THE TRANSFORMATION OF INTERNATIONAL COMITY

JOEL R. PAUL*

I
INTRODUCTION

Private international law reflects and shapes the contours of public and private law in ways that demarcate the boundaries of state sovereignty and allocate power among public and private actors. When courts decide on the reach of domestic and foreign law, or on the availability and appropriateness of the forum, they are balancing the forum's public policy against the rights of private parties. In doing so, they are also circumscribing both the relationship between the court and the political branches and between the forum state and the world. Private international law functions much like a constitution to empower and delimit authority, and, much like a constitution, the evolution of private international law is a story about the shifting historical context in which courts, the sovereign, and private actors play out their relations in market and personal transactions.

In the United States the foundation of private international law is the doctrine of international comity. Roughly speaking, courts, according to this doctrine, should apply foreign law or limit domestic jurisdiction out of respect for foreign sovereignty.[1] International comity requires courts to balance competing public and private interests in a manner that takes into account any conflict between the public policies of the domestic and foreign sovereigns.

Scholars and courts have characterized international comity inconsistently as a choice-of-law principle,[2] a synonym for private international law,[3] a rule of public international law,[4] a moral obligation,[5] expediency,[6] courtesy,[7]

This Article is also available at http://www.law.duke.edu/journals/lcp.

* Professor, University of California Hastings College of the Law.

1. MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 327 (2003).

2. *See*, *e.g.*, IAN F.G. BAXTER, ESSAYS ON PRIVATE LAW 22 (1966).

3. *See*, *e.g.*, JOSEPH H. BEALE, A TREATISE ON THE CONFLICTS OF LAW, vol. 1 § 6.1 (1935); L. OPPENHEIM, INTERNATIONAL LAW 34 n.1 (H. Lauterpacht ed., 8th ed. 1955).

4. *See*, *e.g.*, Letter from Elihu Root, Secretary of State, to Victor H. Metcalf, Secretary of Commerce and Labor (Mar. 16, 1906), *in* 288 DOMESTIC LETTERS OF THE DEPARTMENT OF STATE (describing comity as a rule of public international law), *cited in* 4 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 460 (1942). *But see* Harold Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L. L. 280, 281 (1982) ("The doctrine of comity is not a rule of public international law, but the term characterizes many of the same functional elements that define a system of international legal order.").

reciprocity,[8] utility,[9] or diplomacy.[10] Authorities disagree as to whether comity is a rule of natural law, custom, treaty, or domestic law.[11] Indeed, there is not even agreement that comity is a rule of law at all.[12] Although other jurisdictions sometimes employ the term comity as a synonym for diplomatic immunity,[13] in the United States comity has served as a principle of deference to foreign law and foreign courts.[14]

For all these reasons, international comity would seem to be too vague, incoherent, illusory, and ephemeral to serve as a foundation for U.S. private international law. Yet, it is precisely these qualities that have allowed the doctrine of international comity to mutate over time in ways that respond to different geopolitical circumstances. Specifically, international comity has shifted in three distinct respects. First, the meaning of comity has shifted over time. Originally, international comity was a discretionary doctrine that empowered courts to decide when to defer to foreign law out of respect for foreign sovereigns.[15] Comity has become a rule that obligates courts to apply foreign law in certain circumstances.[16] Second, the object of comity has changed. Whereas once courts justified applying foreign law out of deference to foreign sovereigns, courts later justified their decisions out of deference to the autonomy of private parties or to the political branches.[17] Most recently, courts have justified limits on domestic law out of deference to the global market. Third, the function of comity has changed. Comity is no longer merely a doctrine for deciding when to apply foreign law; it has become a justification for deference in a wide range of cases concerning prescriptive, adjudicatory, and enforcement jurisdiction.

This article briefly traces these shifts in the meaning, function, and object of international comity. These developments are closely tied to historical contexts: the conflict over slavery in the early nineteenth century, the development of a

5. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31 (3d ed. 1979); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 33 (1834).

6. *See, e.g.*, Somportex, Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971).

7. *See, e.g.*, FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS 5 (2d ed. 1881).

8. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 163–64 (1895); Hans Smit, *International Res Judicata and Collateral Estoppel*, 9 UCLA L. REV. 44, 53 (1962).

9. *See, e.g.*, BEALE, *supra* note 3, § 71; HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 79 (Richard Henry Dana, Jr. ed., 8th ed. 1866) ("There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted, only from considerations of utility and the mutual convenience of States . . . .").

10. *See, e.g.*, Harold Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 589 (1983).

11. *See* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 4 (1991).

12. *Id.*

13. *E.g.*, Judgment of Jan. 27, 1969, Cass. Civ. 1re, Arrêt no. 75 (dismissing a civil suit against a foreign consulate out of comity).

14. Hilton v. Guyot, 159 U.S. 113, 164 (1895).

15. Paul, *supra* note 11, at 17.

16. *Id.* at 78.

17. *Id.* at 63–69.

national economy in the latter half of the nineteenth century, the Cold War in the mid-twentieth century, and the present era of globalization.

For these purposes, the term "comity" is used here in two senses. First, it refers to the classical doctrine of comity as it evolved through the nineteenth century. This classical idea of comity was quite specific and applied narrowly to conflict-of-laws cases. In all these cases, courts applied foreign law out of deference to foreign sovereigns. Since the turn of the twentieth century, comity has come to inform a broader class of cases in which courts have applied foreign law or refrained from the exercise of domestic prescriptive, adjudicatory, or enforcement jurisdiction. In this regard, comity functions both as a conflicts rule and as a justification for deferring to the foreign law. This broader concept of comity as a rule and a justification for deference encompasses a wider constellation of cases and related doctrines—like the foreign-act-of-state doctrine—which, though analytically distinct from the classical doctrine, nonetheless shares certain methods, values, and justificatory rhetoric. The article's conclusions apply with equal force to both the original form of the comity doctrine and the broader idea of comity both as a doctrine and a justification for deference to foreign law.

