Common Law vs. International Law Adjective Rules in the Original Jurisdiction

James E. Beaver

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol20/iss1/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
Common Law vs. International Law Adjective Rules in the Original Jurisdiction

By JAMES E. BEAVER*

[We are generally men of untaught feeling; ... instead of casting away all our old prejudices, we cherish them to a very considerable degree ... and the longer they have lasted, and the more generally they have prevailed, the more we cherish them. We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would be better to avail themselves of the general bank and capital of nations, and of ages. Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them ... [P]rejudice, with its reason, has a motive to give action to that reason, and an affection which will give permanence. Prejudice is of ready application in the emergency; it previously engages the mind in a steady course of wisdom and virtue; and does not leave the man hesitating in the moment of decision, skeptical, puzzled, and unresolved. Prejudice renders a man's virtue his habit; and not a series of unconnected acts. Through just prejudice, his duty becomes a part of his nature.

—Edmund Burke,
Reflections on The Revolution in France 102-03 (II Select Works, Oxford, 1877).

A Preliminary Appraisal

CONTROVERSIES between and among states of the United States, in the original jurisdiction of the United States Supreme Court,¹ involve quasi sovereigns. Quasi because, while the several states were recognized and long acknowledged as in many respects

* Associate Professor of Law, University of Washington.

“sovereign and independent,”
this sovereignty, if it now exists at all,
was abdicated to a certain extent upon ratification
of the Constitution of 1787.
Full development of the ramifications of this renunciation

---


4 Thus, the United States may sue states in the original jurisdiction. Authorities cited note 1 supra. The states, however, may not sue the United States without its consent. E.g., Louisiana v. McAdoo, 234 U.S. 627, 628-29 (1914); Kansas v. United States, 204 U.S. 331, 343 (1907); Oregon v. Hitchcock, 202 U.S. 60, 70 (1906). See Arizona v. California, 298 U.S. 558, 568 (1936).

Any controversy in which the United States, as plaintiff, sues a state, “is not a controversy between equals . . . .” In fact, its right to sue may sometimes be “on the footing of an ultimate sovereign interest . . . .” Sanitary Dist. v. United States, 266 U.S. 405, 425 (1925) (Homes, J.). See In re Ayres, 123
of sovereignty and diffusion of competencies between two species of government, each fully competent over matters entrusted to it, but "neither sovereign with respect to the objects committed to the other," would be digressive. Of high significance for purposes of this article, however, is the voluntary relinquishment of the sovereign power to settle controversies by waging war, entering compacts, and the like. The "highly important" dispute-settling power was vested

U.S. 443, 505 (1887) (individuals and state); Choctaw Nation v. United States, 119 U.S. 1, 27-28 (1886) (United States and Indian tribe). But the United States "obviously" is not a state within the meaning of art. III, § 2, cl. 2, so that the mere presence of the United States as a party does not confer original jurisdiction. Ex parte Peru, 318 U.S. 578, 583 n.3 (1943); United States v. West Virginia, 295 U.S. 463, 470 (1935). See generally Missouri v. Holland, 252 U.S. 416, 433, 435 (1920) (Holmes, J.).

6 See, e.g., Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868); 1 BLACKSTONE, COMMENTARIES *49; THE FEDERALIST No. 45 (Madison).


8 U.S. Const. art. I, § 10, cl. 3. The power may have been given up, but armed conflicts nevertheless have been averted on occasion only narrowly. E.g., Oklahoma v. Texas, 258 U.S. 574, 580 (1922); see Nebraska v. Wyoming, 325 U.S. 589, 608 (1945); Virginia v. West Virginia, 246 U.S. 565, 598-600 (1918); Chambers v. Baltimore & O.R.R., 207 U.S. 142, 148 (1907) ("[t]he right to sue and defend in the courts is the alternative of force ... [and] is the right conservative of all other rights ...."); Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907); United States v. Texas, 143 U.S. 621, 641 (1892); Burton's Lessee v. Williams, 16 U.S. (3 Wheat.) 529, 538 (1818).


As to the types of compacts within the coverage of the clause and the means for securing Congressional consent, see Louisiana v Texas, 176 U.S. 1, 17-18 (1900); Wharton v. Wise, 153 U.S. 155, 167-73 (1894); Virginia v. Tennessee, 148 U.S. 503, 517-22 (1893); cf. Sherrill v. McShan, 356 F.2d 607, 610 (9th Cir. 1966) (similar provisions of Arizona and California constitutions as to boundary); State v. Holden, 46 N.J. 361, 217 A.2d 132 (1966) (concurrent legislation by New Jersey and Pennsylvania concerning concurrent jurisdiction over interstate bridge).

9 See Pennsylvania v. West Virginia, 262 U.S. 553, 596 (1923), where an especially interesting application of the commerce clause is discussed. It must be noted, however, that both Justice McReynolds and Justice Brandeis felt compelled to write dissenting opinions. Id. at 604, 609 n.4. To the same effect,
in the national Supreme Court as to disputes which need litigating,\textsuperscript{11} and in the national legislature\textsuperscript{12} to approve or disapprove compacts negotiated between states for the compromise of disputes between and among them.

According to Mr. Chief Justice Taft, the Court's procedures in the resolution of controversies between states differ from those it pursues in cases involving "mere" private parties.\textsuperscript{13} The Constitution, moreover, prescribes no particular \textit{modus operandi},\textsuperscript{14} nor is there any pertinent Act of Congress.\textsuperscript{15} In light of the attractions of universality as a goal,\textsuperscript{16} and a conscious engineering of "progress"\textsuperscript{17} in the

see Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943), where it was stated that the "full faith and credit clause like the commerce clause ... became a nationally unifying force." In brief, the states are tied together by their agreements—or the agreements of their inhabitants—embodied in the Constitution. For example, the judiciary article, the treaty clause, the compact clause, the full faith and credit clause, the commerce clause, etc.

\textsuperscript{10} United States v. California, 332 U.S. 19, 26 (1947). See also Missouri v. Illinois, 200 U.S. 496, 520 (1906), where the court said the rules established in these cases were "irrevocable by any power except that of this court to reverse its own decision" unless by constitutional amendment or compact ratified by Congress.

\textsuperscript{11} U.S. Const. art. III, §§ 1-2. In this class of cases the jurisdiction depends "on the character of the parties, whatever may be the subject of the controversy." United States v. Texas, 143 U.S. 621, 643 (1892) (Harlan, J.); accord, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378, 393 (1821) (Marshall, C.J.).


\textsuperscript{12} U.S. Const. art. I, § 10, cl. 3.

\textsuperscript{13} North Dakota v. Minnesota, 263 U.S. 365, 372 (1923). Similar language can be found elsewhere. \textit{E.g.}, Colorado v. Kansas, 320 U.S. 383, 393 (1943). \textit{But see} authorities cited note 152 \textit{infra}.


\textsuperscript{15} "Congress has passed no act ... prescribing the mode of proceeding in ... the original jurisdiction ... ." New Jersey v. New York, 30 U.S. (5 Pet.) 283, 286 (1831). Chief Justice Marshall's assertion of 1831 is equally true today. It might be added that today even more than in 1927 "[t]he Supreme Court has ceased to be a common law court." \textsc{F. Frankfurter} & \textsc{J. Landis}, \textsc{The Business of the Supreme Court} 307 (1927).

\textsuperscript{16} \textit{See, e.g.}, \textsc{A. Ehrenzweig}, \textsc{Conflict of Laws} 315, 348 (1962); \textit{cf.} \textsc{P. Jessup}, \textsc{Transnational Law} ch. 1 (1958) (universality of the human problem). \textsc{See also} the treatment of uniformity or universality in such disparate sources
erection of that edifice, it might perhaps have been anticipated that the suggestion should now be made that international law principles respecting the admissibility of evidence and trial practice should be adopted and applied by the Supreme Court in cases in the original jurisdiction. The claim was advanced by Michigan in Wisconsin v. Illinois when it moved the Court’s Special Master, Circuit Judge (Retired) Maris, to reinstate substantial amounts of evidence which had been stricken as hearsay. The excluded evidence consisted, among other things, in the words of Michigan’s Attorney General, of testimony by witnesses “relying upon information which they had received from others in the form of oral interviews” as well as written responses to inquiries, letters, “copies of records from books and documents,” and the like. Michigan asserted the right “to present such evidence as it desires irrespective of the exclusionary rules of evidence applicable in common law courts in the trial of ordinary cases.”

The theory advanced in support of Michigan’s contention was that the states are (quasi) sovereigns, that international adjective law governs litigation among such estimable litigants and that that law as the following: Hanna v. Plumer, 380 U.S. 460, 463 (1965) (“threat to the goal of uniformity”); Malloy v. Hogan, 378 U.S. 1, 3 (1964) (uniform application of “the applicable federal standards” respecting self-incrimination in all the states); id. at 16, 28, where Justice Harlan, dissenting, uses phrases such as “compelling uniformity” and the “monolithic society which our federalism rejects”; A. CAMUS, RESISTANCE, REBELLION, AND DEATH 202 (J. O’Brien transl. 1961) (“the shouts of so many people bent on simplifying everything”). There are, of course, many different kinds and degrees of uniformity and of the striving toward universality.

17 “The sanction for ad hoc decision of these cases is . . . the general language of Article III of the Constitution, which wisely provided for a flexible and progressive system of law by omitting to define the standards which should control the Supreme Court.” Note, What Rule of Decision Should Control in Interstate Controversies, 21 Harv. L. Rev. 132, 133 (1907) (emphasis added). See also J. BURCKHARDT, WELTGESCHICHTLICHE BETRACHTUNGEN (7th ed. 1949).

18 388 U.S. 426 (1967). The so-called “Lake Level Case” originated in an application to modify the decree in Wisconsin v. Illinois, 281 U.S. 179 (opinion); id. at 696 (decree) (1930).

19 Brief for Michigan in Support of Motion to Restore at 1-2.

20 Id. at 23.

21 The words “substance” and “procedure” are not self-defining, but no attempt is made here to refine their distinction. See, e.g., J. BEALE, CONFLICT OF LAWS § 584.1 (1935); W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 154-93 (1942); A. EHRENZWEIG, CONFLICT OF LAWS 307-68 (1962); H. GOODICH, CONFLICT OF LAWS § 80 (1949); Ailes, Substance and Procedure in the Conflict of Laws, 39 Mich. L. Rev. 392 (1940); Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 Yale L.J. 333 (1933).

22 Brief in Support of Motion by Michigan to Vacate Certain Rulings with Respect to Inadmissibility of Testimony at 15 (Oct. Term 1960), relating
recognizes no rules of incompetence. The motion was denied by Judge Maris, who emphasized in his Final Report of December 8, 1966, that all “witnesses appeared personally, were sworn, and testified orally,” thus affording counsel and Master “opportunity to observe them” and for (deferred) cross-examination. Michigan’s theory might well have been revived in the Supreme Court upon objections to the Special Master’s Final Report, which proved unfavorable to her; but the cause was terminated by a decree adopting the recommendations of the Report at the suggestion of all parties to the dispute. It should be pointed out that Michigan might have claimed less; for example, she could have urged that the “interstate common
to Wisconsin v. Illinois, 388 U.S. 426 (1967): “Rules of evidence utilized by international tribunals in receiving evidence presented by sovereign states should prevail in original suits heard by the United States Supreme Court between sovereign states of the Union.”

23 The contention seems substantially correct. “[T]he technical rules of evidence . . . applied to the conduct of trials in . . . municipal courts . . . have no place in regulating the admissibility of, and in the weighing of evidence before, this international tribunal.” Parker Case (United States v. Mexico) decided under General Claims Convention, Sept. 8, 1923, 43 Stat. 1730 (1923), T.S. No. 678 (decision rendered 1927), quoted in J. RALSTON, THE PROCE-DURE OF INTERNATIONAL TRIBUNALS 96 (rev. ed. 1926, Supp. 1936); “We have absolutely nothing in the world to do with the common law rules of evidence in any shape or form.” Mixed Claims Commission 169 (United States v. Germany), quoted in J. WIGMORE, EVIDENCE § 4 at 153 (3d ed. 1940) [hereinafter cited as WIGMORE]. “In international law there are no general rules requiring the exclusion of categories of evidence. . . . [T]he tendency has always been to give tribunals the widest discretion in the admission and assessment of evidence.” J. SIMPSON & H. FOX, INTERNATIONAL ARBITRATION 192 (1959).

24 Record, vol. 30 at 11, 61-62, Wisconsin v. Illinois, 388 U.S. 426 (1967) (Ruling of Jan. 3, 1961). Among other things, Judge Maris observed: “I think it is quite clear under Rule 9 of the Supreme Court’s own rules, that Rule 43 of the Federal Rules of Civil Procedure is the governing rule; and under that rule, it is the common law rules of evidence, or the rules of evidence that have been developed in the courts of the United States, that control, and not some rules of evidence developed under the civil law or some other alien system which has not been followed in this country.” He also noted that “there should be great liberality” in admitting evidence. “See authorities note 315 infra, to the effect that “the hearsay rule itself,” which is “subject to a great many exceptions, should be liberally applied;” that the rule of liberality “applies more particularly to the rule of relevance than . . . to rules relating to competency;” and: “But against objection of a party who asserts that he is entitled to have cross-examination of the primary witness who has knowledge of the fact being testified, it seems to me that rules of evidence applicable in this case require that the evidence of the witness who merely testifies to what that primary witness has declared should be excluded.”


26 See id. at 434-36 (Report of the Special Master—Conclusions); id. at 437-41 (Report of the Special Master—Recommended Decree).
law" adjective rules applied in such cases are now ripe for relaxation, that the eminent judges and lawyers appointed as Special Masters from time to time, not to mention the Justices themselves, are exceptionally competent to receive hearsay, attributing to it whatever weight it merits, and so forth. Yet it is not the purpose of this article unduly to embroil itself in controversy over the respective merits or demerits of the hearsay rule within the common law system. Such controversy, however intriguing, is quite tangential to the acutely interesting jurisprudential questions posed by Michigan's broader claim.

It must be admitted that no magical superiority can be attributed to common law adjective rules. Indeed, civil law practice can assert a far more ancient and aristocratic lineage, porphyrogenetic in usages of the Peregrine Praetor, whence developed the *jus gentium* itself, while common law remedial devices trace rather directly to savage practices of the roving tribes of the Teutoberger Wald. Nevertheless, adoption of the suggestion of Michigan's Attorney General might have unfortunate consequences, and the proposal faces very considerable difficulties.

First, common law principles, albeit slightly modified, have heretofore governed the conduct of original causes between states in the Supreme Court for more than 150 years. By rule, by judicial decision, and in actual practice, the Court persistently has applied the evidentiary principles and practices derived from the English com-

---

27 The narrower claim is contained within the broader for practical purposes. Some of Michigan's arguments were especially germane to an advocacy of revision within the common law. For example, Michigan mentioned that proof of injury to a sovereign state "presents many problems and difficulties." Brief in Support of Motion by Michigan to Vacate Certain Rulings with Respect to Inadmissibility of Testimony at 8, 9 (Oct. Term 1960), relating to Wisconsin v. Illinois, 388 U.S. 426 (1967). "To bring before the Court the great number of individual witnesses who have indicated to us a sincere belief that a permanent lowering of the waters of the Great Lakes would cause them serious injury and that a permanent increase in the levels would benefit them presented an enormous task. . . .

"Obviously a great deal of the information gathered by these and other witnesses [from state agencies, private enterprises and two firms of engineers] would be of a hearsay nature, consisting of information which they received from others and which they verified to the very best of their ability. These are professional men who know what they are about and would certainly be capable of evaluating the information which they were given." Id.; cf. Rhode Island v. Massachusetts, 39 U.S. (14 Pet.) 210, 275 (1840) (McLean, J.) (treatment of the application of the laches defense to states).

28 The literature upon this subject is, of course, extensive. See, e.g., C. McCormick, Evidence 626-34 (1954); 5 J. Moore, Federal Practice §§ 43.02 [3], 43.02 [5] (2d ed. 1964). This writer’s own views in this area are not definitely formed by any means.
mon law and chancery courts and developed here. It is true that the practice developed quite independently of any suggestion or offer by Court or counsel of international law practice as an alternative. Nevertheless, rigorous attention was given to the issue of appropriate mode of operation; stare decisis, embodying the "restraints of legality and the authority of tradition,"29 thus urges rejection of the claim.

Secondly, under international law principles, the several states are not international juristic persons. Vis-a-vis other nations the United States alone is sovereign; it alone bows to alien procedure, and then only by its voluntary agreement.

Thirdly, under conflict-of-laws rules, whether the doctrine of the civil law (lex loci actus) or of the common law (lex fori) be invoked, the result is the same: the territorial forum is the United States and the controversy arises there. Either choice of law principle dictates application of evidentiary and procedural rules common to all of the contending quasi sovereign litigants.

Fourthly, abandonment of common law practice would be extraordinarily burdensome to all (or most) of the Justices, Masters and counsel, requiring application of rules totally alien to their professional experience.30 Customary international law adjective rules, if they have objective existence at all apart from the agreement of sovereign litigants in particular proceedings, are amorphous at best,

29 Lord Acton, Political Causes of the American Revolution, in Essays on Freedom and Power 196, 196-97 (G. Himmelfarb ed. 1948). Compare id. with Baker v. Carr, 369 U.S. 186, 287 (1962) (Frankfurter, J.) (dissenting opinion) ("Such a massive repudiation of the experience of our whole past . . . demands a detailed analysis of the role of this Court.") But see, e.g., Seattle Times, July 26, 1966, at 12, col. 2 (night sports final ed.), where it was reported that the House of Lords "announced it is abandoning 'the binding force of precedent' in certain circumstances in order to make English law more flexible and up to date. . . . henceforth . . . the Lords reserve, for themselves alone, the right to depart from previous decision 'when it appears right to do so.'" See also The Nereide, 13 U.S. (9 Cranch) 388, 426 (1815) (Marshall, C.J.) ("The antiquity of the rule[s] is certainly not unworthy of consideration."); Schwarzenberger, The Inductive Approach to International Law, 60 Harv. L. Rev. 539, 567 (1947) ("basically, international law is customary law. . . . 'In diplomacy even more than in matters . . . domestic . . . precedents play a dominant part in the growth of usage.'").

30 A noteworthy side-effect might conceivably be an accelerated "result-orientation" in the decisions of the Court. Looser proofs and procedures would seem conducive to greater freedom and subjectivity in decision-making. E.g., Rostow, supra note 3. Arizona v. California, 373 U.S. 546 (1964), means to at least one of the justices that greater freedom in this regard is not needed; it has been seized. "[The present case] will, I think, be marked as the boldest attempt by judges in modern times to spin their own philosophy into the fabric of the law . . . ." Id. at 628 (Douglas, J.) (dissenting opinion). Among many similar expostulations see, e.g., Reynolds v. Sims, 377 U.S. 533, 615-16, 624 (1964) (Harlan, J.) (dissenting opinion).
and opinion seems generally to be divided as to what any given rule of practice is or should be. Indeed, available literature is sparse and inaccessible, quite apart from the wide range of opinion.

