesize}
\begin{enumerate}
\item See Clermont & Huang, supra n. 117.
\item See Hague Draft, supra n. 8, art. 6 (contract), art. 11 (trust).
\item See Burbank, supra n. 36, at 112-19.
\item See Hague Draft, supra n. 8, arts. 101(b) (tort or delict), art. 14 (multiple defendants), art. 16 (third party claim).
\item See Stein, supra n. 36.
\item Draft Article 22 provides:
\begin{enumerate}
\item In exceptional circumstances, when the jurisdiction of the court raised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may on application by a party, suspend its proceedings if in the case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defense on the merits.
\item The court shall take into account, in particular—
\begin{enumerate}
\item any inconvenience to the parties in view of their habitual residence;
\item the nature and location of the evidence, including documents and witnesses, and the procedure for obtaining such evidence;
\item applicable limitations or prescription periods;
\item the possibility of obtaining recognition and enforcement of any decree on the merits.
\end{enumerate}
\item In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.
\item If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, unless the defendant es-
\end{enumerate}
\end{enumerate}
\end{footnotesize}
effect on domestic law in other signatory States, since it would authorize courts openly to exercise a measure of jurisdictional equilibration that they may approximate today through other means. 164

Draft Article 22 permits a court that has jurisdiction under the convention, other than exclusive jurisdiction or jurisdiction under provisions protective of consumers and employees, to suspend its proceedings "[i]n exceptional circumstances" if the exercise of jurisdiction would be "clearly inappropriate" and "if another State has jurisdiction and is clearly more appropriate to resolve the dispute." The draft article requires the court to consider certain factors, forbids discrimination on the basis of nationality or habitual residence, and prescribes circumstances in which security may or must be required from the defendant seeking suspension. Finally, the draft article provides for a court that has suspended its proceedings (1) to decline jurisdiction if the court of the other State exercises jurisdiction or if the plaintiff does not bring proceedings in that State in the time specified, or (2) to proceed with the case "if the court of the other State decides not to exercise jurisdiction."

By permitting a court seised of jurisdiction under the Convention to suspend its proceedings, and ultimately to decline to exercise jurisdiction, in favor of "a court of another State," rather than only "a court of another Contracting State," draft Article 22 appears to give broad scope to this jurisdictional equilibration device. The drafting history confirms that such was the intent. 165 For one who previously assumed that compromise between the civil law and common law traditions would limit the operation of the common law device to cases in which "an alternative forum was available in another signatory state," this is surprising. Indeed, without the aid of the drafting history and the Special Commission's Report, one might have been

164. See supra text accompanying n. 100. Might the example of Quebec have helped to persuade skeptics to accept a limited form of forum non conveniens in the proposed Hague Convention? See 1.-sier, supra n. 8, at 46, 50; Fawcett, supra n. 63, at 10-17.

165. See Working Document No. 144 E, supra n. 103, art. 24; Hague Conference on Private Int'l Law, Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Working Document 241 E, art. 24 (June 1996) ("if a court of another [Contracting] State has jurisdiction and is clearly more appropriate to resolve the dispute.") See also Nygh & Pears, supra n. 97, at 89.

166. Burbank, supra n. 34, at 122. Wendy Kennett had suggested foreclosing the operation of forum non conveniens "in cases where the plaintiff was domiciled in a Contracting State." Kennett, supra n. 156, at 568-69.
tempted to conclude that the failure to specify "Contracting State" was inadvertent. Not wishing to criticize the basic compromise reached, I note only that the provision for security in draft Article 22(4) apparently does not reach cases in which the other court sits in a non-Contracting State.

It is difficult to fault the conditions set forth in draft Article 22(1) to wit, the requirement of exceptional circumstances, the carving out of certain bases of exclusive and protective jurisdiction and the limitations requiring that the exercise of jurisdiction in the court seized be clearly inappropriate and that these be some other clearly more appropriate State whose courts have jurisdiction. Moreover, although draft Article 22(2) requires the court entertaining a motion to suspend to take account of certain factors, it does not exclude the consideration of other factors that might signal "exceptional circumstances" and that might inform judgments about the appropriateness of the respective forums.

It is not clear why, however, and it is a source of considerable controversy in the United States that, draft Article 22 appears to govern dismissals by the courts of Contracting States even when exercising jurisdiction under national law as permitted by draft Article 22.