II

PRE-TWENTIETH CENTURY: COMITY AS DEFERENCE TO FOREIGN SOVEREIGNS

A. Middle Ages to Renaissance: The Move From Statutism to Comity

The origins of the comity doctrine are obscure, but comity must be understood as a reaction against the preexisting system of private international law known as statutism. European jurists had been wrestling with the question of when and how to apply foreign law since at least the thirteenth century.[18] The need for a system to resolve conflicts of law arose as commerce between different city-states slowly increased. Medieval Italian jurists developed the statutist doctrine as a theory for determining the governing law based on statutory interpretation.[19] According to the statutists, the legal status of every person or thing was fixed in a certain place at a certain time and could not be altered: a person's martial status would be determined by the place where the marriage was performed; property rights would be determined by the place where the property was physically located.[20] Statutism had an appealing uniformity and simplicity because everything could be readily and permanently categorized based upon place. Timing, intent, circumstance, public policy, or the

18. Walter Ulmann, LAW AND JURISDICTION IN THE MIDDLE AGES 397–410 (1988).

19. Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM J. COMP. L. 297, 303–04 (1953).

20. *See* Kurt Lipstein, PRINCIPLES OF THE CONFLICT OF LAWS, NATIONAL AND INTERNATIONAL 7–12 (1981).

interests of the parties were subordinated to physical placement. In a premodern, relatively static world in which people lived their whole lives in one town and contact outside the local community was the exception rather than the norm, physical placement was an attractive solution to the question of when to apply foreign law. Obviously, as the opportunities for contact and business outside of a locality increased, so would the complexity of the questions confronted by the statutists. Accelerating commerce and movement inevitably would wear down the hard lines of statutism. As the doctrine grew more complex, it began drawing distinctions that seemed increasingly arbitrary.[21]

As nation-states emerged, local law trumped the absolute authority of the Church and of Roman law and undermined claims of universality to any legal system.[22] Statutism broke down under the pressure of competing national systems. Moreover, as commerce grew, so too did the frequency of contacts between merchants of different nationalities. Conflicts of law became more common. As people and goods became more mobile, a system of rules based on the static connection to a specific place seemed inflexible and unworkable.

The northern Renaissance of the 1600s posed a particular challenge to the antiquated system of the statutists. The struggle for Dutch independence from the brutality of Spanish rule represented the triumph of modern commerce, religious tolerance, and nationalism over parochialism and prejudice. After thirty years of war the Dutch Republic emerged as the first modern European nation-state. The Treaty of Westphalia in 1648 became the first constitutive document of modern international law, embodying the principles of state sovereignty, equality, and respect for religious minorities.[23]

Dutch independence raised new questions about the applicability of foreign law in Dutch courts. The Dutch wanted a theory that would both unify the Dutch provinces and create a post hoc rationalization for the application of Spanish law in Dutch courts during the period before independence. A group of Dutch jurists of the 1600s—John and Paul Voet, Christian Rodenburg, and particularly, Ulrich Huber—tried to find a more pragmatic, fluid approach to resolving conflicts of law that would reinforce the idea of sovereign independence. Huber first used the phrase *comitas gentium*, literally the "civility of nations," to describe the justification for applying foreign law.[24] Huber wrote that sovereigns "so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects."[25] Although Huber believed that comity was a principle of

21. *See* Friedrich Juenger, *General Course on Private International Law*, 193 RECUEIL DES COURS 119 (1986).

22. As Alex Mills has pointed out, the growth of science and reason would eventually undermine any claim to universal natural laws, including statutism. Alex Mills, *The Private History of International Law*, 55 INT'L L. Q. 1, 15 (2006).

23. Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L. L. 20, 28–33 (1948).

24. Ernest G. Lorenzen, Huber's De Conflictu Legum, 13 ILL. L. REV. 375, 376 (1919).

25. *Id.*

international law, he believed the decision to apply foreign law itself was left up to the state as an act of free will.[26] Huber viewed all law as inherently territorial, and, therefore, the forum court was free to decide whether allowing foreign law to operate in its territory was consistent with the power and rights of the forum state and its citizens. At the core of this idea of comity was the respect of one sovereign for another. In the Dutch edition of his treatise, Huber employed a vivid metaphor to explain comity: "The high authorities of each country offer each other a hand."[27] One can envision this scene as it might have been depicted by the Dutch genre painters of the 1600s: a familiar commercial setting with two merchants concluding a transaction with a handshake. It is a masculine image that connotes mutual respect and authority between equals.

B. Eighteenth to Nineteenth Century: Comity as Respect for the Forum's Public Policy

Comity developed in the eighteenth and nineteenth centuries as a permissive doctrine that empowered courts to decide when to apply foreign law and to refrain from applying foreign law that conflicted with the forum's public policy. Huber had little influence over the development of conflicts principles on the continent, but Lord Mansfield, the father of the law merchant, introduced comity into English law almost a century later. Scottish barristers, like Mansfield, were exposed to the writings of Dutch jurists with whom they shared a common religious and intellectual tradition that distinguished them from the parochialism of Anglican barristers. In *The Case of James Sommersett*, Sommersett, who was born a slave in the United States, had sailed to London with his master Stewart.[28] Since Britain had outlawed slavery, Sommersett, after spending some time in London, argued that he was no longer a slave. Stewart insisted that since Sommersett was born a slave under the *lex loci*, he remained a slave. Sommersett's attorney insisted that according to Huber the *lex loci* should not be applied by the forum where it conflicted with the forum's public policy.[29] Mansfield held that a British court could not be required to recognize the property rights of a U.S. slaveholder in his slave.[30] Mansfield opined that slavery "is incapable of being introduced on any reasons, moral or political."[31] Slavery was "so odious, that nothing can be suffered to support it, but positive law."[32] Mansfield viewed comity as discretionary; courts should apply foreign

26. *See, e.g.*, Mills, *supra* note 22, at 26. *But cf.* ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS 8–9 (1992). Watson disagrees with the conventional interpretation of Huber. He insists that Huber "does not allow for free discretion applying foreign law." *Id.* at 8.