Fifthly, to the extent that common law rules have been modified in this class of cases, quite often the alteration has been restrictive. For example, the burden of proof borne by a complainant state asserting a right of action against another state is said to be much greater than when private litigants are before the tribunal.\textsuperscript{31} The more exacting common law practice is arguably especially befitting where great public interests are involved and the scrupulous ascertainment of objective fact is avowedly uniquely desired and demanded.

This analysis is not intended to decry the importance of international law or of a universally applicable improvement in dispute-resolution; quite the contrary. The practical alternative to terror, internal factional strife, lawlessness and the lynch mob in the municipal sphere, has been the establishment of a rule of law superior to individual men and aggregations of persons. Something similar, most civilized human beings surely must agree, ultimately is required for the sake of the survival of humankind. Over four decades ago it was already the judgment of Charles Warren that the limited surrender by the states of certain specific powers of sovereignty was essential to continued survival of this Nation.\textsuperscript{32} In an atomic era, similar considerations are undoubtedly much more critical and pressing. “Who can say”, inquired Warren, who in 1924 had never dreamed of atomic weaponry, “that it may not require a similar relinquishment of some rights and powers of sovereignty by the nations of the world, to save our modern civilization?”\textsuperscript{33}

Who, indeed, can say, today? It is unfortunate that the “well-informed and well-meaning individuals and groups,”\textsuperscript{34} the “publicists”\textsuperscript{35} who are sufficiently aroused, tend in their enthusiasm, op-

\textsuperscript{31} See text accompanying notes 310–32 infra.

\textsuperscript{32} C. Warren, The Supreme Court and Sovereign States 96 (1924). See also J. Scott, James Madison’s Notes of Debates in the Federal Convention of 1787 and Their Relation to a More Perfect Society of Nations 70 et seq. (1918); H. Wehberg, The Problem of an International Court of Justice 151 (C. Fenwick transl. 1918); Scott, The Role of the Supreme Court of the United States in the Settlement of Inter-State Disputes, 15 Geo. L.J. 146, 147, 156–67 (1927).

\textsuperscript{33} C. Warren, The Supreme Court and Sovereign States 76 (1924). 1924 is also the year in which Charles Warren was appointed a Special Master. New Mexico v. Texas, 266 U.S. 586, 586–87 (1924).

\textsuperscript{34} G. Von Glahn, Law Among Nations 733 (1965).

\textsuperscript{35} Schwarzenberger, The Inductive Approach to International Law, 60 Harv. L. Rev. 539, 559 (1947); cf. United States v. California, 332 U.S. 19, 43 (1947) (Frankfurter, J.) (dissenting opinion) (“dubious and tenuous writings of publicists”); The Paquete Habana, 175 U.S. 677, 720 (1900) (Fuller, C.J.)
timism and impatience, to renounce (or at least belittle or ignore) the experience of the federalist experiment, like all experience of the past. Well-meaning enthusiasts would do well to pause and consider the incredibly larger difficulties and complexities which must beset a world-wide, “universal” judicial article, reposing a thorough-going original jurisdiction in an International Court of Justice. As contrasted to the United Nations, the thirteen “emerging” sovereign colonies in 1780 had a common heritage and agreed first principles, including the common law, an advantage impossible to overemphasize. The constitution, for example, “could not be understood without reference to the common law.” In the words of Professor Von Glahn:

[Those who] have insisted that a full-fledged judicial system for the world is not only necessary—and [those] who would deny that such would be necessary at some distant time in the future—but feasible now . . . exude undue optimism. Common sense and a hard look at the world as it is . . . dictate the view that such conceptions are . . . lovely mirages.

(dissenting opinion) (“speculations and repetitions of the writers on international law”). In The Schooner Exchange v. M‘Faddon, 11 U.S. (7 Cranch) 116, 135 (1812), Attorney General Pinkney, in argument, urged the Court not to decide the case “upon the authority of the slovenly . . . Byner-shoek, or the ravings of that sciolist Martins . . . . One would as soon consult Gibbons or Hobbs, for the doctrines of our holy religion, as Martins for the principles of the law of nations.” But Chief Justice Marshall thought Byner-shoek “a jurist of great reputation.” Id. at 144. See also West Rand Cent. Gold Mining Co. v. The King, [1905] 2 K.B. 391, 401-02 (Lord Alverstone, C.J.).

36 On the value of history as vicarious experience, see, e.g., J. BURCKHARDT, WELTGESCHICHTLICHE BETRACHTUNGEN 11-12 (7th ed. 1949); R. COLLINGWOOD, THE IDEA OF HISTORY 10 passim (1946); S. NEUMANN, THE FUTURE IN PERSPECTIVE 5-6 (1946).

37 See Cato the Elder, in CICERO, DE RE PUBLICA II, i, at 113 (Loeb ed. 1928): “[T]here never has lived a man possessed of so great genius that nothing could escape him, nor could the combined powers of all the men living at one time possibly make all necessary provisions for the future without the aid of actual experience and the test of time.”

38 “[T]he U.N. can be an effective guarantor of peace only when there is a consensus” among the major powers based upon “as large a measure as possible of moral, political, and economic homogeneity” including, e.g., “a significant degree of agreement . . . on moral values” and “commitment to common standards of legal, political, and economic relations.” The word “consensus” is here doubtless used in the correct, Calhounian sense of that word. G. TAYLOR & B. CASHMAN, THE NEW UNITED NATIONS—A REAPPRAISAL OF UNITED STATES POLICIES 99 (1965); cf. Perez v. Fernandez, 202 U.S. 80, 91 (1906); note 259 infra.

The common ground of agreed first principles which is basic to all national legal systems is as yet (regrettably ...) lacking .... [I]t is ... utopian in the worst sense of that abused word to dream of an early realization of "world law."

The law of nations is today in a stage of transition and development, full of promise [but] limited as yet .... [O]nly when rules are supplied with a methodology for their application and enforcement may we presume the existence of a true law.\(^{40}\)

All (or virtually all) agree that an "appropriate" world judicial system is desirable and ultimately essential. The national judicial power of the United States in original jurisdiction cases may be viewed in a limited sense as a laboratory experiment toward a world judiciary. The common heritage and agreed first principles restrict its value as a model; but it is about the best example we have.

The framers of the universal Judicial Article must bring forth a flawless arrangement on their first cast; once imposed, there will probably be no withdrawal, as the Civil War would seem to indicate. Clearly, "the measures by which wars might be made altogether impossible for the future may well be worse than even war itself."\(^{41}\)

The framers would do well to adopt a humble posture, like that advocated by the Swiss sage Jacob Burckhardt. In his critique of Hegel, he gently deplored "the cautiously insinuated doctrine of perfectibility, i.e., the pervasive notion of progress," suggesting that "we are not initiated in the scope and designs of Universal Wisdom and perceive her not. The impudent [Hegelian] preconception of a World Plan results in faulty notions because it proceeds from false premises."\(^{42}\)

Although adoption of international law adjective rules in original jurisdiction cases would not advance the accomplishment of World Law one iota, the method of conflict-resolution adopted in the Constitution and the practices of the Court in effectuating the constitutional grant of power might be valuable vicarious experience toward developing a methodology for the application of World Law. The time consumed in the inquiry may not be wasted. And if we are to abolish war, and in doing so not only destroy it but also bring into existence something better and not worse, let us be cautious, realizing that "no kindly law of nature will save us from the fruits of our ig-

\(^{40}\) G. Von Glahn, Law Among Nations 733 (1965).

\(^{41}\) F. Hayek, The Road to Serfdom 238 (1944). \textit{Compare id.} with A. Camus, Resistance, Rebellion, and Death 129 (J. O'Brien transl. 1961) ("None of the evils that totalitarianism claims to remedy is worse than totalitarianism itself.") and Kurland, \textit{Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"} 78 Harv. L. Rev. 143, 176 (1964) ("In that event, the Court may have no more function to perform than the Supreme Court of South Africa now has.").

\(^{42}\) J. Burckhardt, Weltgeschichtliche Betrachtungen 4-5 (7th ed. 1949) (author's translation).
This is surely a sufficient justification for an attempted careful recounting of the means utilized by our own arbiter of disputes among quasi sovereign states shorn of the means to wage war.

The Practice of the Court

Rules

Common law adjective rules have been utilized from the beginning as the rules of procedure in actions between and among states in the United States Supreme Court. Only two qualifications of note have been enunciated. Some of these rules are rather more restrictively applied; for example, the complainant state's burden of proof is greater than a private plaintiff's would be. Certain other rules are somewhat relaxed; that is, grossly technical pleading and other rules are not stringently applied when to do so would defeat the ends of justice.

On August 8, 1791, the Chief Justice announced that the Court considered "the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of this court" and that alterations of those rules would be made when necessary.

44 Cf. In re Debs, 158 U.S. 564, 584-85 (1895). This greater "liberality" applies to some rules, including, apparently, multifariousness. Virginia v. West Virginia, 220 U.S. 1, 27 (1911); see notes 166, 329-30 infra. See also discussion in note 24 supra. However others are more "restrictive", for example, indispensability of parties.

Mr. Justice Brown gives an interesting possible justification for rather more liberal joinder rules in terms of avoiding a "multiplicity of suits", the state assuming "the entire pecuniary burden of [the] litigation, when all the inhabitants of the ... State are more or less interested in the result." Louisiana v. Texas, 176 U.S. 1, 28 (1900) (concurring opinion); see Missouri v. Illinois, 180 U.S. 208, 241 (1901) ("suits ... by individuals, each for personal injuries ... would be wholly inadequate and disproportionate"). The same analysis explains development of common law equitable remedies such as interpleader, class actions and bills of peace.

45 See, e.g., California v. Southern Pac. Co., 157 U.S. 229, 249 (1895): "[I]n cases of original jurisdiction ... this court will frame its proceedings according to those which had been adopted in the English courts in analogous cases, [especially] the rules of court in chancery ... although the court is not bound to follow this practice when it would embarrass the case by unnecessary technicalities or defeat the purposes of justice."

46 Sup. Ct. R. VII, 5 U.S. (1 Cranch) xvii (1801). The rule is said, in the recapitulation of rules and orders appearing id., to have been announced in 1791, but the only earlier statement of the rule in the reports is found at 2 U.S. (2 Dall.) 414 (1792). The date given at 5 U.S. (1 Cranch) xvii (1801) would thus seem to be erroneous, since the rule announced at August Term, 1792 was promulgated under similar circumstances and is substantially identical to the rule appearing id. In accord with common usage, however, it will be denominated herein The Rule of 1791.
Throughout the 19th century, and indeed until 1939, the Rule of 1791 remained in force.\textsuperscript{47} Rule 5 of the rules published in 1939 provided that original docket cases should be "governed, as far as may be, by the rules applicable to cases on the appellate docket."\textsuperscript{48} This seemingly substantial revision worked no change in the actual practice, and after only 15 years the Court cast aside the appellate analogy and reverted to the original rule and ancient tradition when Rule 9 was adopted on July 1, 1954.\textsuperscript{49}

Rule 9 of the Court's present Rules provides that the Federal Rules of Civil Procedure, "where their application is appropriate, may be taken as a guide to procedure in original actions in this court."\textsuperscript{50} Thus, to take evidence questions as an example, Rule 43 is the Court's pilot in original jurisdiction cases and renders admissible all proofs competent by virtue of federal statute, formerly competent pursuant to the Equity Rules, or competent according to the rules of practice in state courts in the state in which the federal court sits, whichever is the more liberal.\textsuperscript{51} The latter provision is manifestly inapplicable, but conceivably might "guide" the Court to select the most liberal rule available in the codes of the litigating states.

Similarly, as regards parties and like questions, the Court has applied the Rules when occasion has arisen.\textsuperscript{52} The Federal Rules were originally drawn by the Supreme Court\textsuperscript{53} as stating the best (or at least an improved) procedure in original proceedings in the federal trial courts. It would seem on the face of it that they would be highly useful and convenient in original proceedings in the Supreme Court as well.\textsuperscript{54}


\textsuperscript{51} Fed. R. Civ. P. 43.

\textsuperscript{52} See United States v. Louisiana, 354 U.S. 515, 516 (1957), where the Court allowed intervention by additional Gulf states, "acting pursuant to Rules 9 (2) and (6) of its Revised Rules, Rule 21 of the Federal Rules ... and the general equity powers of the Court." See also the ruling of Special Master Maris, supra note 24.


\textsuperscript{54} See R. STERN & E. GRESSWAN, SUPREME COURT PRACTICE 308 (3d ed. 1962). See also Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18
Usage and Decisional Law

The Rule of Practice adopted in 1791 was followed from the beginning by the Supreme Court. In *New Jersey v. New York*, Chief Justice Marshall considered the early usage in cases in which states were involved. He pointed out that as early as *Chisholm v. Georgia*, the Court had followed the procedures of the English Courts of Chancery (as distinguished from the practice at law), sometimes pursuant to the Judiciary Act of 1789 (with respect to areas in which Congress had legislated), on other occasions without any congressional directive. Among the common law procedures followed were the issuance of subpoenas and *distringas* to compel the appearance of the state and commissions to take depositions. The Chief Justice concluded that the Court had power to enter a decree *ex parte* upon the default of the defendant state to enter an appearance.

---

56 2 U.S. (2 Dall.) 419 (1793).
58 A somewhat similar problem—also involving what mode of procedure to follow in a novel class of cases—arose in the early diversity cases: whether the Rules of Decision Act, Judiciary Act of 1789, ch. 20, § 34 (now 28 U.S.C. § 1652), restricted the manner in which the federal courts could administer relief to those remedies available in courts of the forum states. *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 222 (1818). Thus, in some states, no chancery courts existed, and a construction, therefore, that “would adopt the state practice in all its extent, would at once extinguish, in such states, the exercise of equitable jurisdiction.” Since Congress distinguished between remedies at common law and in equity, the Court decided that “to effectuate the purposes of the legislature, the remedies in the courts of the United States, are to be, at common law or in equity, not . . . the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles.” *Id.* at 222-23. See also *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 190-91 (1877); *Irvine v. Marshall*, 61 U.S. (20 How.) 558, 564-65 (1857).
59 *Grayson v. Virginia*, 3 U.S. (3 Dall.) 320 (1796). See also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 479 (1793) (show cause order); *Oswald v. New York*, 2 U.S. (2 Dall.) 402 (1792) (order for return of writ); *Oswald v. New York*, 2 U.S. (2 Dall.) 415 (1793) (show cause order to compel appearance of state).
International tribunals, by contrast, have ordinarily possessed no subpoena powers or procedure to compel the attendance of unwilling witnesses or parties.62

The question of the appropriate practice in the original jurisdiction received its most rigorous consideration seven years later, in Rhode Island v. Massachusetts.63 A boundary dispute had exacerbated relations between the states (and predecessor colonies) of Rhode Island and Massachusetts for almost two centuries. The prayers of Rhode Island's bill in equity were that the Court ascertain and establish the boundary between the states, restore and confirm her rights of sovereignty, and quiet her title.64

62 E.g., M. HUDSON, INTERNATIONAL TRIBUNALS 94 (1944); 1 WIGMORE 154. Indeed, it is only "rarely" that witnesses are heard. Complaints Against the U.N.E.S.C.O., [1956] I.C.J. 77, noted in L. GREEN, INTERNATIONAL LAW THROUGH THE CASES 852, 855 (2d ed. 1959) [hereinafter cited as GREEN]; M. HUDSON, supra at 92; 1 WIGMORE 94. Oral testimony was heard by the International Court of Justice in the Southwest Africa Case [1956] I.C.J. 23, noted in GREEN at 62, and the Corfu Channel Case, [1949] I.C.J. 4, noted in GREEN at 161, but it is believed those are the only two examples. Since "an international tribunal has no power to punish for perjury or contempt," the value of any such testimony would be limited in any case. M. HUDSON, supra at 93. See also G. WHITE, THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS 218 (1965) (expert witnesses used only once by Court of Justice of the European Communities).


63 37 U.S. (12 Pet.) 657 (1838).
64 Id. at 716.
Massachusetts contended on demurrer that there was no jurisdiction in the Court because no rule of decision had been established by Congress, "by the administration of which" the parties' rights could be determined. Adverting to claimed distinctions between the term "all cases in Law and Equity" and the word "controversies" in the judicial article, its counsel argued that the latter is less extensive.

Daniel Webster is said to have participated in Massachusetts' argument. Id. at 669. However, the only argument printed by the Reporter is that of Mr. Austin. Id. at 669-86.

Mr. Austin was not the first advocate of this position. Forty-five years earlier, Mr. Justice Iredell made a stunning, persuasive presentation to this effect in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 430-33 (1793). For example, section 13 of the Judiciary Act of 1789, 1 Stat. 80-81, "conveying the authority of the Supreme Court", limited the cognizable controversies involving states mentioned in article III, to those "of a civil nature," a legislative limitation which any "reasonable man will think well warranted," since criminal cases are "uniformly considered of a local nature." The Justice might have raised the specter of a criminal prosecution of a sovereign state, but he did not! Moreover, all "courts of the United States" receive "their organization as to the number of judges . . . from the legislature only." Id. at 431. Similarly, as to the judges' practice, the legislature "[h]aving a right thus to establish the court, and it being capable of being established in no other manner, I conceive it necessarily follows, that they are also to direct the manner of its proceedings." Id. In brief: "It is their duty to legislate . . . It is ours only to judge." Id. at 433 (emphasis by Mr. Justice Iredell.); see Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289-300 (1888) (exhaustive discussion of the extraterritorial application of penal laws). See also Osborn v. United States Bank, 22 U.S. (9 Wheat.) 738, 819 (1824) (Marshall, C.J.) (judicial power "is capable of acting only when the subject is submitted . . . in the form prescribed by law").

Article III, section 2, clause 1 of the United States Constitution extends the national judicial power to "all Cases, in Law and Equity, arising under this Constitution", etc., on the one hand, and "to Controversies to which the United States shall be a party" and "Controversies between two or more States," etc. on the other. (Emphasis added.). Mr. Austin argued that the terms law and equity in this article referred to the complex code of the mother country with which the Framers were familiar, a system "extensive, but not universal, and limited in its operation by well settled decisions." Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 673 (1838). The law must exist which the court is to apply—in this case, common law and equity—or alternatively, other law enacted as applicable to the case by Act of Congress. Judges, he said, "are to expound the law, not to make it." Id. at 675. In brief, so he argued, the Constitution is not self-executing. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 393 (1821) (Marshall, C.J.): "In one description of cases, the jurisdiction of the Court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the Constitution. The character of the parties is every thing, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these, the nature of the case is everything, the character of the parties nothing." For a similar treatment of the difference between the
than the former. There was lacking an adjective law to put the Court into operation, so he said, to regulate the procedure from summons to judgment and execution (absent which "judicial action is a mere mockery").