267. Draft Article 22(1)(a) provides that Article 22, like Article 21, displaces domestic law in situations where all parties to the litigation are habitually resident in the State but the court "is required to determine whether to decline jurisdiction or suspend its proceedings on the grounds that the dispute ought to be determined in the courts of another Contracting State." Draft Article 22(1) contains a special provision for security in situations where "the other court has jurisdiction only under Article 17." Draft Article 22(1)(a) permits escape from the requirement of its predecessor, requirements that are applicable only when there are proceedings in different Contracting States, "under the conditions specified in Article 22." None of these provisions would be dispersive on the question of scope, but all might be thought to suggest what I previously assumed would be the rule if compromise were possible, namely that the proposed convention would permit a court in a Contracting State to decline jurisdiction only in favor of the court of another Contracting State

268. That provision requires the suspending court to "under the defendant to provide sufficient security to satisfy any decision of the other court on the merits" in situations where "the other court has jurisdiction only under Article 17" and "unless the defendant establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced." Draft Article 17, in turn, applies only to Contracting States.

269. Recall, however, that these conditions make it hard to credit the notion that after Article 22 could effectively serve the purposes of Article 22 of the Brussels Convention on related actions. See supra text accompanying note 105. Compare Lewentz London Principle 4-3, supra n. 97, which requires a court to "direct jurisdiction and refer the matter to an alternative court where it is satisfied that the alternative court is the manifestly more appropriate forum for the determination of the merits of the matter."

270. "The list is not exhaustive, as indicated by the words 'in particular'. Other factors, such as the substantive law to be applied in resolving the dispute, the availability of legal aid in the extent of the relief which may be granted in such forum, may also be relevant." Nygh & Peter, supra n. 97, at 91.
Fortunately, the Special Commission Report flags the issue, notes arguments for and against that interpretation and wisely concludes that "[t]his point will require clarification at the Diplomatic Conference."

One of the factors that a court is required to consider under draft Article 22(3), "applicable limitation or prescription periods," is often the subject of conditional forum non conveniens stays or dismissals in the United States and other countries, the party seeking to escape the jurisdiction being required to waive any time bar in the alternative forum. The draft article does not explicitly authorize the imposition of such a condition, and the fact that another factor, "the possibility of obtaining recognition and enforcement of any decision on the merits," is the subject of a separate provision, draft Article 22(4) authorizing or requiring the taking of security from the defendant, might be the basis for a negative inference in that regard. The article should explicitly authorize the imposition of conditions, in addition to the provision of security, which experience in common law countries indicates may be necessary and appropriate to wise jurisdictional equilibration practice.

Divining the motive force behind draft Article 22(3), which forbids discrimination on the basis of the nationality or habitual residence of the parties in deciding whether to suspend proceedings, does not require great imagination. The possibility of invidious discrimination under the Brussels Convention, after all, was an important...
reason for the United States to initiate this process at The Hague.\textsuperscript{176} Those on the receiving end of such implied criticism may take the view that discrimination is discrimination,\textsuperscript{177} even if as a result the poor moth is blocked from the light.\textsuperscript{178} But we are all, I hope, discriminating, and thus, if this provision remains in Article 22, capable of distinguishing differences in treatment that are prompted by the consistent application of factors that are nationality-neutral from differences that are causally tied to the consideration of nationality (or habitual residence).

The critical question here, I believe, is the extent to which consideration of what the Supreme Court of the United States has called "public interest factors," which includes, even if not acknowledged as such, the regulatory interests of the forum, is permissible in declining jurisdiction under draft Article 22.\textsuperscript{179} It may be that, at least in most cases where the proposed convention provides the jurisdictional standards, a measure of regulatory interest is assured. But that will not be true in some cases, including particularly cases in which jurisdiction is asserted within the gray zone as authorized in draft Article 17.\textsuperscript{180}

If further negotiations do not lead to the restriction of Article 22 to cases in which jurisdiction is asserted under the convention, perhaps draft Article 22(3) should be revised to exempt from the non-discrimination provision cases in which jurisdiction is founded on Article 17. That may not be necessary, however, and it may not be desirable from the perspective of domestic United States law reform "under the influence, if not the command, of a private international law treaty."\textsuperscript{181} It would not be necessary if perceived lack of regularity.

\textsuperscript{176} See von Mehren, supra n. 9, at 278-82.