27. In Dutch, "de Hooge machten van yder Landt bieden elckander de handt." ULRICH HUBER, HEEDENSDAEGSE RECHTSGELEERTHEYT 13 (1699).

28. The Case of James Sommersett, 20 How. St. Tr. 1, 3–4 (K.B. 1772).

29. *Id.* at 60.

30. *Id.* at 82.

31. *Id.* at 82.

32. *See* ROBERT COVER, JUSTICE ACCUSED 87 (1975).

law except to the extent that it conflicted with principles of natural justice or public policy, such as the prohibition against the slave trade.

Mansfield's approach was not necessarily followed by other British courts. The common law's ideas about conflict of laws were far from settled. As foreign commerce increased, so did the need for addressing the question of which law governed. In the United States, conflict of laws also arose from interstate commerce. The expansion of the U.S. territory after the Louisiana Purchase and the resulting tensions between free and slave states spurred efforts to articulate a coherent doctrine of conflict of laws.

The Louisiana attorney Samuel Livermore in 1828 authored the first American treatise on conflicts, in which he sought to revive the doctrine of the statutists and explicitly rejected Mansfield's ideas of comity. Livermore described comity "as grating to the ear when it proceeds from a court of justice."[33] According to Livermore, international law did not allow courts any discretion to decide whether to apply foreign law.[34] Instead, courts were bound by international law to apply the same law that a foreign court would apply. Livermore's argument provoked a contrary argument from Supreme Court Justice Joseph Story.[35] Justice Story's thesis became the foundation for American conflicts principles.

As a circuit judge, Story had written a passionate opinion striking down the property claims of foreign slave traders on the basis that the slave trade violated the law of nations.[36] Story, a Harvard Law professor, thought that Livermore had it exactly wrong. Story's concern was that free and slave states needed some freedom to decide when and how to enforce the slave laws. He believed that a comprehensive system for resolving conflicts of law that was flexible and indulged the public policies of the forum state would relieve tensions between free and slave states and lead to greater accommodation.[37] In his *Commentaries on the Conflict of Laws*, Story borrowed the doctrine of international comity directly from Huber and Mansfield.[38] By allowing courts the freedom not to apply foreign law, Story hoped to localize the effect of slavery. Only if a state wished to accommodate the law of another state would its courts apply foreign law. Comity was consensual, not obligatory. Over time, a pattern of states voluntarily applying each other's laws would encourage reciprocity and greater trust. Story hoped his system of conflicts rules would reduce the risk of a civil war between the states.[39]

33. SAMUEL LIVERMORE, DISSERTATION ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS 26 (1928).

34. *Id.* at 26.

35. Paul, *supra* note 11, at 20–21.

36. United States v. La Jeune Eugenie, 26 F. Cas. 832, 851 (C.C.D. Mass. 1822).

37. *See* PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY (1981); R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY 372 (1985).

38. STORY, *supra* note 5, § 29.

39. *See* FINKELMAN, *supra* note 37.

Justice Story characterized comity as the foundation of conflicts principles. He described conflicts of law for the first time as "private international law," which he argued was merely a subcategory of international law.[40] In other words, there was a unity of public and private international law, and domestic conflicts principles were derived from international law, rather than domestic law. By placing private international law within the framework of international law, Story was expressing the unity of public and private law that prevailed up through the middle of the nineteenth century. Story created a universal vision of conflicts that rivaled the statutists. Yet, he also asserted the primacy of the sovereign will of the forum state. It was an ingenious move that anticipated the rise of legal positivism in the latter half of the nineteenth century.

Story, like Mansfield and Huber, envisioned the doctrine of international comity as a license for courts to deny foreign law when it conflicted with the forum's own public policy. All three jurists were concerned with deeply polarizing public issues—nationalism, religious factionalism, and slavery. For each, comity empowered courts to decide whether to defer to foreign law out of respect for a foreign sovereign or whether domestic public policy should triumph over mere courtesy. For each, the court was the agent of the sovereign's own public law.

C. Industrialization and the Separation of Public and Private Law

Unfortunately, Story's elegantly framed doctrinal solution to the problem of slavery did not spare the United States the trauma of the Civil War, and the unity of public and private international law that he had envisioned barely survived the end of the nineteenth century.[41] To appreciate why private international law separated from public international law, it is necessary to consider the effect of industrialization on the relationship of public and private law generally in the nineteenth century. As political, economic, and technological forces transformed a local agrarian economy into an industrial national economy, these same forces created a fissure between public and private law.[42]

The growth of large enterprises and the concentration of capital, which were essential to the industrialization project, were facilitated by laissez-faire economics and the belief that the private market was outside the reach of public regulation. Of course, in reality, federal support was essential for the development of new infrastructure, and both the federal and state governments shaped regulations to ease the growing pains of the new industries.[43] The market was "natural," while the state was unnatural; as long as the market remained

40. STORY, *supra* note 5, § 9.

41. *See* Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L L.J. 149, 163 (1988).

42. Arguably, Justice Story himself contributed to the emergence of the public–private distinction decades earlier with his opinion in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 666, 668–84 (1819) (Story, J., concurring).

43. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 130–39 (1992).

"free" from state control, it would bring prosperity and progress.[44] The role of courts was to police the state's neutrality and maintain the limits on federal power over the economy.