Massachusetts admitted that it had agreed "under certain circumstances" to waive its sovereignty and submit its controversies to decision by the Court; but before it could be called upon to do this a "code" must be propounded "suitable to the decision of her case." Massachusetts further claimed that there must be established, by the legislative authority, "forms of process", a "mode of proceeding", a scheme for the casting of judgment, and means of enforcement. "There is no usage in such cases." Massachusetts thus did not urge a choice between two available procedural systems, but in asserting a want of power in the Court, invoked the non-existence of common law rules applicable to this class of cases: "There are no principles, meaning the common law", nor any (common law) "usage," to govern decision and regulate the conduct of the litigation.

Rhode Island also conceived the question in issue to be one of power in the Court. Such power existed, it suggested, by virtue of the parties' constitutional agreement. Though intercolonial boundary disputes had been decided by the King in council, there was no magic in such practice traceable to notions of sovereignty. Colonial grants and charters derived from the King, but he could have transferred his royal jurisdiction to any one of his courts. Had he done so, those controversies, of whatever character, would have been proper subjects

---


69 Id. at 678-79 (emphasis added). The passage continues: "[T]he states, as is contended, by agreement to submit their controversies to judicial decrees, never intended to include in these controversies questions of sovereign right, for the regulation of which no law is made; and no law ever can be made [as to such matters] by any other power than themselves, and each one for itself alone." Id. at 679.

70 Id. at 685 (emphasis added). Boundary disputes are non-justiciable and "in the highest degree political; brought by a sovereign, in that avowed character, for the restitution of sovereignty." Id.

71 Id. (emphasis added).

72 Id. at 687. In Mr. Hazard's words, had the Court "power to proceed to the hearing and trial of the cause, and to make a final decree therein?" Id.

73 Mr. Hazard explained the doctrinal "gap" covering the period of rebellion and Articles of Confederation, by asserting that the United States came into being as such upon the Declaration of Independence, and the states were never fully sovereign. Id. at 689-90.
of judicial investigation and decision. Is there any reason "in nature" why states should not be governed by "the laws and principles of justice, as much as any other parties?" In addition to the agreement of the parties, there was also the necessity of the case: "All controversies . . . must be settled either by force or by the judgment of some tribunal," acting judicially.74

As to the claim that Congress had not prescribed rules of practice, Rhode Island pointed out that the Supreme Court had conducted its affairs in New York v. Connecticut,75 New Jersey v. New York,76 and many other cases77 by invocation of the common law analogy. For example, suit was commenced uniformly in such cases by subpoena served upon the Governor and Attorney General of the defendant state,78 and the Court should proceed now in consonance with its prior practice and its subsisting rules.79 It never "entered the heads" of the framers and ratifiers of the Constitution that more was necessary to meet the exigency of the case than to establish a competent court which would automatically decide them and try them in the

74 Id. at 692-93.
75 4 U.S. (4 Dall.) 1 (1799). The Court here said that "reasonable" notice of application for injunction was required, but a shorter period was appropriate when application was made "to a court" instead of to "a single judge," and "until a general rule shall be settled," this doctrine applied. Notice here was held sufficient. Id. at 2. The Court denied the injunction because New York was "not a party" to the ejectment actions in the Connecticut courts and not "interested" in their decision. Id. at 5. The Court concluded that the rule in equity that process—subpoena—"should be served sixty days before the return" had not been observed; the alias subpoena, however, was awarded. Id. at 6.
76 28 U.S. (3 Pet.) 461, 467 (1830). It was here "ordered by the Court that, as the service of the former process . . . was defective . . . process of subpoena be, and the same is hereby awarded as prayed." See also New Jersey v. New York, 30 U.S. (5 Pet.) 284, 289 (1831) (reprinting the rule unsatisfied by New Jersey, which had served the Governor, but not the Attorney General of New York).
77 Counsel pointed out that the injunction in Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792), "was an exercise of the original jurisdiction of the Court, and no doubt of its propriety was ever considered." Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 702 (1838). Counsel also invoked the following cases: Huger v. South Carolina, 3 U.S. (3 Dall.) 339 (1797); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); Oswald v. New York, 2 U.S. (2 Dall.) 402 (1792).
78 See also authorities note 59 supra.
same way as any other disputes; i.e., by common law.\textsuperscript{80}

Alternatively, Rhode Island contended\textsuperscript{81} that Congress had acted sufficiently. Thus, Section 14 of the Judiciary Act of 1789,\textsuperscript{82} the All-Writs Statute, empowered the Federal courts to issue writs of \textit{scire facias}, habeas corpus, and whatsoever other writs were "necessary" for the exercise of their jurisdiction, and "agreeable to the principles of usages of law."\textsuperscript{7983} It suggested also that Section 17 of the Act of 1789,\textsuperscript{84} which empowered the federal courts "to make and establish all necessary rules for the ordinary conducting of business in said courts, provided such rules are not repugnant to the laws of the United States,"\textsuperscript{85} was a sufficient grant of power, if any was necessary, for the formulation of rules of practice.

Although an international law \textit{modus operandi} was not suggested as an alternative by either party—a fact rather pertinent respecting the contemporary understanding of the constitutional grant—the question of the proper trial practice to be followed in such cases was thus directly put in issue by vigorously contesting parties litigant.

Rhode Island prevailed on the issues here pertinent.\textsuperscript{86} Mr. Justice Baldwin, who delivered the opinion of the Court,\textsuperscript{87} already in 1831

\textsuperscript{80} Id. at 697.

\textsuperscript{81} Id. at 700.

\textsuperscript{82} Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82.

\textsuperscript{83} The present statute, 28 U.S.C. § 1651(a) (1964), provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in and of their respective jurisdictions and agreeable to the usages and principles of law."

\textsuperscript{84} Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83.


\textsuperscript{86} Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838); Rhode Island v. Massachusetts, 38 U.S. (13 Pet.) 23 (1839); Rhode Island v. Massachusetts, 39 U.S. (14 Pet.) 210 (1840); Rhode Island v. Massachusetts, 40 U.S. (15 Pet.) 233 (1841); Rhode Island v. Massachusetts, 45 U.S. (14 How.) 591 (1846). However, the final decree went in favor of Massachusetts.

\textsuperscript{87} Only Chief Justice Taney dissented. Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 752 (1838). Justice Story, as a citizen of Massachusetts, declined to sit. Justice Barbour concurred in the result without approving all of the reasoning of Justice Baldwin. Id. at 754. The Chief Justice's dissent was based on the theory that "sovereignty" and not "title" to real estate was in issue, and thus no "judicial" question was raised: "Contests for rights of sovereignty and jurisdiction between states over any particular territory, are not, in my judgment, the subjects of judicial cognizance and control, to be recovered and enforced in an ordinary suit; and are, therefore, not within the grant of judicial power contained in the constitution." Id. at 753. Note the Chief Justice's explanation, in Florida v. Georgia, 58 U.S. (17 How.) 478,
had sought to have "the practice in England" and the Court's "power to proceed in suits between states, without an act of Congress having directed the mode of proceeding", argued in open Court. He recognized the special and limited character of the original jurisdiction and thus analyzed the power conferred at its source. In ratifying the Constitution the states acted "in their highest sovereign capacity," through their people, exercising all possible attributes of sovereignty "in a plenitude unimpaired" and "controllable by no authority", since, by virtue of the successful revolution, not only "the prerogative of the crown" but also "the transcendent power of parliament" devolved upon them. These sovereign powers the states actually exercised for a time after 1776. What they thereupon possessed them-

492 (1854), of how "at a very early period . . . a doubt arose" as to how the Court could "exercise its original jurisdiction without a previous Act of Congress regulating the . . . mode of proceeding," and how this "doubt" was resolved. See text accompanying note 148 infra.

89 37 U.S. (12 Pet.) 657, 720 (1838). See generally Minnesota v. Hitchcock, 185 U.S. 373, 382, 384 (1902), where Justice Brewer said: "It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject matter. . . .

"[I]f it were held that this court had original jurisdiction of every case of a justiciable nature in which a State was a party and in which was presented some question arising under the Constitution . . . many cases, both of a legal and an equitable nature, in respect to which Congress has provided no suitable procedure, would be brought within its cognizance. To this it may be replied that this court cannot deny its jurisdiction in a case to which it is extended by the Constitution."

For further expositions of subject-matter jurisdiction, see, e.g., Ableman v. Booth, 62 U.S. (21 How.) 506, 524 (1858) (Taney, C.J.) ("lawless violence"); Elliot v. Peirson, 26 U.S. (1 Pet.) 328, 340 (1828) (Trimble, J.) (if a court "act without authority, its judgments . . . are . . . nullities" and "all persons concerned in executing [them] . . . are considered, in law, as trespassers"). See also J. Locke, Second Essay on Civil Government and a Letter Concerning Toleration § 202 (1948) ("a thief and a robber" even though the highest magistrate).

90 Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 720 (1838). Historically, according to Justice Baldwin, the King's sovereign judicial powers in this regard had been delegated in fact to judges. Id. at 737. Still, these judges were "members of council" who "did not sit in judicature, but merely as his [the King's] advisors." Id. at 739. The Court also adverted to this history in later cases: Virginia v. West Virginia, 246 U.S. 565, 597-98 (1918); United States v. Texas, 143 U.S. 621, 640 (1892); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 288 (1888). See generally authorities cited note 2 supra.

91 See, e.g., Wharton v. Wise, 153 U.S. 155, 166 (1894) (Field, J.).
selves of they could and did convey; in 1781 to Congress\textsuperscript{92} and in 1787 to the Court. The Court acquired jurisdiction by virtue of "a grant of judicial power" well within the competence of the covenants to give; the parties in the cause subjected themselves to the Court's judicial power "by their own consent."\textsuperscript{93}

A true sovereign decides controversies within his power by his own supreme will, but a court, so far as it acts judicially and not as an usurping despot, "decides according to the law prescribed by the sovereign power." When the states, by ratifying Article III, submitted their disputes to the Court "without prescribing any rule of decision," they expected that Court "to act by known and settled" substantive principles of "national [international] or municipal jurisprudence" appropriate to the case presented for adjudication.\textsuperscript{94} Just

\textsuperscript{92} Congress, there being no national judiciary, acted through appointed "committees or commissioners." Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 288 (1888) (Gray, J.).

Articles of Confederation, art. 6, provided in part: "No State, without the consent of the United States in Congress assembled, shall send . . . or enter into any conference, agreement, alliance or treaty with any King prince or state . . . .

"No two or more states shall enter into any treaty . . . or alliance . . . between them . . . .

"No state shall engage in any war without the consent of the United States in Congress assembled. . . ."

\textsuperscript{93} Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 720 (1838) (emphasis added). Mr. Justice Baldwin said that at the time the Constitution was adopted eleven boundary disputes existed between and among the several states; that by U.S. Consr., art. I, § 10, cl. 1, the states were prohibited from entering into "any treaty, alliance, or confederation," and in the next clause from making "any agreement or compact with another state, with a foreign power . . . or engaging in war," and so forth. Briefly stated, the states had controversies but were effectively barred from exercising a sovereign's prerogative power to resolve them. Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 724-25 (1838).

\textsuperscript{94} Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 737 (1838). Mr. Justice Holmes, citing this precise page observed that "this court must . . . be governed by rules explicitly or implicitly recognized." Missouri v. Illinois, 200 U.S. 496, 519-20 (1906). See also text accompanying notes 280 et seq., infra.

The Court in Rhode v. Massachusetts could have added the argument of Mr. Chief Justice Marshall in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821): "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."
as sovereigns who go civilly into a foreign municipal court submit themselves to the foreign law and its judicial—procedural—process, so the states gave themselves over to a court, and in so doing, they had a very precise idea as to the substance and procedure to be there applied. Boundaries between nations are political questions, but when their resolution is given to a court, they become judicial. The implied terms of the constitutional compact were, (1) that "appropriate" substantive law, sometimes international in character, would be the substantive rule of decision, and (2) that the mode of proceeding should be according to the common law. All interstate controversies were to be so treated, because the states—divesting themselves of their sovereignty to that extent—had agreed that it be so. The Constitution was an agreement by the states to subject their controversies to a judicial power acting according to the practice common to the experience of all of the sovereign signatories, to wit: the law and procedure applied in the courts of law and chancery of England, "[t]he law, as administered in England . . . from the time of Edward the Third".


97 Id. at 748. Chief Justice Taney, the sole dissenter, did not differ in his conception of the appropriate procedure: "Contests for rights of sovereignty . . . between states over any particular territory" where no right of
The question whether to dismiss Rhode Island's bill was answered: "[A]s the bill is on the equity side of the Court, it must be done according to the principles and usages of a court of equity."\textsuperscript{101} Deciding that the bill, under traditional equity doctrine, should not be dismissed on demurrer, Justice Baldwin observed that the "simple" factual issues in the cause should be determined in the usual way:

We think it does not require reason or precedent, to show that we may ascertain facts with or without a jury, at our discretion, as the circuit courts, and all others do, in the ordinary course of equity: our power to examine the evidence in the cause, and thereby ascertain a fact, \textit{cannot depend on its effects}, however important in their consequences. Whether the sovereignty . . . of a State, or the property of an individual . . . the right is to territory . . . [Either] is a case appropriate to equity [and] established forms of . . . decrees . . . .\textsuperscript{102}

Since Rhode Island prayed that its intercolonial compact with Massachusetts be nullified on "grounds of the most clear and appropriate cognizance in equity", fraudulent representations and mistake, grounds "not cognizable in a court of law," the controversy was not an "exception to the usual course of equity" but was of an "ordinary" character and would be handled accordingly.\textsuperscript{103}

In the next term, Massachusetts, its demurrer having been overruled, was granted an extension of time to answer Rhode Island's bill.\textsuperscript{104} In 1840, when other pleading questions were taken up,\textsuperscript{105} the extent to which equity practice was to govern this chancery litigation appeared very clearly in connection with the order of argument. According to Mr. Peters, the Court, invoking The Rule of 1791, observed that "the practice of the English courts of chancery is the

\textsuperscript{101} Id. at 732 (emphasis added).
\textsuperscript{102} Id. at 734-35 (emphasis added).
\textsuperscript{103} Id. at 735 (emphasis added).
\textsuperscript{104} Rhode Island v. Massachusetts, 38 U.S. (13 Pet.) 23 (1839). Procedural pleading-time rules could not be applied to these parties "without committing great injustice . . . [since] the parties in the nature of things, must be incapable of acting with the promptness of an individual." Id. at 24. Mr. Webster stated in support of the motion that the Court's opinion on demurrer had been submitted to the Massachusetts legislature only shortly before its adjournment, and would again be presented at the next session. Id. at 23. The Chief Justice also reviewed the common law "steps" that had been taken; for example, Rhode Island had secured leave to withdraw her replication and amend her bill. Id. See Virginia v. West Virginia, 222 U.S. 17, 19-20 (1911), where Mr. Justice Holmes observed: "[A] state cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed."
\textsuperscript{105} Rhode Island v. Massachusetts, 39 U.S. (14 Pet.) 210 (1840).
practice in the courts of equity of the United States.”108 The “books of practice” in those courts revealed that the moving party has the right to begin and close arguments. “The same rule should prevail in the courts of the United States, in chancery proceedings.”107

Under the same chancery rules, Rhode Island would be compelled to admit the boundary line held, allegedly *vi et armis*, by Massachusetts. By choosing to challenge the sufficiency in law of Massachusetts' plea in bar, Rhode Island would admit the correctness of the facts asserted in the plea and the incorrectness of those alleged in the bill.108 But the Court was unwilling to adhere so rigidly to technical rules of chancery pleading. The Chief Justice, the sole dissenter in 1838, remarked on the want of “precedents to guide us in the forms and modes of proceeding” by which controversies of this character could most conveniently and justly be adjudicated.109 The Court, he said, “upon re-examining the subject” was “quite satisfied” that the decision to fashion the proceedings “according to those which had been adopted in the English Courts, in cases most analogous to this” was correct. Therefore, “the rules and practice of the Court of Chancery should govern . . . .”110 The Chief Justice appended the proviso that it would be the “duty” of the Court to mould the rules of chancery practice and pleading . . . [so] as to bring the case to a final hearing on its real merits. . . . In ordinary cases between individuals, the court of chancery has always exercised an equitable discretion in relation to its rules of pleading, whenever it has been found necessary to do so for the purposes of justice.111

---

106 Id. at 216.
107 Id. The Reporter again reprints the arguments of counsel at great length: Mr. Austin, id. at 216-27; Mr. Hazard, id. at 227-46; Mr. Webster, id. at 246-51.
108 Massachusetts' plea “in bar” was based upon an alleged agreement of January 19, 1720 to submit the boundary dispute to commissioners appointed by both colonies, and averred laches on the part of complainant. If Rhode Island, the complainant, “according to the rules of pleading in the Chancery Court,” elects to “set [the plea] down for argument,” instead of filing her replication, it thus “admits the truth of all the facts stated in the plea, and merely denies their sufficiency in the point of law . . . .” Id. at 257. On the other hand, according to those chancery rules, if it replies, denying the facts stated in the plea, it “then admits that if the particular facts in the plea are true, they are . . . sufficient in law to bar . . . recovery . . . .” Id. at 257-58. Rhode Island had set the plea down for argument, so that technical rules would, if the plea stood, compel a final disposition “upon an issue highly disadvantageous to Rhode Island.” Id. at 258. Though the plea was overruled on other grounds, the Court said that it would not thus foreclose the complainant from later putting in issue the facts averred in the plea. Id. at 259.
109 Id. at 256-57.
110 Id. at 258. This language was quoted by Mr. Justice Harlan with approbation in United States v. Texas, 143 U.S. 621, 647-48 (1892).
111 The rule of relaxation of technical pleading and similar rules has, of
And in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted. . . .\textsuperscript{112}

Nonetheless, the rule that chancery practice should obtain was reasserted strongly in an opinion by the one Justice who previously had dissented. The single qualification—that mere technical rules thus inherited should not be followed, at least when they might lead to unjust or absurd results—was the same consideration which impelled a simplification of procedure in the Equity Rules and later in the Rules of Civil Procedure, as well as a liberalized practice in most state courts. The ends of decision on the merits and just results were not thought better achieved by a total renunciation of inherited common law adjective rules. It hardly detracts from the strength of this authority that Massachusetts’ argument,\textsuperscript{113} like the Chief Justice’s earlier dissent, was one addressed to the existence of power in the tribunal rather than the manner of its exercise.

Mr. Justice McLean alone urged, in his dissenting opinion,\textsuperscript{114} that international law—\textit{substantive} international law—had anything to do with the case.\textsuperscript{115} But the dissenting Justice expressly recognized that common law “forms” must be applied:

This case having assumed the forms of a chancery proceeding, the established rules of chancery pleading must govern it. In this mode the points for decision are raised; but the court, in \textit{deciding} the ques-

---

\textsuperscript{112} Rhode Island v. Massachusetts, 39 U.S. (14 Pet.) 210, 257 (1840).