\textsuperscript{177} See Rehme, supra n. 99, at 1299. They may also point out that one's reaction to perceived discrimination may depend upon whether one is a potential victim or beneficiary, using the proposed Hague Convention as Exhibit 1. See Does, Preliminary Draft of the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: Provisions on Jurisdiction, (to file with author). Unlike the Brussels Convention, however, the proposed Hague Convention does not require Contracting States to recognize judgments entered by the courts of other Contracting States, pursuant to jurisdictional bases declared to be competent, in cases not within the scope of the convention.

\textsuperscript{178} As a moth is drawn to the light, so is a litigant drawn to the United States." Smith Kline & French Laboratories Ltd. v. Stahl, 1983) 1 W.L.R. 730, 738 (Eng. C.A. 1983).

\textsuperscript{179} See supra text accompanying nn. 45-46. The Special Commission's Report suggests that consideration of such matters is appropriate. See Nyst & Pecar, supra n. 97, at 91, quoted supra n. 170. Note, however, the English view that "public interest considerations not related to the private interests of the parties and the ends of justice have no bearing on the decision which the court has to make," Luttre v. Cape plc, [2000] W.L.R. 1645 (H.L. 2000). See Fawcett, supra n. 63, at 15-16.

\textsuperscript{180} The relevance of this point depends, of course, on the answer to the question whether draft Article 22 governs in cases where jurisdiction is asserted under national law pursuant to draft Article 17. See supra text accompanying nn. 171-72.

\textsuperscript{181} Supra text accompanying n. 15.
tory interest were a permitted factor in making judgments about "exceptional circumstances" and about appropriateness of the forum under Article 22, and if United States courts applying Article 22 were candid about the influence of regulatory considerations on decisions to decline jurisdiction.165

2. Progress in National Law

This discussion suggests that, apart from the proposed Hague Convention, but in part because of the perception of invidious discrimination in United States forum non conveniens law that it reflects, domestic law should be purged of differential presumptions based on nationality that supposedly implement considerations of litigation convenience but that often mask crude judgments about regulatory interest. At the same time, the doctrine should be reshaped explicitly to comprehend attention to regulatory interest,166 an important check on jurisdictional equilibration that has nothing to do with convenience and that, indeed, cannot properly be confined to the policies underlying the substantive law. The realities of international forum selection revealed by decisions in the United States and abroad demonstrate that the American legal system is distinctive as much for the rules by which it ensures and fructifies access to court as by its rules of substantive law.167

If I am correct that regulatory interest is reflected in those arrangements, including procedural arrangements, that are consequential to the implementation of substantive law norms, explicit attention to that matter should force American lawmakers finally to confront the relevance if any that the loss, not only of more favorable substantive law, but also of the ability to finance a lawsuit, should have on the decision to decline jurisdiction. Although American decisions occasionally discuss that matter, no coherent approach emerges

165. This reorientation would not necessarily eliminate discrimination, however, since the definition of regulatory interest can itself be discriminatory. See Hart Bl., "Choice of Law and the State's Interest in Protecting its Own," 23 Wm. & Mary L. Rev. 173 (1981).

166. See Hoffman & Rowley, supra n. 42.

from them.\textsuperscript{185} English cases, applying doctrine that explicitly accounts for the loss of litigation advantage, are more informative, but there too coherence has been lacking, at least until recently, probably because of differences of views about what is a "legitimate" litigation advantage (which are culturally contingent).\textsuperscript{186}

American forum non conveniens law seems generally to contemplate dismissal rather than a stay or suspension of proceedings,\textsuperscript{187} although a conditional dismissal may be the functional equivalent of a stay. In this as well, it is different from similar doctrine in some other Anglo-American jurisdictions.\textsuperscript{188} It also differs from draft Article 22, which authorizes a suspension of proceedings ripening into action declining jurisdiction if "the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court," but which directs the suspending court to "proceed with the case if the court of the other State decides not to exercise jurisdiction."

Apart from the proposed Hague Convention, but again under its influence, American forum non conveniens law should be changed to make a stay rather than dismissal the norm.\textsuperscript{189} Even if the recommended attention to comparative litigation finance did not yield a change in doctrine, for instance preventing a forum non conveniens dismissal where there was a domestic regulatory interest and the plaintiff lacked the ability to finance litigation elsewhere, conditional dismissals might not always guarantee that there would be a compe-


\textsuperscript{186} See Lubbe v. Cape plc, [2000] 1 Lloyd's Rep. 139 (Eng. C.A. 1999); see also Airbus Industrie GIE v. Talal, [1996] 1 A.C. 119, [1996] 2 All E.R. 297 (H.L. 1995). On July 30, 2000, the House of Lords removed the stay upheld in the Court of Appeal in the Talal case. Critical to that decision were the findings that legal advice was not available to the plaintiffs in South Africa and that they would have no other means of obtaining the professional representation or expert evidence that would be essential to the just adjudication of their claims. See Lubbe v. Cape plc, [2000] W.L.R. 1545 (H.L. 2000).