Shaped by these assumptions at the turn of the century, U.S. courts erected a wall of separation between public and private law that would have seemed strange to a jurist a century earlier.[45] Judges read into the federal constitution natural-law rights to property and contract, declaring that the fourteenth amendment's due-process clause safeguarded the liberty of the marketplace.[46] By insulating property and contract rights from the reach of the state, the courts drew a boundary between domestic U.S. public and private law.[47]

These developments in domestic U.S. law indirectly undermined the unity of public and private international law as well. Early in the twentieth century, public international lawyers abandoned private international law at the doorstep of municipal law. Private international law became a subject of domestic (mostly state) private law. Even the name "private international law" became outmoded in the United States, and most U.S. legal scholars now referred to it as "conflict of laws." By rechristening private international law "conflict of laws," lawyers and judges reinforced the idea that private international law had no familial relationship to the grand principles of public international law. Conflicts rules were a subject of the private law of the forum state, and there was no pretense that the conflict rules in California or New York were somehow derived from universal principles under public international law. Yet, until the end of the nineteenth century, even after private international law had been transformed into purely domestic law, U.S. courts continued to regard the application of foreign law as a matter of international comity—a courtesy owed to another sovereign—rather than an

44. *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424–26 (1982).

45. For a good discussion of why this distinction is untenable, see Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

46. In the last quarter of the nineteenth century the Supreme Court confronted the emerging public–private distinction in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (upholding a Louisiana statute creating a slaughterhouse monopoly within New Orleans). There the Court upheld state regulation of slaughterhouses against the argument that the state was interfering in Fourteenth Amendment rights of due process, equal protection, and privileges and immunities of citizenship. The Court noted that rights originate from the state, not natural law. *Id.* at 77. Citizens have whatever specific rights are contained in the Constitution plus whatever additional rights are conferred by the states. *Id.* at 77–80. The famous dissents by Justices Field and Bradley argued that the Constitution protects "natural rights" to property and livelihood. *Id.* at 95–98 (Field, J., dissenting); *id*. at 113–19 (Bradley, J., dissenting). Field and Bradley's broader view of fundamental rights contributed to a strong backlash, which eventually resulted in the Court's infamous opinion in *Lochner v. New York*, 198 U.S. 45 (1905), striking down a law that limited the hours bakers could work as a denial of the substantive due-process right to contract.

47. As Morton Horwitz concluded his study of American law in the eighteenth century, legal formalism depends upon elites having "a great interest in disguising and suppressing the inevitably political and redistributive functions of law." HORWITZ, *supra* note 43, at 266.

obligation under domestic law. The shift from courtesy to obligation did not begin until the turn of the twentieth century.[48]

D. Early Twentieth Century: Comity as More Than Mere Courtesy

In the waning hours of the nineteenth century, the Supreme Court issued its classic statement on comity in *Hilton v. Guyot*.[49] A French company sued a U.S. national in the United States to enforce a French court's order to pay damages arising out of a contract performed in France. The enforcement of a foreign judgment was a matter of comity, Justice Gray wrote:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[50]

Accordingly, the Court reasoned that a foreign court's judgment should be given effect only if the foreign court would have given effect to an equivalent judgment by a U.S. court.[51] Since French courts would not have enforced a U.S. court's order in a comparable situation, the Supreme Court decided that a U.S. court was under no obligation to enforce the French court's award of damages.[52]

This enigmatic description of comity contains two significant ambiguities. First, what does it mean to say that comity is neither "absolute obligation" nor "mere courtesy and goodwill"? The application of foreign law is inherently indeterminate; it is a matter for the court's discretion, not quite binding, but perhaps a bit stickier than mere "goodwill." Second, comity is offered here both as a rule for the enforcement of foreign judgments, and as an explanation for why foreign judgments should be enforced. In other words, comity is both a legal doctrine and also a justification for deferring to foreign judgments. The central premise in *Hilton* is that, whatever comity means, it is a concern that arises from the sovereign equality of states. Thus, as the twentieth century began, it was still clear that the doctrine of comity derived from the respect that one sovereign paid to another.

Comity's meaning became more ambiguous as the vested-rights theorists gained prominence in the early decades of the twentieth century. Scholars like Joseph H. Beale rejected comity as a basis for deciding the governing law.[53] They argued that courts did not literally apply foreign law.[54] Rather, courts recognize "vested rights" that private parties obtained in foreign jurisdictions.[55]

48. Paul, *supra* note 11, at 26–27.
49. 159 U.S. 113 (1895).
50. *Id.* at 163–64.
51. *Id.* at 228–29.
52. *Id.*
53. BEALE, *supra* note 3, § 6.1.
54. *Id.*
55. *Id.*

As such, the obligation to do justice bound courts to protect vested rights. The first Restatement on the Conflict of Laws concluded that no comity doctrine "governs the action of a court with regard to the enforcement of a foreign right."[56] The vested-rights theory briefly offered an alternative to comity as the basis for conflict of laws, until it was exposed as a tautology in the 1930s. By then, legal scholars seemed to agree that deference to foreign sovereigns was more a matter of obligation than of mere courtesy.[57]

By mid-century, U.S. legal scholars like Brainerd Currie had abandoned the formalism of the vested-rights theory in favor of interest analysis.[58] In their view, courts should defer to foreign law based upon the balance of public and private interests. Vested-rights theory had affected the way these scholars thought about deference. According to these scholars, courts were not free to exercise their unbounded discretion in deciding whether to apply foreign law. Although courts were not necessarily obligated to apply foreign law if it conflicted with the public policy of the forum, there were principles of interest-balancing that constrained the courts. The meaning of comity was shifting from a doctrine of deference based upon courtesy to a doctrine of deference based upon obligation.[59]

III

THE POST-WAR ERA: COMITY AS DEFERENCE TO THE AUTONOMY OF PRIVATE PARTIES AND TO THE EXECUTIVE

Two interconnected developments after World War II—the growth of international commerce and the pervasive threat posed by the Cold War—transformed comity from a general principle of deference left to the discretion of courts into something more like an obligation to apply foreign law. First, the growth of foreign trade and multinationals led to a growing number of cases involving the enforcement of international contracts. U.S. courts were increasingly confronted with having to decide whether to enforce arbitration clauses, foreign choice-of-law and choice-of-forum clauses, and foreign judicial and arbitral decrees that were manifestly inconsistent with U.S. statutes.[60] Courts also faced the issue whether to extend U.S. regulatory jurisdiction to

56. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 6, cmt. a (1934).