\textsuperscript{113} See id. at 247-48 (argument of Mr. Webster).

\textsuperscript{114} Id. at 262-79. Mr. Justice Catron also dissented on the ground that the 1711 arbitration should be held conclusive against Rhode Island. \textit{Id.} at 279-81. But he specifically declined to consider whether there was any difference in the substantive legal principles applicable to individuals and states as litigants. \textit{Id.} at 281.

\textsuperscript{115} In the first place, he suggested, there are “equitable considerations” which work differently upon states than upon individuals; states conduct their affairs with “greater deliberation, and a more imposing form of procedure” so that between them factual mistakes occur only rarely. \textit{Id.} at 275. Moreover, the finding of an agreed commission, while Rhode Island and Massachusetts were both colonies (and before they had mutually agreed to repudiate portions of their sovereign powers), ought to be conclusive against Rhode Island’s pleas of fraud and mistake under principles of the law of nations: “The high litigant parties, and the nature of the controversy, give an elevation and dignity to the cause which can never belong to differences between individuals. . . . The question is \textit{[inter]national} in its character; and it is fit and proper that it should be decided by those broad and liberal principles which constitute the code of \textit{[inter]national law}.” \textit{Id.} at 275-76. Justice McLean contended that the case was clear, among other things, because sovereigns must abide by the decree of arbitrators once they have entered articles of arbitration; time covers stale disputes with its peaceful mantle even more readily among nations than among individuals; and no treaty was ever set aside on the ground of an alleged mistake. \textit{Id.} at 276-77.
tions involved, may apply principles of the common law, of chancery, or of [inter]national law, as they shall deem the circumstances of the case require.116

The Court having held the proper mode of interposing multiple grounds for want of equity to be demurrer or answer rather than plea in bar,117 Massachusetts again demurred in the 1841 term.118 As ordinarily on demurrer, "upon the case, as it comes before [the Court], the complainant avers, and the defendant admits"119 Rhode Island's allegation that the place marked was fixed by mistake. Rhode Island contended that "the demurrer will not permit the party to avail himself of lapse of time," and that "an answer must be put in."120 Massachusetts, by its attorney Daniel Webster, replied: "But the lapse of time is on the face of the complainant's bill; and when this is so, it will avail the party demurring."121 He further claimed that, the Court having "adopted" the rules of the Court of Chancery in England,

116 Id. at 268-69 (emphasis added). The passage continues in part: "[I]t would seem to be unreasonable that the complainant, by stating the matter in bar in his bill, should prevent the respondent from pleading it. And such is not the established rule in chancery pleading.

"A plea is a special answer to the bill, and generally sets up matter in bar, which does not appear in the bill; but this is not always the case. . . .

"If a bill be brought to impeach a decree, on the ground of fraud used in obtaining it, the decree may be pleaded in bar of the suit. 3 Bro. P.C. 558; 2 Eq. Ca. Ab. 177; 7 Viner. Ab. 398; 3 P. Wms. 95.

"These authorities show that a plea in bar may embrace matters stated in the bill." Id. at 269.

The Justice also reviewed instances when a demurrer should be interposed, and considered the question whether Massachusetts' plea was not "multifarious, and, consequently, bad." Id. at 269-72. "[A] special plea at law . . . [is] substantially the same as . . . a plea in Chancery. It must be single, and not double." Id. at 269. All in all, the opinion is a very learned discourse upon the common law mode of proceeding to be followed in litigation between contending states.

117 Id. at 259-62.


119 Id. at 271; accord, Arizona v. California, 283 U.S. 423, 452 (1931) (Brandeis, J.).

120 Rhode Island v. Massachusetts, 40 U.S. (15 Pet.) 233, 267 (1841); see Rhode Island's own statement of her argument, id. at 259-66.

121 Id. at 267. Compare Fed. R. Civ. P. 8(c) (statutes of limitations and lacks affirmative defenses which must be affirmatively pleaded) with Fed. R. Civ. P. 9(f) (averments of time material). Thus, in Berry v. Chrysler Corp., 150 F.2d 1002 (6th Cir. 1945), it was held that Federal Rules 12(b), 9(f), and 8(c) must be read in pari materia, so that the defense of limitations may be raised on motion to dismiss for failure to state a claim upon which relief can be granted when the time-bar appears on the face of the complaint. Accord, United States v. United States Cas. Co., 218 F. Supp. 653, 655 (D. Del. 1962); 2 J. Moore, FEDERAL PRACTICE ¶ 8.28; cf. Williams v. Murdoch, 330 F.2d 745 (3d Cir. 1964).
its decisions were controlling and should be looked to. The effect of a
time-bar appearing on the face of a complaint "has been settled in
these [English] courts for half a century."122

The Court agreed at least insofar as it applied to suits between
individuals, with Webster's pleading argument, but the demurrer was
overruled. First, "one of the most familiar duties of the Chancery
Court" is to relieve against mistake, especially when, as Rhode Island
averred, the adverse party's representations contributed to the mis-
understanding.123 Clearly, if Rhode Island had discovered the error a
days after consummation of the agreements, a court acting "upon
principles of equity," would have restored her to the true charter
line.124 Thus Rhode Island's bill was perfectly good, as Massachusetts
contended, unless she forfeited her right by laches.125 Absent this,
Rhode Island's bill would be upheld because "it is admitted by the
demurrer that she never acquiesced . . . ." Moreover, she averred
efforts to negotiate, and that she had been prevented from appealing
to the proper tribunal for redress.126

The rule of laches in cases involving individuals gave the Chief
Justice some difficulty.127 At the time, so he apparently believed,
equity truly followed the law; as between private citizens, where the
statute of limitations would be a bar at law, so he believed, the same
rule undoubtedly would be applied in a court of equity. Moreover, an
individual party could have taken advantage of such time-bar "by
demurrer, and is not bound to plead or answer." Mr. Webster's
argument128 would have been upheld, had the parties been John Doe
and Mary Roe; the time necessary to operate as a bar in equity could
not have exceeded twenty years by analogy to the statute of limita-
tions. This Court of Equity refused to follow the law's twenty year
time-bar because "two political communities are concerned, who can-

123 Id. at 271.
124 Id.
125 Id. at 272. The Court made a very acute presentation of Massachusetts' laches claims. Rhode Island might be barred by "acquiescence or unreasonable
delay," by prescription or "presumption of acquiescence," or "guilt" of such "laches and negligence in prosecuting her claim that she is no longer entitled
to the countenance of a court of chancery." Id.
126 Id.
127 Id. at 272-73. Chief Justice Taney thought the answer "very plain"
but his discussion does not seem as lucid as therefore could be expected.
128 Mr. Webster's argument on the merits of the demurrer was: "There
are two modes in which lapse of time may be taken advantage of in Courts of
Equity. The first, where the law expressly applies. . . . Equity then adopts
the same rule [citing authority]. Second, where there has been laches, the
statute of limitations will be applied by Courts of Chancery [citing authority].
In this case, both rules apply. There has been most abundant laches." Id. at
287-88.
not act with the same promptness as individuals." Moreover, the boundary had been in a wild unsettled country where the error was not likely to be discovered, while the only tribunal was across the Atlantic, and was also likely to proceed with the cause only “when it suited its convenience.” Apart from such equitable considerations, the case ought “to be more fully before the Court, upon the answer, and the proofs to be offered on both sides,” before final disposition. The holding that at least far greater laches is needed to bar a state than a private individual, had previously been announced in common law courts, and the Supreme Court subsequently has

---

129 Id. at 273. See also note 104 supra. In any event, one might inquire which statute of limitations might apply. Massachusetts has no power to close the doors of Rhode Island’s courts, and vice versa. See, e.g., Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 440 (1943) (Stone, C.J.) (state “without power to give extraterritorial effect to its laws”); Hilton v. Guyot, 158 U.S. 113, 163 (1895).

No state has legislative power to close the doors of the Supreme Court in any kind of case, let alone cases in the original jurisdiction, where not even the national legislature could accomplish such a result. See Lockerty v. Phillips, 319 U.S. 182, 187 (1943); United States v. Hoar, 26 F. Cas. 329 (No. 15373) (C.C.D. Mass. 1821) (no state has sovereign “prerogative” to bar suit by the United States in a national court).


131 Id. at 274.


133 See, e.g., Missouri v. Illinois, 200 U.S. 496, 520-22, 526 (1906), where Mr. Justice Holmes seems to be expressing doubt whether passage of time creates a “substantive” prescriptive property right as between quasi sovereign states or merely operates, under a “procedural” rule of evidence, to enhance the burden of proof born by the complainant state.

Substantive international law seems to be considered highly pertinent in this area. See, e.g., Michigan v. Wisconsin, 270 U.S. 295, 306-8, 313-14 (1926); Maryland v. West Virginia, 217 U.S. 1, 41-44 (1910); Louisiana v. Mississippi, 202 U.S. 1, 53-54 (1906); Virginia v. Tennessee, 146 U.S. 503, 522-24 (1893). But the law applied is at least heavily influenced, and has been increasingly regulated, by equity principles. Washington v. Oregon, 297 U.S. 517 (1936) (Cardozo, J.); cf. Guaranty Trust Co. v. United States, 304 U.S. 126, 132-38,
followed and developed the rule. In any case, Massachusetts' demur-
ner was overruled.\textsuperscript{134}

\textit{Rhode Island v. Massachusetts} ultimately reached final decree
five years later.\textsuperscript{135} The parties had offered in evidence "historical
documents" such as legislation, charters, commissioners' reports and
court proceedings,\textsuperscript{136} and the Court proceeded on the facts so estab-
lished. There is very little indication as to how the evidence was
received.\textsuperscript{137} Since the controversy related to events transpiring be-
tween 1621 and 1790, little oral testimony was or could have been
taken.\textsuperscript{138} Mr. Justice McLean (who had earlier advocated the use of
international substantive law)\textsuperscript{139} delivered the opinion. He
approached the case "under a due sense of the dignity of the parties,"
but his opinion is nevertheless brief, because the disputed boundary
line presented "a simple question, differing little, if any, in principle
from a disputed line between individuals."\textsuperscript{140}

Reviewing the "facts proved,"\textsuperscript{141} the Court admitted the obvious
difficulty of establishing \textit{state of mind} after more than a century.\textsuperscript{142} Rhode Island, trying to avoid the agreements of 1711 and 1719, claimed
it had relied on representations by the Massachusetts Commissioners
and the words of the charter as justification for its belief that the
crucial boundary marker was within three miles of the Charles River
and for its failure to discover the truth until about 1750.\textsuperscript{143} Several
depositions, however, settled the fact that the crucial boundary station
was well known in the neighborhood. This finding, coupled with
the unlikelihood that two Rhode Island Commissions would have been
misled to the same effect, created a strong inference against the mis-
take.\textsuperscript{144} "From the nature of this supposed mistake, it [was] scarcely
susceptible of proof,"\textsuperscript{145} absent which Justice McLean said:

\begin{itemize}
  \item \textsuperscript{134} Rhode Island v. Massachusetts, 40 U.S. (15 Pet.) 233, 274 (1841).
  \item \textsuperscript{135} 45 U.S. (4 How.) 591 (1846).
  \item \textsuperscript{136} Id. at 592-628.
  \item \textsuperscript{137} All the proofs seem to have been such that a common law tribunal
  would take judicial notice or, in any case, would admit under one or another
  exception to the hearsay rule.
  \item \textsuperscript{138} Historically, evidence in equity was largely produced by written inter-
  rogatories, sworn pleadings, and written depositions rather than orally in
  court, with cross-examination, in the presence of the trier of fact. F. JAMES,
  \item \textsuperscript{139} Text at note 114 supra.
  \item \textsuperscript{140} Rhode Island v. Massachusetts, 45 U.S. (4 How.) 591, 628 (1846).
  \item \textsuperscript{141} Id. at 633-35.
  \item \textsuperscript{142} Id. at 635.
  \item \textsuperscript{143} Id.
  \item \textsuperscript{144} Id.
  \item \textsuperscript{145} Id. at 637; see Alabama v. Georgia, 64 U.S. (23 How.) 505, 510 (1859)
\end{itemize}
The fact of a want of this knowledge, after the lapse of more than a century and a quarter, is difficult to establish. It certainly cannot be assumed against transactions which strongly imply, if they do not prove, the knowledge . . . .

It may be a matter of doubt, whether a mistake of recent occurrence, committed by so high an agency in so responsible a duty, could be corrected by a court of chancery. Except on the clearest proof of the mistake, it is certain there could be no relief. No treaty has been held void, on the ground of misapprehension of the facts, by either or both of the parties.146

The Court was applying a treaty between colonies. Substantive principles of international law have often been invoked as an aid in construing interstate compacts,147 which would seem to be an indistinguishable problem. In any case, the decision and final decree in favor of Massachusetts followed.148

The exhaustive and well-considered opinions of the Court in the landmark149 case of Rhode Island v. Massachusetts leave no doubt as to the procedural rules thought at that time appropriate for the conduct of litigation between states: common law and equity rules, received from England and since developed here.

Since the almost decade-long (1838-1846) consideration of the appropriate adjective rules for application in the original jurisdiction, similar doctrine has often been reannounced. Chief Justice Taney, in Florida v. Georgia,150 restated the rule. In cases involving individuals, "established forms and usages" in common law and equity courts would "naturally" be applied, but those rules "could not govern" cases involving sovereign states. Thus, the Court was obliged to "mould its proceedings for itself" in a manner most appropriate for "convenient" exercise of the power conferred "in the simplest form in which the ends of justice could be attained." Toward this end the Court "adopted


149 This characterization is not that of this writer alone. See, e.g., United States v. Texas, 143 U.S. 621, 648 (1892) (Harlan, J.); Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 73 (1867) (Nelson, J.).

150 58 U.S. (17 How.) 478, 492-93 (1854). See also California v. Southern Pac. Co., 157 U.S. 229, 266 (1895) (Harlan, J.) (dissenting opinion); Kentucky v. Dennison, 65 U.S. (24 How.) 66, 95-96 (1860) (Taney, C.J.) ("the form and nature of the process to be issued, and upon whom it is to be served, have all been heretofore . . . decided, and cannot now be regarded as open to further dispute").
as a general rule, the custom and usage of courts of admiralty and equity and later seized upon "the chancery practice" as "furnishing the best analogy." Courts of equity "constantly" have recognized the "power and propriety of deviating from the ordinary chancery practice" when the "purposes of justice" so require. Thus, in this dispute about the location of the Florida-Georgia boundary, the United States was allowed to intervene, representing the interests of the non-party states.

In 1856 the Court rejected a contention that costs could not be assessed in original jurisdiction cases without a prior Act of Congress. Mr. Justice Nelson reached the same result as Chief Justice Taney by following a different route. He observed that there is "nothing peculiar" in the nature of the original jurisdiction conferred upon the Supreme Court to distinguish it specially from the original jurisdiction of the inferior federal courts. In fact, much of this jurisdiction is concurrent. Moreover, "principles of international law" are involved only when "interests of our foreign relations are concerned." There is nothing in "the nature of the jurisdiction" or "the character of the suit" to impel a distinction in the award of costs between the Supreme Court and the circuit courts: "[W]hen the constitution . . . conferred that jurisdiction on this court, it cannot be construed to exclude the power possessed and constantly exercised by every court of equity then known, to use its discretion to award or refuse costs."

Eight decades later another equity case came before the Court.

---

151 Florida v. Georgia, 58 U.S. (17 How) 478 (1854). This "power and propriety of deviating" are reiterated at three separate points in the opinion. Deviation when quasi sovereign parties are involved is justified by their sovereignty, though they enjoy "equality of right." When the contest involves parties "not on an equal footing," deviation is justified by the inequality. Choctaw Nation v. United States, 119 U.S. 1, 28 (1886).


153 Id. at 461.

154 Id.

155 In addition to the Wheeling Bridge case, see North Dakota v. Minnesota, 263 U.S. 583 (1924), as to award of costs. See also Arizona v. California, 357 U.S. 902 (1958) (per curiam); Arizona v. California, 354 U.S. 918 (1957) (per curiam); Texas v. New Mexico, 354 U.S. 918 (1957) (per curiam); Nebraska v. Wyoming, 325 U.S. 589, 657 (1945); Georgia v. Tennessee Copper Co., 304 U.S. 546 (1938) (per curiam); Wisconsin v. Illinois, 281 U.S. 179, 200 (1930); North Carolina v. Tennessee, 49 S. Ct. 515 (1929) (per curiam) (no official citation).


Arizona sought leave to file a bill to perpetuate testimony for use in anticipated future litigation with other Colorado River Basin states. California objected to the filing of the bill, claiming that “the testimony if taken would not be admissible in evidence.” Mr. Justice Brandeis observed:

Bills to perpetuate testimony [were] known as an independent branch of equity jurisdiction before the adoption of the Constitution. . . . To sustain a bill of this character, it must appear that the facts which the plaintiff expects to prove by the testimony of the witnesses sought to be examined will be material in the determination of the matter in controversy; that the testimony will be competent evidence . . . . The only question . . . is whether the testimony which it is proposed to take would be material and competent evidence in the litigation contemplated.

Since Arizona “failed to show that the testimony which she seeks to have perpetuated could conceivably be material or competent evidence” as to the construction of the Colorado River Compact, leave to file was denied. Interestingly, the contemplated litigation would be a case in which the substantive common law incorporates substantive principles of international law. Even in such a case, the adjective rules determining validity of a cause of action and the code of evidence are the rules of the common law.

---

158 Id. at 346-47; see South Carolina v. Georgia, 93 U.S. 4 (1876), where the Court expressly reserved the question whether a state, seeking to enjoin a nuisance, “must not aver and show that it will sustain some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court.” Id. at 14.


160 Id. at 360; cf. Sanitary Dist. v. United States, 266 U.S. 405, 432 (1925) (large part of the evidence irrelevant and immaterial). In Virginia v. West Virginia, 209 U.S. 514, 536 (1908), in a part of the decree appointing a Master, the Court stated that “[a]ll public records . . . of Virginia prior to . . . April 1861 . . . which in the judgment of the master may be relevant . . . or copies thereof, if duly authenticated, may be used in evidence . . . but all such evidence shall be subject to exceptions to its competency. [Later] public acts and records . . . shall be evidence . . . subject to proper legal exception to its competency.” (Emphasis added). See also Wisconsin v. Illinois, 309 U.S. 569, 571 (1940) (per curiam) (state failed to submit appropriate proof of menace to health); New Mexico v. Lane, 243 U.S. 52, 58 (1917) (presumption that New Mexico landowner a citizen of that state).


162 The Court noted that the proper interpretation of the interstate compact in question would involve application of rules of treaty construction, for example, whether recourse might be had to diplomatic correspondence if the “meaning of [the] treaty [were] not clear,” but not to “oral statements made by those . . . negotiating the treaty.” Id. at 359-60. See also United States v. Texas, 162 U.S. 1, 23 (1898); Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842).