\textsuperscript{187} It appears that the issue can properly be considered in decisions under draft Article 22 of the proposed Hague Convention. See Nygh & Focar, supra n. 97, at 91, quoted supra n. 179. Otherwise, if a plaintiff whose case has been suspended thereunder does not bring proceedings in a court of "the other State" within the time specified, the suspending court is required to decline to exercise jurisdiction.

\textsuperscript{188} See, e.g., Bennett, supra n. 156, at 555.

tent court in the more appropriate State. Moreover, whatever the psychological and bureaucratic benefits of getting rid of a case, preserving the opportunity to take a look at developments abroad ex post would ease the agony, or discipline the sincerity, of prediction, enabling American courts to respond more sensitively, and on the basis of actual information, to situations in which any relief, let alone justice, proved only theoretically possible in another forum.

It might be argued that another reason for federal forum non conveniens law to change from a norm of dismissal to one of stay or suspension arises from the Supreme Court's bright line approach to that distinction for separation of powers purposes in the cognate area of abstention and from the Court's failure to date to rationalize the forum non conveniens doctrine for that purpose. Whatever the force of separation of powers concerns in connection with jurisdictional equilibration in general, and whatever functional differences there may be between dismissal and stay, however, it would be difficult to rest on the distinction when suspending or declining jurisdiction did not require the existence of actual litigation in another forum and was not concerned with the potential for a recognizable judgment.

Having suggested a number of changes in American forum non conveniens law for international cases, some of which are inspired by the proposed Hague Convention, I conclude this discussion by considering how such changes should be implemented and whether there is sufficient need for uniformity that federal law should provide the governing rules, or some of them, for both federal and state courts. The two questions are analytically related.

Under current conceptions of the requirements of federalism, it appears to be difficult if not impossible to carry an argument for a federal judge-made law of forum non conveniens that is binding on

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190. See Preliminary Document No. 9, supra n. 106, at 43.
191. See Robertson, supra n. 187, at 364; id. at 371 ("in the real world, everyone knows that international plaintiffs who suffer forum non conveniens dissimilarities in the United States are typically unable to go forward in the hypothesized foreign forum").

The Principles address a concern expressed in many quarters about the process of declining jurisdiction, namely the prospect that it could lead to a denial of justice in which a plaintiff is left without an effective forum in which to secure relief. They do so by coupling the process of declining jurisdiction with that of referral. This process ensured that, in cases where a court is permitted to decline jurisdiction by these Principles, it shall always refer the matter to an alternative court, and provides a mechanism to ensure that such referral is effective.

Third Interim Report, supra n. 97, at 18.

192. See supra text accompanying n. 47-62. 112. "The Court [in Quackenbush] was less successful in bringing within the analytical fold post-1948 cases dismissing damages actions on the ground of forum non conveniens, to which it understandably imputed a separate history." Burstein, supra n. 48, at 17 (footnote omitted).
Moreover, as I have suggested, it is equally difficult to sustain the continued use of federal forum non conveniens law, the scope of application of which is essentially confined to international cases—here, cases in which no other domestic court is available—as a model for state forum non conveniens law, whose scope is broader. If uniformity is deemed sufficiently important, both considerations support federal statutory treatment of the subject, at least in international cases.

Arguments for legislation as the vehicle of change, although not for uniformity, are that it would put to rest any remaining questions about current federal judge-made doctrine as a matter of separation of powers, and that it could put to rest remaining questions prompted by special venue provisions in federal statutes. More broadly, and a matter that does implicate uniformity where there is concurrent subject matter jurisdiction in the federal and state courts, legislation could dispose of doubts about the legitimacy of forum non conveniens dismissals under certain federal regulatory statutes. Congress could do so simply by enumerating the federal statutory claims, if any, to which the doctrine could not be applied. Alternatively and probably preferably, Congress could articulate the relevance of regulatory interest, broadly defined, to the analysis and thus perhaps influence the development of doctrine in areas not formally reached by its commands.