57. *See* JOHN C. COLLIER, CONFLICT OF LAWS 351–54 (1987); Yntema, *supra* note 19, at 314–15.

58. *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

59. *See generally* CURRIE, *supra* note 58.

60. For example, the U.S. Supreme Court enforced an arbitration clause in an international contract when the contract conflicted with U.S. antitrust laws. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). It was uncertain in that case whether a Japanese arbitrator would properly apply U.S. antitrust law when the contract provided that it was governed by Swiss law and when one of the defendants who allegedly engaged in anticompetitive behavior was not subject to the arbitration clause. As Justice Stevens noted in his dissent, "just as it is improper to subordinate the public interest in enforcement of antitrust policy to the private interest in resolving commercial disputes, so it is equally unwise to allow a vision of world unity to distort the importance of the selection of the proper forum for resolving its dispute." *Id.* at 665 (Stevens, J., dissenting).

transactions that occurred overseas but violated public policies in the United States.[61]

A. Comity as Deference to Private Autonomy

These mid-twentieth-century opinions acknowledged not merely the traditional deference paid to foreign sovereigns, but more significantly, the need to defer to the autonomy of private parties. Where private parties had negotiated for foreign choice of law or forum, they should be held to their bargains.[62] When parties operating outside of the United States had no reasonable expectation that they might be subject to U.S. law, it seemed unfair to impose U.S. law on them.[63] The Restatement (Third) on Foreign Relations Law recharacterized the traditional doctrine of comity as a principle of "reasonableness," and that principle applied not merely to prescriptive jurisdiction, but also to adjudicatory and enforcement jurisdiction.[64] According to the Restatement, courts applying comity—or what the Restatement called a "principle of reasonableness"[65]—were explicitly required to consider the public interests of both the United States and the foreign government in determining when the exercise of jurisdiction is reasonable.[66] Reasonableness also possessed overtones of due-process concerns, which seemed to bolster the argument that courts were obligated in some circumstances to apply foreign law. Chief Justice Warren Burger warned that we "cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[67] Protecting private parties' expectations was "an indispensable element in international trade, commerce, and contracting."[68]

By tying this expanded idea of comity as "reasonableness" to both foreign sovereigns and the autonomy of private parties, U.S. courts began to redefine the character of comity. The reporters of the Restatement preferred to use the term "reasonableness" to emphasize the idea of a "legal obligation" to apply foreign law, as contrasted with comity, which carried "too much of the idea of

61. For example, the U.S. Supreme Court decided not to apply U.S. securities laws prohibiting fraud in connection with the sale of securities when the sale of securities issued by a foreign company mostly took place overseas, even though it involved a U.S. purchaser. Scherck v. Alberto-Culver Co., 417 U.S. 506 (1974). In another case, a U.S. circuit court decided not to extend U.S. antitrust laws to a foreign transaction in which one U.S. corporation manipulated a foreign government to destroy its U.S. competitor. Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 549 F.2d. 597 (9th Cir. 1976).

62. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628–31 (1985).

63. Scherck v. Alberto-Culver Co., 417 U.S. 506, 517–19 (1974).

64. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403, cmt. a (1986).

65. *Id.*

66. *Id.*

67. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1971).

68. *Id.* at 13–14.

discretion or even political judgment."[69] The meaning of comity had clearly shifted from a matter of judicial discretion to one of legal obligation.

Furthermore, by focusing on the will of private parties, the courts reinforced the public–private distinction that arose in the nineteenth-century jurisprudence; respect for foreign law was becoming a metaphor for the idea that courts respected the wishes of private parties. For example, in one judgment upholding the enforcement of a foreign arbitration clause the Supreme Court opined,

> [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[70]

In this way the Court tied comity to the imperative of protecting the expectations of private parties. Deference to foreign sovereigns had shifted towards deference to private-party autonomy.

B. The Impact of the Cold War on Comity

The other related development in the transformation of comity was the Cold War. The Cold War affected U.S. law and legal institutions generally and ultimately had profound consequences for the development of private international law in the United States. First, domestic anxieties over the danger posed by Communism bred a political environment that was hostile to government regulation of property, contract, and free enterprise. The possibilities for political action and public discourse were narrowed by the pervasive and imminent threat of Soviet communism, especially during the 1950s.[71] In this political environment any critique of private rights appeared suspect. The bold efforts of legal realists like Robert Hale[72] in the first half of the century to use the law as an instrument for social policy were curtailed. Securing the expectations of private parties against excessive public regulation or occupation of private property was a hedge against the growth of authoritarian government. This judicial attitude was also reflected in judgments enforcing the choices that private parties made in their contracts. By enforcing foreign choice-of-law and arbitration clauses, U.S. courts evinced their commitment to protecting the autonomy of private parties. In this respect, the

69. Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. OF INT'L L. 42, 52 n.50 (1995).

70. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985).

71. *See* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 241–56 (1973) (arguing that moral relativism on the one hand and McCarthysm on the other reinforced the status quo and precluded public discussion of fundamental social reforms).

72. Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (arguing that the status quo is actively constituted and enforced by coercive state power, and therefore, the distribution of property represents policy choices and is not merely the result of private market forces).

judicial response to the Cold War reinforced deference to private-party autonomy.

Second, during the Cold War the United States took the leadership in promoting market democracy as a bulwark against Communism. Through the Marshall Plan and the Bretton Woods institutions (the International Monetary Fund, the International Bank for Reconstruction and Development, and the General Agreement on Tariffs and Trade) the United States sought to expand international trade by reducing government barriers to the free movement of goods, services, and capital. These measures contributed to the steady and significant increase in the total volume of world trade. To the extent that the global market was seen as a way of containing the spread of Communism, it is unsurprising that courts construed comity in ways that minimized the regulatory burdens on private parties and allowed transnational actors the freedom to opt out of domestic law in order to facilitate the growth of the global market.