163 Among many similar examples of common law practice, see, e.g., United States v. Louisiana, 363 U.S. 1, 5 (1960) (motion for judgment on pleadings); Illinois v. Michigan, 359 U.S. 963 (1959) (per curiam) (summary judgment); United States v. Louisiana, 351 U.S. 978 (1956) (per curiam) (in-

According to Mr. Justice Field, even where substantive international law would be highly pertinent, “t[h]e reason and necessity of the rule of international law . . . may not be as cogent in this country, where neighboring States are under the same general government. . . .” Iowa v. Illinois, 147 U.S. 1, 10 (1893); accord, New Jersey v. Delaware, 291 U.S. 361, 380 (1934) (Cardozo, J.).
the nature of interpleader brought by Texas to ascertain the true domicile of a decedent, one Edward Green, for state death tax purposes. The interpleaded defendants, each, like Texas, claiming Green as a domiciliary, were Florida, New York and Massachusetts. The gross estate of about $45,000,000.00 was exceeded by the amount of the four claims. The Court had appointed a Special Master and the cause presently was before the Court upon exceptions to his findings.

The Court considered that constitutional authority to hear the case and grant relief depended upon whether the facts alleged and found would bottom a decree “according to accepted doctrines of the common law or equity systems of jurisprudence, which are guides to decision of cases within the original jurisdiction of this Court.”

Mr. Justice Stone—citing common law authority—took the view that equity had extended its jurisdiction to cases in which the interpleading stakeholder asserts a personal claim in the fund. The Court’s origi-

---


165 The Court has held interpleader unavailable to an executor against the taxing officials of two states, since neither of the state officials was on a “frolic” in seeking to impose the tax. Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937). See Massachusetts v. Missouri, 308 U.S. 1, 15, 17 (1939) (property involved sufficient to answer claims of both states); Ex parte Young, 209 U.S. 123, 159 (1908); United States v. State Bank, 96 U.S. 30, 36 (1877). See also Western Union Co. v. Pennsylvania, 368 U.S. 71, 75-80 (1961).


167 Texas v. Florida, 306 U.S. 398, 405 (1939). The Court earlier held that a justiciable controversy was presented to enjoin a state from consummating a purpose to withdraw natural gas from an established current of interstate commerce: “This is . . . a judicial question. It concededly is so in suits between private parties, and of course its character is not different in a suit between states.” Pennsylvania v. West Virginia, 262 U.S. 553, 591 (1923) (emphasis added). Similar language has been used elsewhere: “To constitute such a [justiciable] controversy [between the states] it must appear that the complaining state has suffered a wrong through the action of the other state, furnishing ground for judicial redress, or is asserting a right against the other state which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence.” Massachusetts v. Missouri, 308 U.S. 1, 15 (1939) (Hughes, C.J.). But see Missouri v. Illinois, 200 U.S. 496, 520 (1906) (Holmes, J.). See also Arkansas v. Texas, 346 U.S. 368, 369 (1953); Georgia v. Pennsylvania R.R., 324 U.S. 439, 477 (1945) (Brandeis, J.) (dissenting opinion); United States v. West Virginia, 295 U.S. 463, 471, 474 (1935); United States v. Oregon, 295 U.S. 1, 24-25 (1935); Florida v. Mellon, 273 U.S. 12, 16-17 (1927); Pennsylvania v. West Virginia, 262 U.S. 553, 610, 615 (1923) (Brandeis, J.) (dissenting opinion); Massachusetts v. Mellon, 262 U.S. 447, 483, 488-89 (1923); Oklahoma v. Atchison, T. & S.F.R.R., 220 U.S. 277, 286, 289 (1911); Maryland v. West Virginia, 217 U.S. 1, 46 (1910); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 287-300 (1888); United States v. San Jacinto Tin Co., 125 U.S. 273, 285 (1888); Georgia v. Stanton, 73 U.S. (6 Wall.) 59, 75-77 (1867).
nal jurisdiction in equity has expanded co-extensively with growth in general common law doctrine. A justiciable issue for adjudication was presented by Texas "by appropriate procedure" because the averments of its bill of complaint constituted "a recognized subject of the equity procedure inherited from England." The assets might be exhausted before the state lawfully entitled got its share, and equity acts "to guard against . . . depletion of the fund at the expense of the plaintiff's interest in it." Thus, the contest was "a 'case' or 'controversy' . . . within the original jurisdiction . . . conferred by the Judiciary Article," because a "cause of action cognizable in equity" was alleged and proved.

The Court reviewed the extensive common law evidence, mostly oral testimony, received by the Master, upon which he based his conclusion that Green died a domiciliary of Massachusetts. In reviewing this evidence the Court—again citing only common law authority—applied common law rules. If common law rules of evidence regulate the determination of the domicile, as between four

---

169 Id. at 407-08. See also Hans v. Louisiana, 134 U.S. 1, 15 (1890); South Carolina v. Georgia, 93 U.S. 4, 14 (1876).  
172 The precise rule of evidence laid down was that "one's statements may supply evidence of the intention requisite to establish domicile at a given place of residence," but such statements "cannot supply the fact of residence there." Id. at 425. The "preponderating evidence" was that Green's true home was in Massachusetts; evidence was wanting that he ever regarded or treated his New York apartment as home. Proof was wanting also that the Massachusetts domicile was abandoned in favor of Florida when he built a house there in 1927. "In such circumstances Florida carries the burden of showing that the earlier domicile was abandoned," and that "burden is not sustained" by proving mere winter residence there. Id. at 427. See also Oklahoma v. Texas, 260 U.S. 608, 638 (1923) ("party asserting . . . should carry the burden of proving").  
For the view that extension of "the neat procedural device of interpleader" to this situation "is another illustration of transferring a remedy from one legal environment to circumstances qualitatively different," see Texas v. Florida, 306 U.S. 398, 432 (Frankfurter, J.) (dissenting opinion). The rule that "a person must have one domicile, and can have only one, is an historic rule of the common law and . . . good sense." Id. at 429. But jurisdiction
adverse quasi sovereign states, of an interstate, ambulatory citizen like Green, it is difficult to postulate a case in which common law procedural rules would be inapplicable in the original jurisdiction.

As a final illustrative example, in United States v. Wyoming\(^{173}\) the United States sued in equity to quiet its title in certain lands and to recover compensation for oil extracted by Wyoming's lessee. The Court's Special Master excluded evidence relating to Wyoming's alleged bad faith on the question of plaintiff's right "to recover a money judgment"\(^{174}\) on account of the unlawful extraction of oil, which constituted a trespass.\(^{175}\) At common law, damages against a should be declined inter alia because "in these modern multiple residence situations the issue of domicile is too often an inherently feigned issue." Moreover, any relevant state court decision would be upon an "issue of state law . . . which this Court would be bound to follow . . . in all other proceedings . . . in the federal courts," and which could not be appealed to the Supreme Court. But merely by virtue of the happenstance of multiple state claims, exhausting the estate, the Supreme Court is empowered to "bind . . . the states."\(^{176}\) Id. at 432 & n.4.

\[^{173}\] 331 U.S. 440 (1947).
\[^{174}\] Id. at 456.
\[^{175}\] A jury demand might have been appropriate on this branch of the case. The Judicial Code provides: "In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury." 28 U.S.C. § 1872 (1964). In any case, the seventh amendment to the Constitution would seem to apply to the trespass cause. Cf. United States v. Louisiana, 339 U.S. 699, 706 (1950), where the Court denied Louisiana's motion for a jury trial: "This is an equity action for an injunction and accounting. The Seventh Amendment and [28 U.S.C. § 1872 (1964)], assuming they extend to cases under our original jurisdiction, are applicable only to actions at law." The Court did not touch upon the question whether a state is a "citizen" within the meaning of 28 U.S.C. § 1872 (1964). In the instant case, United States v. Wyoming, 331 U.S. 440 (1947), the issue whether the corporate defendant, Wyoming's lessee, could likewise qualify as a "citizen" would have arisen had a jury demand been made. See also Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792), discussed in California v. Southern Pac. Co., 157 U.S. 229 (1895), where the bill was in equity and was ultimately dismissed because Georgia's remedy was at law. There was a jury trial in Brailsford. Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794). There were also jury trials in other unreported cases in 1795 and 1797. H. CARSON, THE SUPREME COURT OF THE UNITED STATES 169 n.1 (1891).

A jury trial might also be appropriate in cases like Georgia's original complaint against 20 railroads for violation of the antitrust laws. Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945). However, there the "prayer was for damages and injunctive relief." Id. at 445. Damages were not recoverable as a matter of law under the peculiar circumstances of the case. Id. at 452-53; cf. Casey v. Galli, 94 U.S. 673, 681 (1876), which was an action at law in the original jurisdiction against the Italian Vice Consul in which the "parties [had] filed a written stipulation . . . waiving the intervention of a jury." But cf. Börs v. Preston, 111 U.S. 252, 260 (1884).

International tribunals do not make use of juries as triers of fact, and thus exclusion of any offered evidence on the ground of irrelevance may be less
“good faith” trespasser are measured by the value of minerals extracted minus expenses, but if the trespass is in “bad faith”, plaintiff is allowed to recover without reference to the expense of extraction. Moreover, once the “trespass and conversion are established, the burden of pleading and proving good faith is on the defendant.” The Court cited common law decisions of the Supreme Courts of Wyoming, Michigan and the United States, and a case in the House of Lords, as authority for these rules. The Court concluded, as a matter of common law, that bad faith was sufficiently alleged and that the evidence should not have been excluded as immaterial. The “master erred in excluding any competent evidence material to the good faith issue and in finding that... defendants acted in good faith.” Competence is a concept more or less unknown to international law, and the Court obviously had common law competence in mind.

The Court cited common law decisions of the Supreme Courts of Wyoming, Michigan and the United States, and a case in the House of Lords, as authority for these rules. The Court concluded, as a matter of common law, that bad faith was sufficiently alleged and that the evidence should not have been excluded as immaterial. The “master erred in excluding any competent evidence material to the good faith issue and in finding that... defendants acted in good faith.” Competence is a concept more or less unknown to international law, and the Court obviously had common law competence in mind.

These illustrations merely serve to exemplify that, from the beginning, the Court’s rules have provided that the practice in controversies tried before it in the exercise of its original jurisdiction is the procedure and usage of the English courts of common law and chancery. The decisions have always stated or assumed that same doctrine. Common law rules of practice and evidence are applied pursuant to an ancient, and only rarely questioned, tradition.

The States Are Not International Juristic Persons

The essential doctrinal thrust of the argument supporting the use of international law adjective principles is the sovereign character of the parties. But the United States, as such, is the only international juristic person, the only “member of the family of nations,” the states having by the express terms of the Constitution renounced any former claim to be treated as separate entities in international affairs. Hence, suits involving the United States and

significant. E.g., M. Hudson, International Tribunals 93 (1944); G. White, The Use of Experts by International Tribunals 4 (1965).

177 Id. at 458 nn.39-41.
178 Id. at 459 (emphasis added). Defendants, moreover, “were not bound to... make an offer of proof of good faith.” Id.
179 E.g., 1 Wigmore 152-53. See also United States ex rel. Amabile v. Italy, [1952] Case No. 5, Decision 11 (Conciliation Comm’n, Italian Peace Treaty of 1947 art. 83), reprinted in Green, supra note 62, at 790.
182 See, e.g., Principality of Monaco v. Mississippi, 292 U.S. 313, 331 (1934);
states are "not ... between equals." Similarly, "in respect of our foreign relations generally, state lines disappear" and for such purposes the states do not exist. In brief, "vis-a-vis all other nations the [national] government is the sovereign." The Byelorussian People's Republic may be a nation; at least, whether "captive" or not, it has a vote in the General Assembly of the United Nations. So do Mauritania, the Mongolian People's Republic and Honduras. But New York does not. The international law is fully consistent. For example, the Convention on the Rights and Duties of States defines "state" as "a person of international law", as an entity possessing, among other things, the unlimited "capacity to enter into relations with the other States" a requirement not satisfied in the case of states of the United States.

In the opinions of the United States Supreme Court, international law concepts appear only when the international law is, for some good reason, a part of the municipal law. A typical instance is in certain admiralty cases, where international substantive law is applied because it is the applicable (or "appropriate") substantive law. Mr. Justice Iredell referred in *Talbot v. Jansen* to the conduct of American citizens in attaching and seizing goods of friendly nations on the high seas under color of a foreign commission as "a violation of our own law, I mean the common law, of which the law of nations is a

---


187 3 U.S. (3 Dall.) 133, 161 (1795). *See also* The Paquete Habana, 175 U.S. 577, 700 (1900) ("International law is part of our law"); The Scotia, 81 U.S. (14 Wall.) 170, 188 (1871) (unlike foreign municipal law, the law of the sea may be noticed and need not be proved); United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820); The Lusitania, 251 F. 715, 732-33 (S.D.N.Y. 1918). The Court has described admiralty substantive law as that "seasoned body of . . . law developed by the experience of American courts long accustomed to dealing with admiralty problems in reconciling our own . . . laws to those of other maritime nations." *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953).
part.” And in The Rapid, Mr. Justice Johnson observed that the “law of prize is part of the law of nations;” since it clearly “was part of the law of England before the revolution,” it “therefore constitutes a part of the admiralty and maritime jurisdiction conferred on this court in pursuance of the constitution.”

According to an eminent English jurist, “[i]nternational law as such can confer no rights cognizable in the municipal courts.” Only when “rules of international law are recognized as included in the rules of municipal law” are they “allowed in the municipal courts to give rise to rights or obligations.” Thus, the law of the sea is universally applicable “only by the concurrent sanction of those nations who . . . constitute the commercial world.” The Rhodian law,
the Amalfitan table and the ordinances of the Hanseatic League "became the law of the sea not on account of their origin, but by reason of their acceptance as such." Similar doctrine was more recently announced in the House of Lords by Lord Macmillan:

Now, it is a recognized prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions. It is manifestly of the highest importance that the Courts of this country before they give the force of law within the realm to any doctrine of international law should be satisfied that it has the hall-marks of general assent and reciprocity.

Under this analysis, it is clear that international law rules of evidence and procedure should not apply in the United States Supreme Court. Far from generally accepting them, the states, when they, albeit very temporarily, were international juristic persons, agreed otherwise. Only common law rules of evidence and procedure have now, or ever had had, the position of general acceptance and general assent and reciprocity among the several states of the United States.

Source of Substantive Law in Interstate Controversies

Apart from the law of the sea, international substantive law principles are sometimes pertinent in cases in the original jurisdiction. The "words of the constitution would be a narrow ground upon which to construct and apply to the relations between States the same system of municipal law in all its details which would be applied be-

191 Id. at 188; see 1 G. Hackworth, Digest of International Law 15-17 (1940); Falk, The Role of Domestic Courts in the International Legal Order, 39 Ind. L.J. 429, 443, 445 (1964).


193 See 3 C. Hyde, International Law As Interpreted and Applied By the United States 2380 (2d ed. 1945), paraphrasing the position of Great Britain: "[T]he practice and procedure adopted in prize courts [a]re not settled . . . by international law, but determined by each nation for itself. . . . [T]he Anglo-American system evolved in the British courts [w]as never followed in the prize courts of France or of any other continental nation . . . [N]o requirement of international law restrict[s] a belligerent in changing its procedure, provided the practice followed should afford a fair hearing. . . ."

194 See Arizona v. California, 292 U.S. 341 (1934) (dictum) (as in the interpretation of treaties); Sanitary Dist. v. United States, 266 U.S. 405, 425-26 (1925); Choctaw Nation v. United States, 119 U.S. 1, 28 (1886); notes 162-63 supra.

tween individuals.” Thus, as to substantive law questions: “[W]e apply Federal law, state law, and international law, as the exigencies of the particular case may demand. . . .”

One example of international law treatment of a substantive problem occurs in the location of interstate boundaries along rivers, like the Missouri and the Ohio, which are constantly shifting their channels. The Court once regarded the *thalweg* rule of interna-

---

195 Missouri v. Illinois, 200 U.S. 496, 520 (1906) (Holmes, J.). A year later Justice Holmes observed: “The States by entering the Union did not sink to the position of private owners, subject to one system of private law.” Georgia v. Tennessee Copper Co., 206 U.S. 230, 237-38 (1907). Thus, such a “case is to be considered in the untechnical spirit proper for dealing with a quasi international controversy, remembering that there is no [substantive] municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress . . . or by the legislature of either state alone.” Virginia v. West Virginia, 220 U.S. 1, 27 (1911) (Holmes, J.).


198 The *thalweg* rule is the rule that the original thread of the stream continues as the boundary between nations when the river changes into a totally new channel. See, e.g., Nebraska v. Iowa, 143 U.S. 359, 360-68 (1892) (see authorities cited therein). But see A. STUYT, THE GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL TRIBUNALS 32-33, 41 (1946), where there are excellent arguments and a gathering of the authorities to the effect that the *thalweg* rule is not a rule of international law at all; Van Alstyne, The Justiciability of International River Disputes: A Study in the Case Method, [1964] DUKE L.J. 307, 308-9 (see authorities cited therein). In Nebraska v. Iowa, supra at 361-64, the Court, quoting an opinion of Attorney General Cushing, used an Institute of Justinian as authority for a substantive rule.
tional law as highly persuasive, if not controlling, but now treats that rule as part of "interstate common law," since the doctrine "may not be as cogent in this country, where neighboring states are under the same general government." In other words, the Court applies the international law thalweg rule not because substantive international law is applicable per se in controversies between states, but because it is peculiarly adapted to river boundary determination. It has thus become "a part of our law."

The substantive law applicable in interstate controversies has its origin elsewhere. Thus the Court, when it assumed jurisdiction of the dispute between Kansas and Colorado over allocation of the waters of the Arkansas River, observed that "this court is practically building up what may not improperly be called interstate common law."

regulating an interstate boundary in the case of a river which abandoned its former channel.


200 Minnesota v. Wisconsin, 252 U.S. 273, 281-82 (1920). The cases sometimes emphasized common law or international law authorities; other cases emphasized both. "Interstate common law" is the synthesis, and this perhaps explains the frequent failure to discuss the source of substantive law. See, e.g., Washington v. Oregon, 214 U.S. 205, 214-15 (1909); Washington v. Oregon, 211 U.S. 127, 134 (1908); Missouri v. Nebraska, 196 U.S. 23, 34-46 (1904); cf. Louisiana v. Mississippi, 204 U.S. 1, 53-54 (1906) (acquiescence in boundary "conclusive, whatever the international rule might be"). However, notice the reference by Justice Story to the "law of nations" in United States v. Smith, 18 U.S. (5 Wheat.) 153, 162 (1820): "[W]hether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is robbery upon the sea." See also Louisiana v. Mississippi, 384 U.S. 24 (1966) (recent application of the thalweg rule).


203 Kansas v. Colorado, 206 U.S. 46, 98 (1907) (emphasis added); see Hinderlider v. La Plata Co., 304 U.S. 92, 110 (1938) (striking treatment of same subject); text accompanying note 231 infra.