190. See American Dredging Co. v. Miller, 510 U.S. 443 (1994); Burbank, supra n. 144, at 1571-82.
191. See supra text accompanying nn. 39, 46.
194. I am inclined to believe that, in cases under federal regulatory statutes like the antitrust laws, a finding of legislative or prescriptive jurisdiction should usually prevent dismissal under the forum non conveniens doctrine. The choice of law process usually does not operate so as to permit the courts of another country to apply such a law, and even if inquiry as to functional equivalence is permissible when determining whether to honor a forum selection clause, see Roby v. Corporation of Lloyd's, 986 F.2d 1353 (2d Cir. 1993), I am not persuaded that the two questions need be resolved in the same way, although they should be considered together. See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985) (arbitration clause); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 516 U.S. 529 (1996) (arbitration clause). But see Capital Currency Exchange, N.V. v. National Westminster Bank plc, 158 F.3d 803 (2d Cir. 1998), cert. denied, 119 S. Ct. 1459 (1999) (antitrust claims subject to forum non conveniens dismissal, court terming 'roughly
Another argument in favor of both uniformity and legislation for international cases involves the foreign relations implications of the doctrine. Although such an argument can be nothing more than theoretical justification for the exercise of federal legislative power, the proposed Hague Convention furnishes concrete evidence that existing American law is perceived to be invidiously discriminatory. Judgments about aspects of doctrine potentially eliciting that response from foreign governments should be made by those charged with the conduct of United States foreign relations, the Congress and the President. 198

Without suggesting that this discussion exhausts the arguments in favor of either uniformity or legislation, its ambition suggests, without even reaching contrary arguments, that any federal legislation should be of limited scope, interstitially setting certain ground rules for the application of this jurisdictional equilibration device in cases where no other domestic court is available. Even one who stresses the strategic value of discretion rather than rules to enhance judicial power 199 must acknowledge the need for some flexibility in making comparative assessments in the pursuit of justice in civil litigation, a need that is greater in international than in wholly domestic cases. 200 Moreover, in the absence of a claim under federal law, of evidence that the content of the doctrine can affect foreign relations, or of far more ambitious legislation prescribing federal jurisdictional standards, 201 the case probably cannot be made for legislation that constrains the freedom of state courts to adjudge, or to refuse to adjudge, their jurisdictional doctrine through the use of forum non conveniens.

V. CONCLUSION

Although there is room for improvement in the treatment of jurisdictional equilibration in the proposed Hague Convention, the cur analogous redress available under Articles 85 and 86 of the Treaty of Rome; Hoffman & Rowley, supra n. 42.

With respect to U.S. antitrust laws, note Article 37(1) of the Swiss Private International Law Act, which "takes up the suggestion made by scholars under the choice of law statutes of a number of continental European countries for years by stating that 'claims arising from anticompetitive behavior are controlled by the law of the country on whose market the claimant has immediately been affected by that behavior.' Letter from Samuel P. Baumgartner to Stephen B. Burbank, supra n. 97, at 5. 198. See Burbank, supra n. 13, at 1337-46.

199. See, e.g., Burbank, supra n. 83, at 235-29.

200. Were it thought appropriate to certify the entire doctrine for international cases, I would favor "a narrowly tailored forum non conveniens doctrine" of the sort advocated by Professor Robertson. See Robertson, supra n. 97, at 378-80. See also Ravelo Mingorance v. Ross, 211 F.3d 509, 614 (9th Cir. 2006) ("rather than treating forum non conveniens as an exceptional tool to be employed sparingly, the district court perceived it as a doctrine that compels plaintiffs to choose the optimal forum for their claim"); Fawcett, supra n. 63, at 12-13 (comparing the English and Australian doctrines of forum non conveniens).

201. See Clermont & Hwang, supra n. 117.
rent draft provisions directed to that end represent an impressive achievement, one that marks substantial progress over comparable doctrines in the United States and under the Brussels Convention.

Treaties are not the only, although in private international law they are the best, means to bridge gaps, and to resolve conflicts, between national laws.202 If a treaty proves impossible at this time, it is perhaps not too much to hope that what we have learned about other legal systems and about means to mediate between them will promote greater understanding and cooperation among the lawmakers of those systems and thus contribute to wise unilateral lawmaking for international civil litigation.

202. See Burbank, supra n. 3.