Third, relying on the judge-made concept of the executive as the "sole organ" of foreign relations,[73] courts deferred to the perceived need for a powerful executive acting in secret to confront the Soviet threat.[74] Courts treated the question of applying foreign law as frequently implicating foreign relations. Judges then justified the application of foreign law as a way of avoiding interference with the executive's conduct of foreign relations.[75]

One example of this approach was the Court's decision in *Banco Nacionale de Cuba v. Sabbatino*, applying the foreign act-of-state doctrine to bar a claim arising out of President Castro's expropriation of U.S. property in Cuba.[76] The claimants argued that the expropriation was illegal under international law and that the U.S. court should apply international law, rather than Cuban law, to the claim.[77] Banco de Cuba argued on behalf of the Cuban Government that the claim was precluded by the foreign act-of-state doctrine, even if the action were contrary to international law.[78] The act-of-state defense operates like a super-choice-of-law rule that requires U.S. courts in some circumstances to apply foreign law to a foreign act of state that occurs in the foreign territory. The Supreme Court held that the doctrine prohibited U.S. courts from questioning the validity of a foreign act of state even if it violated customary international law requiring prompt, adequate, and effective compensation.[79] In the Court's view, the doctrine rested on both comity and constitutional underpinnings of

73. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

74. Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 689–92 (1998).

75. Geopolitical threats justified the president unilaterally deploying military forces and covert operatives, suppressing information from Congress and the public, imposing background checks, loyalty pledges, and speech restrictions on government workers, and invading the privacy of other citizens. *Id*. at 675–77.

76. Banco Nacionale de Cuba v. Sabbatino, 376 U.S. 398, 415 (1964).

77. *Id*. at 420.

78. *Id*. at 430–31.

79. *Id*. at 436–37.

the separation of powers.[80] *Sabbatino* went beyond the traditional comity rationale that U.S. courts must defer to a foreign sovereign. Here, the Court stated explicitly that its judgment rested at least in part on the need to defer to the executive in order to avoid interference in the conduct of foreign relations.[81]

It may seem ironic that the Court used comity in *Sabbatino* as a justification for deferring to a communist expropriation of private property, particularly in light of the Court's general deference to private party autonomy. When comity is used as a justification—rather than as a doctrinal rule—it may operate to justify contradictory actions. In this case, deference to the executive trumped the Court's deference to the rights of private parties. It reflected in part the Court's view of the relative importance of giving the executive the widest latitude in dealing with communist states.

The Supreme Court's decision in *First National City Bank v. Banco Nacional de Cuba* clarified this new form of comity.[82] Writing for a plurality of the Court, then-Justice Rehnquist opined that the Court should not apply the foreign-act-of-state doctrine where the executive has advised the Court against it.[83] Rehnquist affirmed that both the act-of-state and sovereign-immunity doctrines are judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government.[84] With that single sentence, the Supreme Court acknowledged an equivalence in the way that courts defer to foreign law and defer to the executive in the conduct of foreign relations. In both instances there is a risk that judicial intervention could "embarrass the conduct of foreign relations by the political branches."[85]

The risk of embarrassing the executive is a curious rationale for a conflicts principle in several respects. First, the court implicitly leaves the legislative branch out of the formulation. The courts might, for example, look to the lawmakers for instruction as to when to apply foreign law so as not to complicate foreign relations or defeat the legislative intent. By pointing to the executive, the courts shift the constitutional authority over lawmaking from the legislature to the executive or from the domestic sphere to the arena of foreign relations. Even if one believes that the executive has the primary responsibility for the conduct of foreign relations—a position not necessarily consistent with the Constitution's own text[86]—a strong argument could be made that conflicts

80. *Id*. at 417–18, 423.

81. *Id*. at 447.

82. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

83. *Id.* at 768.

84. *Id*. at 762.

85. *Id*. at 765.

86. Article I of the Constitution clearly enumerates a vast range of congressional power over foreign relations, while Article II gives the president the relatively modest authority to receive foreign ambassadors ceremonially and appoint ambassadors and negotiate treaties with the Senate's advice and consent. Article II also gives the president military authority as commander-in-chief, which seems logically distinct from the power to conduct foreign relations, and which authority is subordinate to Congress' power to authorize, raise, regulate, and finance the military. *See* Paul, *supra* note 74, at 691–92.

principles are more closely related to the prescriptive powers of the lawmakers than to the foreign-relations powers of the executive.

Second, this judicial deference to the executive seems to undermine the rationale for the traditional rule of respect for foreign sovereigns. Traditionally, comity was designed to facilitate good relations with foreign sovereigns by according them fair and equal treatment in the courts.[87] By contrast, the transformation of comity into a rule of deference to the executive has the perverse effect of politicizing the judicial process. The executive branch can determine the outcome in a U.S. court just by advising the court whether to allow the foreign act of state defense. By relegating the court to the role of a mere intermediary for the executive, comity undermines the principle of the rule of law itself. If the court allows the executive to decide when and how to proceed, then all foreign sovereigns and their laws may not be equal in American courts. One could argue that any principle of conflicts that allows either the courts or the executive unbridled discretion to determine the applicable law in each individual case creates uncertainties that weaken the rule-of-law principle. However, as between affording discretion to the executive or to judges, it seems that courts acting alone would be less likely than the executive to be influenced by inappropriate political considerations in the determination of the applicable law. For example, if the executive can control access to the court, there is a risk that the executive would be more likely to assert authority on behalf of a political ally or powerful constituency than on another equally deserving party. Such actions would tend to undermine the legitimacy of the judicial branch.

Third, the rhetoric of deference to the executive undermined the principle of democratic accountability by privileging the executive's role in foreign relations over Congress' constitutional prerogatives. Of course, many scholars would defend the growth of the executive's power in the face of the Soviet threat.[88] Comity as deference to the executive reinforced a more general trend of concentrating power in the presidency. The courts seemed to forget that the Constitution expressly gives Congress the power to control foreign commerce, impose tariffs, adopt treaties, raise and regulate the military, appropriate funds, approve ambassadors, prescribe offenses against the law of nations, and declare war.[89] The disastrous consequences of the executive acting unilaterally to project U.S. power around the globe were as apparent during the Cold War as they are today. Deploying comity as a form of unquestioning deference to the executive branch would not create a stable doctrinal foundation for conflicts of law. It

87. *See supra* II.B.