State authorities, in this class of cases, will be "examine[d] with appropriate respect . . .", but "such decisions do not detract from the responsibility of this Court in reaching its own conclusions . . . for otherwise the constitutional guaranty could not properly be enforced." Kentucky v. Indiana, 281 U.S. 163, 176 (1930) (Hughes, C.J.). Still, the Court "might await such a decision, in order that it might have the advantage of the views of the state court, if sufficient grounds appeared for delaying final action." Id. at 177. See also Nebraska v. Wyoming, 325 U.S. 589, 599-600, 617-18 (1945); United States v. Oregon, 295 U.S. 1, 14, 28 (1935); United States v. Utah, 283 U.S. 64, 75 (1931); Missouri v. Illinois, 200 U.S. 496, 518 (1906); McKenna v. Wallis, 344 F.2d 432, 433-36 (5th Cir. 1965) (court determined that rights and expec-
The Court held in 1902\textsuperscript{204} that power existed to hear the suit in equity brought by Kansas to restore the fertility and bounty of its prairies, which it claimed were being rendered desert by its upstream neighbor. Colorado was exhausting the waters of the Arkansas River, which formerly had flowed through Kansas, before they reached her borders. Mr. Chief Justice Fuller observed that the states had renounced sovereign power to settle such disputes by war or treaty, and that the judicial power was extended by the Constitution to quasi-political questions arising between states which formerly might not have been amenable to judicial solution.\textsuperscript{205}

Colorado contended\textsuperscript{206} that the “rule which controls foreign and independent states in their relations to each other” should govern the substantive rights of the two states. Colorado argued that control of the rivers within its boundaries was its absolute sovereign prerogative, and that Kansas as an independent nation would have no right of reprisal under the substantive rule of international law; therefore, Colorado had the unfettered right totally to stop the flow of the Arkansas River into Kansas. But the Court, “[a]pplying the principles settled in previous cases,”\textsuperscript{207} upheld the validity of the stated cause of action and rejected Colorado’s claim. The “cause should go to issue and proofs . . . .”\textsuperscript{208} Manifestly, if the substantive international law rule announced by Colorado, with which the Chief Justice apparently agreed, was applicable in such cases, many complainant states would have been remediless and many decrees\textsuperscript{209} of the Supreme Court would never have been entered.

After Colorado’s demurrer was overruled, Colorado answered and the United States intervened.\textsuperscript{210} Both states again urged the same substantive doctrines.\textsuperscript{211} The United States opposed the contentions of both, claiming that it had control of the river by virtue of its “duty of legislating for the reclamation of arid lands.”\textsuperscript{212} Kansas’ bill was dismissed, but without prejudice to its right to institute a new suit if the depletions should materially increase to the extent of destruction of United States in public lands are those known at common law which is the general law followed by courts of United States).

\textsuperscript{204} Kansas v. Colorado, 185 U.S. 125 (1902).
\textsuperscript{205} Id. at 139-44.
\textsuperscript{206} Id. at 143.
\textsuperscript{207} Id. at 144.
\textsuperscript{208} Id.
\textsuperscript{210} Kansas v. Colorado, 206 U.S. 46, 95 (1907).
\textsuperscript{211} Id. at 57–64.
\textsuperscript{212} Id. at 86.
ing an "equitable apportionment" of the waters between the two states.\textsuperscript{213} As to the source of "equitable apportionment" common law, the Court said:

> There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States . . . . Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined . . . . We are clearly of opinion that this cannot be so . . . .

What is the common law?

The common law includes those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest . . . upon . . . the will of the legislature.

> "As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes."\textsuperscript{214}

The Court held that its jurisdiction is not "ousted," even if the contending states are "sovereign and independent in local matters," and even if their "relations . . . depend in any respect upon principles of international law." The "cardinal" rule underlying interstate relations is "equality of right;" thus one state cannot impose its legislative policy upon another. Yet, whenever "natural laws," e.g., geographic circumstances, cause the action of one state to reach into the territory of another, a justiciable dispute is presented and the Court is obliged to settle that dispute in such fashion that "the equal rights" of both and "justice" are equally subserved. Thus grows "common law":\textsuperscript{215}

> In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. . . . Surely here is a dispute of a justiciable nature which must and ought to be tried and determined. If the two States were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court.\textsuperscript{216}

\textsuperscript{213} Id. at 117-18. The court conceived that the detriment to Kansas by virtue of the diminution of the waters of the Arkansas was not sufficiently great to make the appropriation by Colorado inequitable as between the two contestants. Id. at 113-14, 117-18. The intervening petition of the United States was dismissed because it did not allege that Colorado's appropriations for irrigation were adversely affecting navigability. Id. at 86, 117.

\textsuperscript{214} Id. at 96-97 (emphasis added), quoting Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92, 101-02 (1901).

\textsuperscript{215} Kansas v. Colorado, 206 U.S. 46, 98 (1907).

\textsuperscript{216} Id. (Emphasis added).
The Court noticed the water law of both states: Colorado had provided for the appropriation doctrine by statute and Kansas followed "generally the common-law rule of riparian rights." Of course, "[n]either State [could] legislate for, or impose its own policy upon the other." Nonetheless, the Court considered Kansas case authority on the subject and concluded that Kansas recognized the doctrine that the rights of a riparian owner are subject to reasonable use for irrigation and other purposes by upstream owners. Cautioning that "the views expressed in this opinion are to be confined to a case in which the facts and the local law of the two States are as here disclosed," the Court held that the detriment to Kansas was outweighed by the benefit to the formerly arid regions which Colorado had irrigated. Although the law of the contestant states had some bearing on the formulation of the "interstate common law" rule applied—that of equitable apportionment—no attempt was made to apply even substantive international law doctrines to the settlement of the controversy.

Strong approval of the "interstate common law" concept is evinced in other opinions. In Connecticut v. Massachusetts, the Court approved the precise phrase in rejecting Connecticut's contention that it should invoke the riparian rights doctrine to restrain Massachusetts from diverting the Connecticut River watershed to serve Boston, since both states adhered to that rule. The Court emphasized that the same rules which governed individuals did not necessarily obtain in suits between states, where "equality of right" was the paramount consideration. The riparian rights doctrine was not the law presently applicable in all states, and each state was free to change its law on the subject in the future. Thus, the Court applied the "interstate common law" rule of equitable apportionment.

In other cases, however, the Court has more readily incorporated

---

217 Id. at 95.
218 Id.
219 Id. at 102-04.
220 Id. at 102.
221 Id. at 113-14.
223 282 U.S. 660 (1931).
224 Id. at 670-71.
225 Id. at 669.
226 Id. at 670.
227 Id.
228 Id. at 670-71, 674.
the substantive law common to both states into the "interstate common law" of equitable apportionment when allocating interstate waters.\textsuperscript{229} Such is the rule by which private citizens in the contesting states regulate their affairs, and application of common doctrines "cannot be other than eminently just and equitable to all concerned."\textsuperscript{230} In any event, it is clear that the law common to the states of the union is that upon which the Court has drawn most heavily in formulating "interstate common law."

Mr. Justice Holmes, discussing the \textit{Wheeling Bridge} case\textsuperscript{231} in \textit{Missouri v. Illinois},\textsuperscript{232} concluded that all the justices, including the dissenters, were in accord as to the jurisprudential concept of "interstate common law." In \textit{Wheeling Bridge}, Pennsylvania sought to abate a "nuisance," which it alleged impeded the navigability of the Ohio River. The bridge, under which certain steamboats from Pittsburgh could not pass, was completely within Virginia's borders. "If the bridge was a nuisance it was an offense against the sovereignty

\begin{footnotesize}
\begin{enumerate}

Likewise in admiralty, two foreign vessels involved in a collision generally will be governed by the common substantive rules of their national law, especially when they enjoy a common nationality, but also when they possess a different nationality. The Belgenland, 114 U.S. 355, 370 (1885); The Scotland, 105 U.S. 24, 30 (1881); see The Mandu, 102 F.2d 459, 463 (2d Cir. 1939). \textit{See generally} Safir \textit{v. Compagnie Generale Transatlantique}, 241 F. Supp. 501 (E.D.N.Y. 1965); A. Ehrenzweig, \textit{Private International Law} 142 (1967).

\item Wyoming \textit{v. Colorado}, 259 U.S. 419, 470 (1922). In at least one case, state law was treated as "fact": "[U]pon a consideration of the pertinent laws of the contending States and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such water." Connecticut \textit{v. Massachusetts}, 282 U.S. 660, 670-71 (1931) (emphasis added); see Treaty with Great Britain, 1911, art. I, para. 1 (unratified), \textit{quoted in A. Hershey, Essentials of International Public Law} 338-39 n.54 (1912), which provided for submission to the Permanent Court of Arbitration or other arbitrator of differences insoluble by diplomacy "and which are justiciable in their nature by reason of being susceptible of decision by the application of principles of law and equity. . . ." (Emphasis added).

\item Pennsylvania \textit{v. Wheeling & Belmont Bridge Co.}, 54 U.S. (13 How.) 518 (1852).
\item 200 U.S. 496 (1906).
\end{enumerate}
\end{footnotesize}
whose laws had been violated." This sovereignty "could not be Virginia, because that state had purported to authorize [the bridge] by statute." The Court divided on the question whether the alleged nuisance violated an interstate compact between Virginia and Kentucky which, by sanction of Congress, had become the law of the United States. But since "no third source of law was suggested by any one," all the justices must have agreed that the law of one of the "sovereigns" involved—and not international law as such—must have been violated.

It is worth noting that the substantive law to be applied in interstate cases is the same today, after Erie Railroad Company v. Tompkins, as it was formerly when the brooding, omnipresent general common law expounded by Mr. Justice Story in Swift v. Tyson was the prevailing jurisprudential concept even in diversity cases. The power formerly exercised under Swift v. Tyson to develop the common law continues in many areas since Erie. An obvious example is the federal antitrust laws, under whose broad guidelines the Court has developed a "common law" of trade regulation.

Cases in the original jurisdiction present an even more striking example of common law development. It was not international law, but "interstate common law" which the Court expounded a few years ago in Arizona v. California. The rule of "equitable apportionment is a method of resolving water disputes . . . . It was created by this Court in the exercise of its original jurisdiction . . . ." And in Hinderlider v. La Plata River and Cherry Creek Ditch Com-

233 Id. at 518.
234 Id. at 519.
235 Id. at 518.
239 But cf. United States v. Texas, 143 U.S. 621, 644-45 (1892), where Justice Harlan said as to the original jurisdiction controversies "capable of a judicial solution," the Court's "trust so momentus" involves the grant of "power to determine them according to the recognized principles of law."
241 Id. at 597.
pany.\textsuperscript{242} an opinion handed down the same day as \textit{Erie},\textsuperscript{243} the Court declared that how to apportion the water of an interstate stream between two states is a question of "federal common law;" such questions of substantive right have been "recognized as presenting federal questions."\textsuperscript{244} The author of both \textit{Erie} and \textit{Hinderlider} was the same: Mr. Justice Brandeis.\textsuperscript{245} If the source of substantive law in a jurisdiction unknown to the courts of common law and chancery is domestic, and those rules are predominantly those of the common law, molded as "the exigencies of the case may require," then it would seem even more important that the adjective rules applied be those with which the litigants are most familiar.

Analogous considerations compel the same conclusion. For example, the conflict-of-laws rule respecting choice of practice and rule of evidence differs in some civil law countries (law of the place where the cause arose) from the common law rule (law of the forum).\textsuperscript{246} In original jurisdiction cases, however, the forum is the United States and the right of action also arises within its territorial confines.\textsuperscript{247} In such circumstances, either doctrine impels uniform application of adjective rules common to all prospective parties litigant and causes.

\textsuperscript{242} 304 U.S. 92 (1938).
\textsuperscript{243} \textit{Erie} R.R. v. Tompkins, 304 U.S. 64 (1938). "There is no federal general common law." \textit{Id.} at 78 (Brandeis, J.).
\textsuperscript{244} \textit{Hinderlider} v. La Plata Co., 304 U.S. 92, 110 (1938).
\textsuperscript{245} Compare the reasoning of Mr. Chief Justice Hughes in \textit{Kentucky} v. Indiana, 281 U.S. 163, 176-77 (1930): "[W]hen a question is suitably raised whether . . . a State has impaired the obligation of a contract, in violation of the constitution . . . this Court must determine for itself whether a contract exists . . . . While this Court always examines with appropriate respect the decisions of state courts bearing upon such questions, such decisions do not detract from the responsibility of this Court in reaching its own conclusions as to the contract, its obligations and impairment, for otherwise the constitutional guaranty could not properly be enforced . . . . A decision . . . by the state court would not determine the controversy here." Accord, \textit{West Virginia ex rel. Dyer} v. \textit{Sims}, 341 U.S. 22, 28 (1951); \textit{Indiana ex rel. Anderson} v. \textit{Brand}, 303 U.S. 95, 100 (1938); \textit{Larson} v. \textit{South Dakota}, 278 U.S. 429, 433 (1929). \textit{But see Zimmerman} & Wendell, \textit{The Interstate Compact and Dyer v. Sims}, 51 \textit{Columbia L. Rev.} 931, 947 (1951) ("The states . . . in their anxiety to save the compact . . . invited the Court to upset a state court's construction of its own constitution and thus breathe life into the corpse of \textit{Swift} v. \textit{Tyson}.").
\textsuperscript{246} \textit{1 Wigmore} § 5. Though the \textit{lex loci actus} rule was proposed, according to Wigmore, as the basic principle at an early session of the Institute of International Law, the rule seems to have been adopted only in France, Italy and Latin America. \textit{See generally} A. \textit{Ehrenzweig}, \textit{Conflict of Laws} 352 (1962); \textit{1 Wigmore} 164 n.10 (see sources cited).
\textsuperscript{247} Generally speaking, international tribunals themselves tend to follow the \textit{lex fori} as to questions of form, practice and procedure; this is considered natural and reasonable. C. \textit{Jenks}, \textit{The Proper Law of International Organizations} 226-27 (1962).
Similarly, when the law of the sea seems to be changing, as evidenced by the adoption of new rules in the majority of commercial nations, the new rule applies to the vessels of those nations whose rules have been altered in common. Likewise, the constitution of the European Economic Community, for example, expressly provides that the tort law be applied in cases involving its citizens, is not the lexis loci delicti, but substantive "principles common to the laws of Member States." The Statute of the International Court of Justice also recognizes, for all its generality, that bilateral conventions "establishing rules expressly recognized by the contesting States" take precedence over "custom" and "general principle of law", whatever these may be. The practice in the original jurisdiction even more clearly should be adjusted to the understanding and expectations of the parties.

"International law is a part of our law," but only "for the application of its own principles" which are "concerned with international rights and duties and not with domestic rights and duties." The rules for the conduct of a lawsuit inherited from the law and chancery courts of England and subsequently developed here are applicable to cases in the original jurisdiction. That body of law cannot be deemed to have crystallized, and the Court has molded those rules from time to time, paralleling the liberalization of procedure which has occurred as well in the national as in the state courts. Another especially interesting analogy is found in the substantive law provisions of the Act of 1860 establishing extraterritorial Consular Courts to dispose of causes involving American citizens under Treaties or "Capitulations" with such countries as the Ottoman Empire, the Sultanate of Morocco, the Kingdom of Muscat, etc. 22 U.S.C. § 145 (1964), formerly 12 Stat. 73 (1860). The Act decrees the "system of laws to be applied": "Jurisdiction . . . shall, in all cases, be exercised and enforced in conformity with the laws of the United States . . . . But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies."

---

248 The Scotia, 81 U.S. (14 Wall.) 170, 188 (1871).
251 Skiriotes v. Florida, 313 U.S. 69, 72, 73 (1941).
252 A case can be made that similar liberalization has occurred in international law practice. See Letter from the British Embassy at Washington to Secretary of State Lansing, April 24, 1916, in 3 C. Hyde, International Law
was the view of Mr. Justice Stone in *Texas v. Florida*, and it is the view encompassed in the day-to-day practice and understanding of lawyers and judges in original cases.

The Supreme Court has not hesitated to develop common law rules of evidence in appropriate cases in the past. An example is furnished by the family-history exception to the hearsay rule. The Court developed the doctrine that the introduction of extra-judicial family-history declarations is permissible when pedigree is directly in issue in the case. This view has been rejected in a majority of state courts because, if such evidence is admissible at all, “it is equally so in all cases whenever they become legitimate subjects of judicial inquiry and investigation.” But in either case, lawyers and judges understand that it is a common law rule that is expounded—whether the common law of a particular state or “inter-state common law.”

Disparities existing from state to state, or between the Supreme Court’s earlier opinions and the existing laws of various of the contending states, should present little difficulty relative to applying the law of the forum. The forum is the United States, and its procedural law has been expounded or is to be developed by the Court in Rule and in opinion. The Court conceivably could adopt a new rule appropriate to this class of cases, by analogy to Rule 43 of the

ChieFLy AS INTERPRETED AND APPLIED BY THE UNITED STATES 2380–82 n.2 (2d ed. 1945): “The old practice . . . belonged to days long before the modern improvements in legal procedure were developed, days when, for instance, parties were prevented from giving any evidence as witnesses in actions which affected their rights. . . . His Majesty’s Government felt bound to alter these rules as soon as they were advised that the rules were obsolete . . . [and] the alterations in the prize court practice and rules were conceived and made in the spirit of those improvements. The [objects of abolishing the old practices] were to prevent delay, to eliminate technicalities, and to enable the parties to prove all the true and material facts . . . .”

253 306 U.S. 398 (1939). The case is more fully discussed in text accompanying notes 164 et seq. supra.

254 The complex, unclear question of applicability of the Rules of Decision Act to evidence questions prior to adoption of the federal rules has been ably discussed. Comment, Federal Rule 43(a): The Scope of Admissibility of Evidence and the Implications of the Erie Doctrine, 62 Colum. L. Rev. 1049, 1051-52 (1962).


256 5 WIGMORE § 1503.


Rules of Civil Procedure for the United States District Courts. In that rule, the Supreme Court took the view that the most liberal rule—whether state or federal—should apply in the event of a conflict. So here, the Court might formulate a general—and very liberal—rule, or merely develop a uniform practice of applying the adjective rule of the most liberal state involved in the multi-state controversy. The Rules of Decision Act, by its terms, requires application of the “laws of the several states” only “in cases where they apply.” This approach would resolve the difficulty of choice of law even if the Rules of Decision Act is applicable. But in any case, even when a foreign nation is a party, “the tribunals of one country have never carried their courtesy to other countries so far as to change the form of action, and the course of judicial proceedings . . .”

Practical Difficulties in Applying Alien, Sometimes Unascertainable, Adjective Rules

Practical convenience is the touchstone of the Anglo-American rule applying the law of the forum to the determination of procedural questions. It is perhaps unfortunate, but certainly true,

---

259 Cf. New Jersey v. New York, 283 U.S. 336, 342-43 (1931) (Holmes, J.): “We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given than in a controversy between neighbors members of a single State. . . . Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war. In a less degree, perhaps, the same is true of the quasi-sovereigns bound together in the Union. A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed . . . . Both States have real and substantial interests in the River that must be reconciled as best they may be. The different traditions and practices in different parts of the country may lead to varying results, but the effort always is to secure an equitable apportionment without quibbling over formulas.” (Emphasis added).


261 The Act does not apply, in any case, to equity, as distinguished from law practice, and virtually, but not quite all, original cases are in equity. E.g., Payne v. Hook, 74 U.S. (7 Wall.) 425, 430 (1868).

262 Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 216 (1818). The rule is applicable also “[w]hen an international body corporate institutes legal proceedings or waives its immunity . . . .” C. Jenks, THE PROPER LAW OF INTERNATIONAL ORGANIZATIONS 227 (1962). See also Dravo v. Fabel, 132 U.S. 487, 490 (1889) (Pennsylvania statute that party may be examined by the adverse party as if under cross-examination “has no application to suits in equity in the courts of the United States”); note 254 supra and authorities there cited.

263 See Sampson v. Channell, 110 F.2d 754, 756 (1st Cir. 1940), cert denied, 310 U.S. 650 (1941), where Judge Magruder attempted to explain the interesting practice of pre-Erie federal courts classifying burden of proving contribu-
Counsel and the Court are steeped in the common law and generally have very little, if any, acquaintance with international substantive law, let alone procedural international law. Access to authorities concerning international doctrine is difficult; most of the significant books concerning the international

...negligence as “substantive” for conflict of laws purposes in order to apply general federal common law, and of state courts classifying the same question as one of “procedure” for conflicts purposes: “In these two groups of cases the courts were talking about the same thing and labeling it differently, but in each instance the result was the same; the court was choosing the appropriate classification to enable it to apply its own familiar rule.” (Emphasis added).

The vastly greater convenience of applying the forum's own law has been recognized on many occasions and in many contexts. E.g., Van Dusen v. Barrack, 376 U.S. 612, 645-46 (1964) (Goldberg, J.) (forum non conveniens); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09, 511-12 (1947) (Jackson, J.) (forum non conveniens).

Freund, The Legal Profession, (1963) Daedalus 689, 691-92: “[M]ake a] comparison of the law with other professions. Lawyers, when put beside natural or social scientists, are parochial; their expertness ceases at the water's edge. An anatomist or an economist can move from a German to an American setting . . . with unimpaired competence . . . . But a German lawyer would have to be retrained before qualifying in a common law jurisdiction. . . . [L]aw is still a cultural specialization, not directly transferable or assimilable like a scientific theorem. If modern physics is, as a physicist has said, international gossip, modern law is condemned to appear tongue-tied.” See also Stone, Book Review, 75 Harv. L. Rev. 1240, 1242 (1962) (R. Pound, Jurisprudence).

rules of evidence and procedure are in foreign languages. This rather fundamental difficulty was encountered by the Court, for example, in *The Paquete Habana*, where numerous foreign language treatises were consulted in order to ascertain the applicable international substantive law. Apart from such obvious practical considerations dictating use of familiar and accessible common law adjective rules, international law rules often are predicated upon totally

---


267 175 U.S. 677 (1900). The case involved appeals by proprietors of two fishing smacks, captured by a United States blockading squadron near Havana, Cuba, from condemnation decrees entered by the United States District Court, S.D. Fla., sitting in Admiralty. There was no governing treaty between Spain and the United States; the question was whether it is "a rule of international law" that "coast fishing vessels, pursuing their vocation of catching . . . fresh fish" are "exempt . . . from capture as prize of war." *Id.* at 686.

268 *Id.* at 686-708. Mr. Justice Gray adverted to over a score of foreign language treatises. One foreign language case was cited: "*La Nostra Segnora de la Piedad*, 25 Merlin, Jurisprudence, Prise Maritime, § 3, arts. 1, 3 . . . ." *Id.* at 685. Mr. Justice Gray could do it, but could we? If we could, are these volumes available to all of us? The perhaps less learned dissenting Justices, Chief Justice Fuller, Justice Harlan, Justice McKenna, virtually ignored the foreign-language sources. *Id.* at 715-21. "It is needless to review the speculations and repetitions of the writers on international law. Ortolan, De Bœck and others admit that the custom relied on as consecrating the immunity is not so general as to create an absolute international rule; Heffter, Calvo and others are to the contrary. Their lucubrations may be persuasive, but are not authoritative." *Id.* at 720. Apparently the "lucubrations," Chief Justice Fuller's word, of the international law theorists *never* achieve consensus. See also note 35 supra.

Mr. Justice Livingston made a reasonable inquiry in United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) (dissenting opinion): "Can [it] be the case, or can a crime be said to be defined . . . when those who are desirous of information on the subject are referred to a code, without knowing with any certainty, where it is to be found, and from which even those to whom it may be accessible, can with difficulty decide, in many cases, whether a particular act be piracy or not? Although it cannot be denied that some writers on the law of nations do declare what acts are deemed piratical, yet it is certain, that they do not all agree . . . . [omitting several paragraphs] *[T]he great body of the community have it in their power to become acquainted with the criminal code under which they live; not so when acts which constitute a crime are to be collected from a variety of writers, either in different languages, or under the disadvantage of translations, and from a code with whose provisions even professional men are not always acquainted." *Id.* at 181-83.
different jurisprudential notions or are bottomed in systems which even a great deal of study may not clarify. In such instances the practical difficulties are traceable to diverging world views of the lawyers.269 The admissibility in evidence and use of hearsay affidavits is a notorious example of this difficulty.270

Confronted with foreign law and foreign language, it is common practice to have lawyers familiar with that language and that legal system in attendance at bar. The inconvenience is obvious. More seriously, the practice tends to be ineffective because of the difficulty in bridging the conceptual gap between two systems of law. Such a relatively simple matter as the effect of a French statute of limitations, for example, was ascertained by the Second Circuit Court of Appeals only uncertainly and with great difficulty, even with the assistance of a French lawyer. His testimony "was exceedingly confusing, not due to any fault of his, but inevitable because of the attempt to import into the French law the refined notion which pervades our own, of a right barred of remedy, but still existing in nubibus... Without in any sense meaning to question his competence, in the upshot his testimony does not materially help us."271

An additional inconvenience in utilizing international adjective law derives from the sharply conflicting views as to what these rules actually are272 in given circumstances. An example is whether

269 See Perez v. Fernandez, 202 U.S. 80, 91 (1906) ("striking illustration of the difficulty of undertaking to establish a common-law court and system of jurisprudence in a country hitherto governed by codes having their origin in the civil law"); S. ROESNNE, THE WORLD COURT 120-21, 128-29 (1962). Compare Le Mesurier v. Le Mesurier, [1895] A.C. 517, 540 ("[A]ccording to international law, the domicil... of the married pair affords the only true test of jurisdiction to dissolve their marriage."), with W. COOK, THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS 460 (1942) ("[T]here never has been [any such] generally recognized rule of international law... .")

270 See D. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 167 (1939) [hereinafter cited as SANDIFER]: "Over no phase of the law of evidence has there been such a divergence of views among jurists and counsel trained in the civil law and in the Anglo-American law, participating in international judicial proceedings, as with reference to the propriety of the admission of affidavits and their evaluation as evidence." Hammelmann has made a highly interesting exposition of the importance of diverse psychological approaches by lawyers schooled under different legal systems and traditions. Hammelmann, Hearsay Evidence, A Comparison, 67 L.Q. Rev. 67 (1951).

271 Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 942 (2d Cir. 1930). See C. JENKS, THE PROPER LAW OF INTERNATIONAL ORGANIZATIONS 47-48 (1962), for some examples of "the difficulties which an international administrative tribunal may have in determining the exact scope and effect of... national law... made applicable" by contract or custom.

272 Cf. United States v. California, 381 U.S. 139, 163 (1965), where "[t]he Special Master found that there was no internationally accepted definition
hearsay evidence is admissible in proceedings before international tribunals. Sandifer is one authority who claims that hearsay is competent under international law, and that the hearsay defect goes to the weight of the evidence rather than its admissibility, although he concedes that hearsay is sometimes excluded, asserting that the basis for such rulings is not always clear. Wigmore mentions a case in which recovery was denied a well-founded claim because the claimant's witnesses did not state facts of their own knowledge. And Witenberg says:

Some rulings hold in effect that the witness may not be examined except as to matters of which he has personal knowledge. They exclude that which the English law calls 'hearsay evidence' or, in French law, proof by "yes-saying" or by general reputation. The witness must relate that which he personally has seen, that which he has participated in, and not that which he has been given to understand out of the mouths of others. A more critical problem is the frequent lack of any primary authority.

for inland waters . . .); The Nereide, 13 U.S. (9 Cranch) 388, 429 (1915) (Marshall, C.J.): "It is remarkable that no express authority on either side of this [substantive international law] question can be found in the books. A few scanty materials . . . have been gleaned . . . They are certainly not decisive." United States v. Smith, 18 U.S. (5 Wheat.) 153, 174-76 (1820) (Livingston, J.) (dissenting opinion); note 286 supra. See also Kling Case (United States v. Mexico), decided under General Claims Convention, Sept. 8, 1923, 43 Stat. 1730 (1923), T.S. No. 678 (decision rendered 1930), reprinted in F. NIELSON, INTERNATIONAL LAW APPLIED TO RECLAMATIONS 441-42 (1933): "Little adjective law has been developed in international practice. International tribunals are guided to some extent by rules formulated in connection with each arbitration. With respect to matters of evidence they must give effect to common sense principles underlying rules of evidence in domestic law."; I. SZASZY, INTERNATIONAL CIVIL PROCEDURE 246- passim (1967).

Wigmore claims that extrajudicial statements are "generally" admitted only if there is an express treaty provision, and that even then there is a "clear recognition of their insufficiency." 1 WIGMORE § 4m; cf. The Anne, 16 U.S. (3 Wheat.) 435, 445 (1818), where it was held that bias does not render the witness incompetent in prize courts, as it did at common law; it only goes to weight. See also SANDIFER 167-72.

"It is not always clear in these cases whether the refusal to accept the evidence as sufficient is based on its hearsay character as such, or whether the tribunal was influenced also by the intrinsic uncertainty of the testimony." SANDIFER, supra note 270, at 258.

1 WIGMORE § 4m n.34.


It would seem that the difficulties are magnified immeasurably when the alien rule cannot be discovered; the competence of counsel or of a judge, even if he can read technical treaties in French, German or Italian, to state the "law" when eminent authorities diverge, can reasonably be doubted. Like reasons have prompted the Court to decline to pass upon issues which "bristle" with questions of state law, "without the benefit of the views of judges who sit there and have a greater familiarity with local law and local practices than we."\(^{279}\)

Even in a case where the general outline of the international law rule is ascertainable it may be questioned whether all the miniscule details of the remedial rules inherent in the presentation of a case would be adequately provided for. Referring to the rules of evidence for international tribunals established by the Hague Conventions of 1899 and 1907, Wigmore states:

"It seems clear that at present one can point to no definite, fixed, and regularly applied rules of evidence observed by international tribunals. . . . [A]n examination of the conventions setting up "ad hoc" international tribunals demonstrates a crying need for more complete and definite rules . . . ."\(^{280}\)

\(^{278}\) Cf. S. Rosenne, The World Court 128 (1982).


\(^{280}\) 1 Wigmore § 4m, at 157. Professor Wigmore also points to a countervailing opinion that "it would be unwise for the present, at any rate, to attempt such an 'adventure'" into codification. Id. An excellent argument, in very similar context, in favor of codification, is found in 3 C. Hyde, International Law § 901 (2d ed. 1945) ("[L]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp."). See also Smit, International Litigation Under the United States Code, 65 Colum. L. Rev. 1015 (1965).

Apparently the principle of international law evidence is "common sense." International tribunals "may not be able" to apply domestic adjective rules "but they must in reason undertake to make use of principles of common sense underlying such rules." F. Nielsen, International Law Applied to Reclamations 66 (1933). Thus, the commission observed in the Russel Case (United States v. Mexico), decided under General Claims Convention, Sept. 8, 1923, 43 Stat. 1730 (1923), T.S. No. 678 (decision rendered 1931), reprinted in F. Nielsen, supra at 587: "It can test the testimony of witnesses in the light of their sources of information and their capacity to ascertain and their willingness to tell the truth. It can assuredly also apply common sense reasoning with respect to the value of what may be called purely documentary evidence which it must receive. It can analyze evidence [and] can draw inferences from the non-production of evidence." Id. at 635. See also Mollen Case (United States v. Mexico), decided under General Claims Convention, Sept. 8, 1923, 43 Stat. 1730 (1923), T.S. No. 678 (decision rendered 1927), reprinted in F. Nielsen, supra at 177, where it is indicated that the Commission does not apply "strict rules of evidence . . . prescribed by domestic law, but . . . must give application to well-recognized principles underlying rules of evidence and of course it must employ common-sense reasoning;" not "fat-
Wigmore suggests that international juristic persons submitting
themselves to international tribunals set forth the rules of practice
in the convention or treaty, and that the parties thereto select rules
"suggested by previous practice" and other rules anticipated to be
"useful" in light of "the particular needs" of the tribunal. In the case
of original controversies, the parties agreed to application of com-
mon law rules; common law *modus operandi* is certainly suggested
by previous practice; and those rules clearly are highly convenient.
It is also the "natural expectation of the parties" that such rules
shall be applied.

In the upshot, the use of international law adjective rules in the
original jurisdiction probably would increase unduly the burdens of
an already overwhelmed Court. The practice thus might contribute
to an increasing want of diligence, a decrease in confidence and
an enhanced juridical subjectivity. But the greatest difficulty is
uous guesswork" but "principles of law" and "proper common-sense reason-
ing." *Id.* at 181; Kling Case (United States v. Mexico), decided *under*
General Claims Convention, Sept. 8, 1923, 43 Stat. 1730 (1923), T.S. No. 678 (decision
rendered 1930), reprinted in F. Neilsen, *supra* at 441-42; I.C.J. *Stat.* art. 43
where the author states that "no detailed rules . . . concerning admissibility . . .
of evidence have been evolved or appear to be necessary at the present
state of development [even though there is a] general principle . . .
that proper evidence must be produced." (Emphasis added).

281 It is the duty of the Privy Council in colonial appeals "to decide a case
as if it were sitting in the country from which the appeal comes . . . Parti-
cularly, in the conflict of laws it is important that a case be decided from
the point of view of the forum, and it leads to confusion if the Privy Council
on an appeal from a court in Palestine, that is, from a forum in which English
law is a foreign law, seems to transfer the forum to England, with the nec-
essary consequence that English law becomes the *lex fori* and the law of
Palestine becomes a foreign law." W. Cook, *The Logical and Legal Bases
of the Conflict of Laws* 458-59 (1943), quoting Falconbridge, *Renouf Obiter
Dicta of the Privy Council*, 19 CAN. BAR REV. 682, 685 (1941). See also *The Trail Smelter Arbitration* (United States v. Canada), 3 U.N.R.I.A.A. 1925
(1941), *quoted in Green, supra* note 62, at 777, 782.

282 See, e.g., Hart, *Foreword: The Time Chart of the Justices*, 73 HARV.
L. REV. 84, 100 (1959) ("with deference, it has to be said that too many of
the Court's opinions are about what one would expect could be written in
twenty-four hours"); Kurland, *Foreword: "Equal in Origin and Equal in
Title to the Legislative and Executive Branches of the Government,"* 78 HARV.
L. REV. 143, 169 (1964) (want of "workmanlike quality").

(dissenting opinion) ("syllogism, metaphysics or some ill-defined notions of
natural justice"); Griswold v. Connecticut, 381 U.S. 479, 509, 511, 513, 519-21
(1965) (Black, J.) (dissenting opinion). Examples could be multiplied. The
point is, all judges are more or less subjective, because they are human, and
all try to be objective. Some succeed better than others, but institutions, one
supposes, ought to be framed to aid, not impair, impartiality.
still that of inconvenience. Particularly appropriate in this connection are Lord Brougham's remarks in *Yates v. Thomson*:284

Can it be contended, that, as often as an English succession comes in question before the Scotch Court, witnesses are to be admitted or rejected upon the practice of the English Courts; nay, that examination and cross-examination are to proceed upon those rules of our practice, supposing them to be (as they may possibly be) quite different from the Scotch rules? This would be manifestly a source of such inconvenience as no Court ever could get over. Among other embarrassments equally inextricable there would be this: that a host of English lawyers must always be in attendance on the Scotch Courts, ready to give evidence, at a moment's notice, of what the English rules of practice are touching the reception or refusal of testimony, and the manner of obtaining it; for those questions . . . must arise unexpectedly during each trial, and must be disposed of on the spot in order that the trial may proceed.285

In addition, it is the accepted principle of the conflict of laws that the forum applies its own procedural rules even when foreign substantive law governs. The rationale for the substance-procedure dichotomy works equally against the use of international procedural rules in litigating original causes before the Supreme Court. The practical underpinning of the conflicts rule is the unreasonable burden imposed by an alien practice on the judicial machinery of the forum and, perhaps more significantly, on the local lawyers. The forum thus follows that procedure "with which the lawyers and judges are more familiar, and which can be administered more conveniently."286

---

284 6 Eng. Rep. 1541, 3 Cl. & Fin. 544 (H.L. 1835), noted in 1 Wigmore § 5.

285 Id. at 1558, 3 Cl. & Fin. 544, 589. See also G. CHESHIRE, PRIVATE INTERNATIONAL LAW 589 (7th ed. 1965): "Every system of law has its own principles for determining the manner in which . . . facts, acts, and documents shall be ascertained . . . . If another system of evidence were admissible it would be equally reasonable to permit another mode of trial." See Rastede v. Chicago, St. P., M. & O. Ry, 203 Iowa 430, 437, 212 N.W. 751, 754 (1927): "It is impracticable to apply in one state the remedial provisions of another for the proof and enforcement of a cause of action. Comity does not require the impracticable, and does not therefore extend to remedial provisions . . . ."

286 Bournias v. Atlantic Maritime Co., 220 F.2d 152, 154 (2d Cir. 1955) (emphasis added); see Wisconsin v. Michigan, 295 U.S. 455, 463 (1935): "Inasmuch as the preparation of the decree may involve the ascertainment of physical facts and the formulation of technical descriptions, the master is authorized to hear counsel, take evidence and to procure such assistance . . . as may be necessary to enable him conveniently and promptly to discharge the duties here imposed upon him." (Emphasis added). See also Report of the Committee on Improvements in the Law of Evidence, 63 A.B.A. REP. 570, 580 (1938): "The rules of evidence are supposed to be based on long-continued professional experience; and they are embedded in the knowledge and habits of the whole body of practitioners. Therefore to change them without consultation of representatives of the profession—much more to do so without notice—is unwise."
As between substantive laws and adjective rules, the latter are far more technical. As Cheshire observes: "The department of procedure constitutes perhaps the most technical part of any legal system, and it comprises many rules that would be unintelligible to a foreign judge and certainly unworkable by a machinery designed on different lines." The sheer number of procedural rules applicable in any given case is an equally pertinent consideration. It is one thing to admit proof of foreign law with respect to a tort or a contract, but quite another to investigate alien law on every one of a multitude of questions involving the form of pleadings, the character of trials, rules of evidence, the taxing of costs and the like.