88. *See, e.g.*, William F. Mullen, PRESIDENTIAL POWER AND POLITICS 39–40 (1976) (arguing that the geopolitical conditions of the Cold War era necessitated giving greater authority to the executive); James A. Nathan & James K. Oliver, FOREIGN POLICY MAKING AND THE AMERICAN POLITICAL SYSTEM 10–25 (3d ed. 1994) (explaining the growth of presidential power as a consequence of the competition with the Soviet Union); Eugene Rostow, *Great Cases Make Bad Law: The War Powers Resolution*, 50 TEX. L. REV. 833 (1972).

89. U.S. CONST. art. I, § 8; art. II, § 2.

could survive the Cold War because of the felt necessity to yield to the hand of a central authority. So long as foreign relations seemed a dark and mysterious wood filled with danger and duplicity, the application of foreign law would be seen as an acknowledgement of respect for the executive as father figure. As the world emerged from the Cold War to the new realities of globalization, the justification for deference had to change.

Finally, relying on the risk of embarrassment as a rationale for a conflicts principle operates as a kind of backhanded compliment to the executive. The image of an embarrassed executive is itself revealing as a form of justificatory rhetoric. On the one hand, the Court appears to be modestly deferring to the executive based on institutional competence. In the words of Justice Douglas, by deferring to the executive's opinion, a so-called Bernstein letter, "the Court becomes a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others."[90] On the other hand, the image of an embarrassed executive is hardly a commanding one. An executive who can be embarrassed is also an executive who is exposed, naked—in other words, an emperor with no clothes. It is not only a question of the executive's competence, but of the executive's power. The executive's vulnerability is so demonstrable that the court risks emasculating the executive merely by deciding to award a claim for damages. By acknowledging the risk of interference with the conduct of foreign relations, the Court calls into question the executive's power to act and suggests that, like the Wizard of Oz, the president may be a mere humbug behind a curtain.

C. Comity and the Public–Private Divide in International Law

So we have two concurrent developments in the concept of comity from the mid- to late twentieth century. In some cases, the courts justified the imposition of foreign law based upon the idea of protecting the expectations and autonomy of private parties. In other cases the courts justified the application of foreign law by arguing that they were not institutionally competent to adjudicate questions that implicated foreign relations, and therefore, they would defer to the executive as the "sole organ of foreign relations."

Liberal free-trade policy and the Cold War led to a bold new rhetoric of comity that obligated courts to apply foreign law, even when the consequences were inconsistent with basic public policy or international law. Paradoxically, comity functioned both to unify and to separate public and private law. Comity bridged the public and private realms by introducing public-policy considerations into the discussion of private-law disputes. Yet, at the same time, courts were also obligated to consider the expectations of private parties. In this way, comity functioned also as a wall to protect private parties in the marketplace from government interference.[91]

90. *First National City Bank*, 406 U.S. at 770–73.
91. Paul, *supra* note 11, at 77–79.

IV

GLOBALIZATION: COMITY AS DEFERENCE TO THE MARKET

With the end of the Cold War, the Supreme Court seemed to back away from the idea of comity as preserving executive supremacy in foreign relations. In the 1993 case of *Hartford Fire Insurance Co. v. California*, the Court signaled that it was taking a different view of the doctrine of international comity.[92] In that case, the defendant U.S. and British companies allegedly violated Section 1 of the Sherman Antitrust Act by conspiring to limit the available coverage for commercial general-liability insurance in the United States.[93] There is no question that the Sherman Act can apply to some foreign conduct. Congress in 1982 had adopted the Foreign Trade Antitrust Improvements Act (FTAIA), which provided that the Sherman Act applied to foreign trade or commerce that has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce.[94] However, the FTAIA did not expressly state that extraterritorial jurisdiction should not be limited by international comity. Therefore, the British reinsurance companies argued in part that, according to international comity, the Sherman Act should not apply to foreign conduct that was otherwise legal in Britain.[95]

Justice Souter's opinion for the Court stated that international comity considerations would arise only if there were a "true conflict between domestic and foreign law."[96] According to Souter, only when foreign law required a party to do something contrary to U.S. law would there be a "true conflict." Thus, in this case, since the British companies did not claim that British law actually required them to limit the terms of reinsurance coverage, there was no "true conflict," and the Court had no reason to apply a comity analysis to limit the scope of U.S. antitrust jurisdiction. In effect, according to the Court's opinion, the foreign-sovereign-compulsion defense literally swallowed up the doctrine of comity. Many commentators read the *Hartford Fire Insurance* opinion as questioning the doctrine of comity and the principle of reasonableness.[97]

In his dissenting opinion in *Hartford Fire Insurance*, Justice Scalia conceded that "it is now well established that the Sherman Act applies extraterritorially."[98] However, Scalia asserted that according to the *Charming Betsy* canon of statutory construction, an act of Congress should never be construed as violating international law if any other possible interpretation is available.[99] To ensure that international law is not violated, Scalia argued that

92. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

93. *Id*. at 770.

94. Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97–290 (codified at 96 Stat. 1246) (1982).

95. *Hartford Fire Ins. Co*., 509 U.S. at 769.

96. *Id*. at 765.

97. *See, e.g.*, Lowenfeld, *supra* note 69, at 47–51.

98. *Hartford Fire Ins. Co.*, 509 U.S. at 814 (Scalia, J., dissenting).

99. *Id.* at 814–15 (citing Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)).

extraterritorial jurisdiction must be tempered by considerations of international comity.[100] In other words, Justice Scalia treated comity as a binding rule of international law, and he equated the comity analysis with the requirement in the Restatement (Third) of Foreign Relations Law of the United States that the exercise of prescriptive jurisdiction must be "reasonable."[101] According to the Restatement, courts are obligated to consider the connections and degree of interests of all the affected states.[102] Given that the relevant activities occurred in the United Kingdom, the defendants were British, and Britain has a comprehensive set of regulations for the reinsurance industry, he concluded that the United States clearly did not have a sufficient connection or interest in the transaction to warrant the exercise of legislative jurisdiction.[103]

Justice Scalia's dissent carried the day in the Supreme Court's 2004 decision in *F. Hoffman-La Roche, Ltd. v. Empagran, S.A.*[104] Foreign plaintiffs brought a class action suit under the Sherman Antitrust Act against foreign defendants who had conspicuously conspired to fix prices in the worldwide market for bulk vitamins.[105] Relying in part on the *Charming Besty* canon, the Court opined that the statute had to be read consistently with the principle of comity to avoid offending foreign sovereigns.[106] Accordingly, it held that the plaintiffs had no cause of action when the admittedly significant effect on U.S. commerce was independent of the effect on foreign commerce.[107] Writing for the majority, Justice Kennedy asserted that this

> rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.[108]

The Court read Congress's intention in light of the interests of the interdependent world market. Whereas *Charming Betsy* required courts to assume that Congress intended to legislate consistent with international law, the principle of international comity, at least as understood in the United States, was never a rule of international law. Comity as applied in U.S. courts was a uniquely American common-law doctrine reflecting our concerns about separation of powers and our particular historical experience. Foreign courts in both common-law and civil-law jurisdictions have not recognized comity as

100. *Id.* at 817.

101. *Id.* at 818–19 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1986)).

102. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1986).

103. *Hartford Fire Ins. Co.*, 509 U.S. at 820–22 (Scalia, J., dissenting).

104. 542 U.S. 155 (2004).

105. *Id.* at 159–60.

106. *Id.* at 164.

107. *Id.* at 175.

108. *Id.* at 164–65.

private international law.[109] Indeed, most foreign courts would agree with Cheshire and North that deciding when to apply foreign law according to the doctrine of comity "is incompatible with the judicial function, for comity is a matter for sovereigns, not for judges."[110]

Key to the Court's justificatory rhetoric is the image of the "highly interdependent" global market.[111] Similarly, the Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* enforced a choice-of-law provision out of "sensitivity to the need of the international commercial system for predictability."[112] Again, in *The Bremen v. Zapata Off-Shore Co.* the Court cautioned that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[113] And in *Scherck v. Alberto-Culver Co*. the Court stressed the damage that "a parochial refusal by the courts" to enforce a foreign arbitration agreement would do to "the fabric of international commerce and trade."[114] In each of these cases the Court sacrificed an important U.S. public policy embodied in U.S. statutes to the requirements of the global market. Similarly, in the *Empagran* decision, the Court failed to reinforce U.S. prohibitions against price fixing (by affording a remedy to the foreign plaintiffs) in deference to the global market.[115]

Those who appeal to a globalized market as a justification for limiting domestic jurisdiction assert that the United States depends on foreign commerce in a way that limits our autonomy. The *Empagran* decision assumes that we are no longer masters of our economic destiny; we are merely competitors in a global marketplace, and as such market forces require us to adjust our legal environment to encourage cross-border investment and commerce. Comity demands not merely respect for foreign sovereigns, the executive, or even for the autonomy of private parties; comity demands respect for the market itself. The *Empagran* judgment seems to treat the market as if it possesses its own autonomous will, much as courts once referred to the sovereign's will. In this globalized economy, courts serve a higher master and the sovereign's will must yield to the will of the market.

109. Paul, *supra* note 11, at 27–44.

110. PETER NORTH & J.J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 5 (13th ed. 1999) ("The fact is, of course, that the application of a foreign law implies no act of courtesy, no sacrifice of sovereignty. It merely derives from a desire to do justice.").

111. *Hoffman-La Roche*, 542 U.S. at 165 (2004).

112. Mitisubishi Motors Corp. v. Soler Chrysler, 473 U.S. 614, 629 (1985).

113. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1971).

114. Scherck v. Alberto-Culver Co., 417 U.S. 506, 517 (1974).

115. *Hoffman-La Roche,* 542 U.S. at 173 (2004).

V

CONCLUSION

Over four centuries, the doctrine of international comity has proved to be remarkably elastic and adaptive. What began in nineteenth-century U.S. jurisprudence as an assertion of the primacy of the forum's own law morphed into an obligation to apply foreign law. In the shadow of the Cold War, comity broadened to become a general principle of deference and a justification for limiting domestic jurisdiction to prescribe, adjudicate, or enforce. Deference to foreign sovereigns became deference to the executive or to the power of contracting parties to select their own law and forum. As the threat of the Cold War receded, comity once again is adapting to the new realities of globalization. The Court's decision in *Empagran* suggests that comity may have found a new object of deference: the Market.

If *Empagran* signals the next incarnation of comity, it is a dangerous and ironic formulation. Deference to the Market has nothing to do with respect for foreign law or private parties. Treating the Market as if it were an autonomous being with a will of its own is delusional.[116] When courts sacrifice the forum's public policy to suit the market, they are substituting their own ideological preference for markets for the policy choices that legislators have exercised. In so doing courts are frustrating policies that are the product of a democratic process.

The mere possibility that the application of domestic jurisdiction may be burdensome or even hostile to international commerce hardly seems a basis for courts to refuse to exercise jurisdiction. Comity was conceived originally as mutual respect between sovereigns. The rule of *Empagran* disrespects sovereigns. It suggests that courts may arrogate to themselves the power that comity acknowledged rests exclusively in the hands of the sovereign. Courts, out of respect for the separation of powers, as well as respect for foreign sovereigns, should apply jurisdiction as the lawmakers intended it to be applied and leave the interest-balancing to the political process.

116. Joel R. Paul, *Free Trade, Regulatory Competition and the Autonomous Market Fallacy*, 1 COLUM. J. EUR. L. 29, 33–41 (1995).