The practical difficulties caused by a myriad of technical adjective rules are obviously accentuated when the rules are discussed only in inaccessible, rare and conflicting sources in foreign languages, and are based upon a different jurisprudential approach or legal system. Learned Hand's perplexity is a pertinent example:

The embarrassment is . . . that we have to interpret another system of law according to notions wholly foreign to it.

We do not know what is meant by the language of section 2220 of the French Civil Code, relating to prescription, for we are not advised how the obligor may "renoncer" the defense.

The desirability of uniform enforcement of legal rights and duties is rather generally accepted. This principle underlies Erie, is basic to the conflict of laws, finds expression in a clause of the Constitution, and is also applicable in the equitable apportionment cases.

That procedural rules are often outcome-determinative is

---

289 For Ailes' characterization of the problem, see id.: "This argument [against use of foreign procedural rules] applies a fortiori where the foreign rule sought to be proved is that of a remote state whose legal system may be so different from that of the forum as to be quite unintelligible without prolonged study. One need not dwell on the hypothetical horrors of ascertaining the rules of evidence if any, which prevail in Mongolia or Afghanistan."
290 Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 943 (2d Cir. 1930).
292 See, e.g., J. BEALE, SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS 1597 (1935): "One of the most important purposes of a systematic and rational application of the principles of the Conflict of Laws is to secure a uniform enforcement of the legal rights and duties arising from any transaction."
293 U.S. CONST. amend. XIV, § 1.
294 See, e.g., Wyoming v. Colorado, 259 U.S. 419, 470 (1922); authorities cited note 229 supra.
notorious; a literal and thoroughgoing effectuation of the uniformity principle would require use of a single integrated body of law, by any domestic tribunal, pursuant to a single uniform choice of law rule. But the overriding practical considerations exclude such practice even though the desired uniformity must suffer. In original jurisdiction cases, by contrast, the principle of uniformity is served if "interstate common law" adjective rules are applied. It must be admitted, of course, that uniform application of any other adjective law, for example, the first in the alphabet, the Alabama practice, as the author is told Brainerd Currie once suggested, or international law practice, if it can be described as "uniform," would equally promote uniformity of result.

Certainty in the procedure to be followed in a cause is independently worthy of consideration; it is fundamental to any rule of convenience or consideration of justice. In cases in the original jurisdiction, litigants originally undertook and continue to expect that common law adjective rules should apply. Conceivably, if the states had anticipated remedial problems and stipulated that international law rules of evidence should govern, the result might be otherwise. Absent such agreement, however, applicable here are Lord

---

295 For example, the burden of proof of contributory negligence can be outcome-determinative; thus, the policy underlying Erie dictates application of the law of the forum state in diversity cases. Sampson v. Channel, 110 F.2d 754, 758 (1st Cir. 1940). Judge Magruder observed: "There is no important counter-consideration here, for the state rule can be easily ascertained and applied by the federal court without any administrative inconvenience." Id. (emphasis added). See also Van Dusen v. Barrack, 376 U.S. 612, 645 (1964) (Goldberg, J.); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947) (Jackson, J.): "There is an appropriateness, too, in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in . . . law foreign to itself."

296 See note 238 supra.

297 See, e.g., Bournias v. Atlantic Maritime Co., 220 F.2d 152, 154 (2d Cir. 1955), where the court says: "While it might be desirable, in order to eliminate 'forum shopping,' for the forum to apply the entire foreign law, substantive and procedural—or at least as much of the procedural law as might significantly affect the choice of the forum, it has been recognized that to do so involves an unreasonable burden on the judicial machinery of the forum . . . and perhaps more significantly, on the local lawyers involved." J. Beale, SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS 1600 (1935), says that the burden would be "so enormous that the practical administration of justice would in all cases be seriously hampered, and in many cases totally defeated." As to rules of evidence, Beale asserts: "The rule that admissibility of evidence is to be governed by the law of the forum is so obviously necessary to an efficient disposition of the business of the court that cases in which counsel have seriously contended that any other rule should be adopted are exceedingly rare." Id. at 1614.
Tenterden's famous words: "A person suing in this country must take the law as he finds it."298

Common law remedial provisions may be either good or bad; but they embody policies peculiar to the heritage of all of the United States. Thus, sworn or unsworn extra-judicial statements are generally excluded because some common law lawyers about the time of the Glorious Revolution of 1688 got the notion that parties should have the opportunity to confront adverse witnesses and cross-examine them. Were international evidentiary doctrine used, such policies might well go unheeded.299 A foreign party is not entitled to remedial rights customarily denied the forum's own citizens;300 far less

299 See Amabile Claim (United States v. Italy), Italian-United States Conciliation Commission (decision rendered 1952), [1953] Int'l L. Rep. 843, 848-51, reprinted in Green, supra note 62, at 790. The Commission said, in a stunning example of the use of hearsay: "Great[er] credibility may be given to declarations of this nature when they are submitted as statements made under oath in the form of either affidavits or 'Atti di Notorietà'.

. . . Both an Affidavit and an Atto di Notorietà are in the form of an ex parte statement or declaration and, while each is used extensively in the administrative proceedings of the respective countries, neither can be used ordinarily, as evidence to establish an allegation of a material fact in a controversial legal proceeding before a domestic court of law in either the United States . . . or Italy. . . .

"[T]he Commission is empowered to determine its own procedure and rules of evidence. It has not been the purpose of this Commission to promulgate any new principles or rules of evidence nor to derogate from those principles and rules of evidence generally recognized and accepted in international law. . . . [T]he Commission has been empowered by the Treaty . . . to employ the widest possible latitude in receiving and evaluating evidence in its search for the truth; and, in adopting such a criterion, the Commission is only conforming to the customary practice followed in international arbitral claims procedures.

". . . International Claims Commissions have customarily adopted a liberal attitude regarding the form, submission and admissibility of evidence. . . . This Commission knows of no rule of international law which would preclude the claimant's use of Affidavits, Atti di Notorietà, signed statements and similar ex parte testimonial instruments as documentary evidence . . . .

""When the Convention or Rules of Procedure are silent, the international tribunal or commission itself must decide the question of the admissibility of ex parte testimonial instruments . . . ."

"[T]he Commission finds that there is no logical basis or legal principle in international law which would preclude the use of an Atto di Notorietà as documentary evidence to establish elements of a claim presented under Article 78." Id. at 792-93. See also Complaints Against the U.N.E.S.C.O., [1956] I.C.J. 77, reprinted in Green 852-55.

300 Marshall v. Sherman, 148 N.Y. 9, 42 N.E. 419 (1895). In discussing
should alien procedure be imported when all of the litigants are, as it were, “natives.”

The unduly heavy workload of the Court, the “enormity of the task that burdens” it, have been frequently and well described. Sixty years ago, in the landmark interstate water case, Mr. Justice Brewer observed:

The testimony . . . is voluminous, amounting to 8,559 typewritten pages, with 122 exhibits. . . . [A]s might be expected in such a volume of testimony, coming as it does from three hundred and forty-seven witnesses, there is no little contradiction and a good deal of confusion, and this contradiction is to be found . . . also in the . . . reports from the officials of the Government and the two States. We have endeavored to deduce from this volume those matters which seem most clearly proved, and must, as to other matters, be content to generalize and state that which seems to be the tendency of the

why methods of serving process should be governed by forum law, it has been said that “[e]ach state has the right to prescribe by law how its citizens shall be brought into its courts.” Harrymore & Schryver v. Roberts, 52 Md. 64, 75 (1879) (emphasis added). G. CHEMORE, supra note 287, at 682, states the proposition thus: “A suitor in England must take the law of procedure as he finds it. He cannot by virtue of some rule in his own country enjoy greater advantages than other suitors here; neither must he be deprived of any advantages which English law may confer upon a litigant in the particular form of action.” See also authorities cited note 95 supra.


It conceivably may be, moreover, that want of workmanlike product and moral exaltation are inextricably intertwined. See L. HAND, THE SPIRIT
This evidence surely was not hearsay or otherwise incompetent; the contradiction and confusion (not to mention sheer volume) would only be compounded by relaxing or discarding common law rules.

When, some decades later, the same two states resumed their contest, the evidence was again "voluminous" as Mr. Justice Roberts complained in a passage announcing his weariness. As a matter of fact, it may have been this very volume of "conflicting" evidence...
that prompted the Court to state—as it did—that the complainant state bears a much greater burden of proof to sustain its case than would a private litigant. Interstate litigation presents complicated, delicate questions which require expert judicial administration. In such cases, common law practice and adjective principles, for example, the hearsay rule, are (in theory at least) an aid to the Court.  

256 U.S. 296, 310-11 (1921) ("It is much to be regretted that any forecast as to . . . the effect [of proposed sewage treatment] must depend almost entirely upon the conflicting opinions of expert witnesses."); Missouri v. Illinois, 200 U.S. 496, 522, 523 (1906) (Holmes, J.) ("categorical contradiction between the experts on the two sides"); Indiana v. Kentucky, 136 U.S. 479, 518 (1890) ("confusion by many witnesses of what they saw with what they heard"); Wisconsin v. Duluth, 96 U.S. 379, 383 (1877) ("Nor shall we address ourselves to the . . . mass of conflicting evidence as to the effect of the canal."); Missouri v. Kentucky, 78 U.S. (11 Wall.) 395, 403 (1870) ("In a controversy of this nature, where State pride is more or less involved, it is hardly to be expected that the witnesses would all agree in their testimony.").

308 Colorado v. Kansas, 320 U.S. 384, 393 (1943). Upon similar reasoning, the Court has denied injunctive relief: "[A]ll of this evidence, and much more which we cannot detail . . . have failed to show by the convincing evidence which the law requires that the sewage . . . discharge[d] in Upper New York Bay . . . would . . . create a public nuisance." New York v. New Jersey, 256 U.S. 296, 312-13 (1921). See also authorities cited note 310 infra.


310 See Pennsylvania v. West Virginia, 262 U.S. 553, 623 (1923) (Brandeis, J.) (dissenting opinion): "Clearly, this Court could not undertake . . . determinations [calling for] the informed judgment of a board of experts. To make equitable distribution [of natural gas] would be a task of such complexity and difficulty that even an interstate public service commission with . . . perfected administrative machinery might fail to perform it satisfactorily [and] this court would be powerless to frame a decree . . . [I]t should, according to settled practice, refuse to entertain [such suits]." See also West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 27 (1951) (Frankfurter, J.) ("inherent limitations upon this Court's ability to deal with multifarious local problems").

311 See Indiana v. Kentucky, 136 U.S. 479, 518 (1890) (Field, J.): "It would serve no useful purpose to attempt an analysis of the testimony of each [of the numerous witnesses produced] and to show how little and how much weight should be attributed to it. All the testimony is to be taken with many allowances from imperfect recollection, from the confusion by many witnesses of what they saw with what they heard, or of what they knew of their own knowledge with what they learned from the narrative of others. The clear and admitted facts . . . corroborated . . . by nearly everything of record . . .
in ascertaining objective truth and reaching a just result,\textsuperscript{312} so that the justices will not be confused by "voluminous" compilations of feckless rumor, surmise and speculation.

Common law rules of evidence and procedure are pervasive in our jurisprudence.\textsuperscript{313} Cases in the original jurisdiction are relatively frequent\textsuperscript{314} and generally of extreme complexity. It thus would seem highly desirable for the Court to be governed by familiar rules. The pertinent conclusion to be drawn from a study of the international law authorities would seem to be that they are—for the moment at least—an unduly ponderous tool for the conduct of litigation in the original jurisdiction.

The Special Appropriateness of More Restrictive Common Law Adjective Rules When Public Interests Are Involved

Complainant states—it is said—must satisfy a much more rigorous standard of proof than individual litigants prosecuting private lawsuits. According to Mr. Chief Justice Taft, "the burden on the complainant state of sustaining the allegations of its complaint is much greater\textsuperscript{315} than if the cause were between private parties. Before leave on our minds a much more satisfactory conclusion than anything derived from the oral testimony before us." See also Missouri v. Kentucky, 78 U.S. (11 Wall.) 395, 410 (1870) (if the objection that the evidence is "mere hearsay... does not exclude all the... maps... it certainly renders them of little value").

\textsuperscript{312} Cf. Florida v. Georgia, 58 U.S. (17 How.) 478, 492 (1854) (Taney, C.J.); "[I]t was, without doubt, one of [the Court's] first objects to disengage [original proceedings] from all unnecessary technicalities and niceties, and to conduct the proceedings in the simplest form in which the ends of justice could be attained."

\textsuperscript{313} Even our legislative bodies, Congress for example, in election contests under U.S. Const. art. I, § 5, attempt more or less successfully to apply common law rules of evidence. Thus: "It is well established that the common law rules of evidence which govern in the courts of law obtain in the trial of cases of contested elections in this House." H.R. Rep. No. 267, 53d Cong., 2d Sess. 2 (1894) (Whatley-Cobb election contest). Common law principles of evidence—utilized even by inquisitorial bodies like Congressional committees—are obviously deep-rooted in our society.

\textsuperscript{314} They "are becoming frequent, and in the rapidly changing conditions of life and business are likely to become still more so." Kansas v. Colorado, 206 U.S. 46, 80 (1907) (Brewer, J.).

the Court can be “moved to exercise its extraordinary power under
the Constitution to control the conduct of one state at the suit of an-
other,” the invasion or threatened interference with rights “must be
of serious magnitude” and must be proved by “clear and convincing
evidence.”

According to Mr. Justice Brandeis, “greater caution”
should be exercised by the Court before “assuming” to act against one
state at the instance of another.

One reason sometimes assigned for the heavier burden is the
“dignity” and the “high” quality of the litigants. Thus, “not every
matter of sufficient moment to warrant resort to equity” by private
citizens will justify the Court’s interference with the action of a
state. Since original actions involve “controversies between sover-
eigns” affecting issues of “high public importance,” the Court has al-
ways been “liberal in allowing full development of the facts.”

Already in 1793 it was thought that such cases were “of uncommon
magnitude,” involving a state, “certainly respectable, claiming to be

U.S. 546 (1963); see West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 27
(dissenting opinion); R. Stern & E. Gressman, Supreme Court Practice 306
(3d ed. 1962) (the rule “[f]inds no support in statute or Constitution [and
whether it] is consistently applied in all cases is questionable”).

Pennsylvania v. West Virginia, 262 U.S. 553, 615 (1923) (dissenting
opinion). Even international law sometimes announces the general rule “that
in the absence of sufficient proof, [a claim] should be rejected rather than
accepted.” Chevreau Case (France v. Great Britain), Arbitration Between
France and the United Kingdom, 2 U.N.R.I.A. 1113 (1931), reprinted
in Green, supra note 62, at 174, 178.

“[E]xclusive jurisdiction was given to this court, because it best com-
ported with the dignity of a State, that a case in which it was a party should
be determined in the highest, rather than in a subordinate judicial tribunal of
the nation.” United States v. Texas, 143 U.S. 621, 643 (1892). It is for this
reason, in part, that other rules have developed; for example, the rule that
“[e]stoppel is not often to be invoked against a government.” West Virginia

Alabama v. Arizona, 291 U.S. 286, 292 (1934); accord, United States v.
Texas, 339 U.S. 707, 715 (1950); Pennsylvania v. West Virginia, 262 U.S. 553,
615 (1923) (Brandeis, J.) (dissenting opinion) (“If these were private suits
relief would necessarily be denied. . . . As the suit is that of one State against
another, even greater caution should be exercised . . . .”); New York v. New
Jersey, 256 U.S. 296, 309 (1921); Missouri v. Illinois, 200 U.S. 496, 520-21
(1906); cf. Virginia v. West Virginia, 246 U.S. 565, 590 (1918) (“controlled by
great consideration for the character of the parties, no technical rules were
permitted to frustrate the right of both of the States to urge the . . . merits of
every subject deemed by them to be material”); comments of Judge Maris in
note 24 supra.

Texas, 253 U.S. 465, 471 (1920); Kansas v. Colorado, 185 U.S. 125, 144-45, 147
(1902).
sovereign,” whose “claim soars so high” as to assert want of jurisdiction in the Court.\(^{321}\) There may thus persist some vestige of the reasoning pertinent in the United Kingdom, that a “king-loving nation would be shocked at the spectacle of their Queen being turned out of her pleasure-garden by a writ of ejectment.”\(^{322}\)

Consistently, the rule of enhanced burden is not applicable in suits by states against individuals.\(^{323}\) In other words, the Court should always exercise restraint, but especially where the litigants are important, or because of the magic inherent in their quasi sovereignty, or even perhaps out of deference to their original altruistic self-denial in irrevocably vesting the Court with arbitral power. It might be suggested that states are “more sovereign” as to some controversies than as to others, so that a distinction could be made based upon the subject matter of the litigation,\(^{324}\) but the cases do not articulate any such differentiation.

More persuasive, possibly, as a reason for the rule, is the fact that the rights, health, and well-being of thousands and even millions of inhabitants of the states may be affected by the action (or inaction) of the Court.\(^{325}\) Typical examples are decrees allocating water resources for irrigation purposes or even as drinking water;\(^{326}\) a suit

---

\(^{321}\) Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 453 (1793) (Wilson, J.) (emphasis added).


\(^{324}\) Cf. Choctaw Nation v. United States, 119 U.S. 1, 28 (1886), where Mr. Justice Matthews declaims that the national sovereign and the Indian nations “are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.” (Emphasis added).

\(^{325}\) The same reason gives rise to the statement that “judicial relief sometimes may be granted to a quasi sovereign state under circumstances which would not justify relief if the suit were between private parties.” Florida v. Mellon, 273 U.S. 12, 16 (1927) (dictum). Compare Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904) with Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907). Small farmers could not enjoin devastating sulphurous gases produced by two great copper smelters, because, according to the Tennessee court, “a great and increasing industry in the state [would] be destroyed, and . . . valuable . . . properties of the state become worthless.” Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 343, 83 S.W. 658, 660 (1904). But according to Mr. Justice Holmes, the quasi sovereign state of Georgia, as parens patriae to the small farmers, not as property owner, could do so. While Georgia’s demand must be examined with caution, “[i]f the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be.” Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907).

\(^{326}\) E.g., Arizona v. California, 373 U.S. 546 (1963); New Jersey v. New
to abate the nuisance created by discharge of sewage into interstate streams, possibly causing typhoid epidemics; and a declaration of a state's power to terminate or unduly to burden interstate natural gas deliveries. Even "private land titles cannot ignore the boundary" established in controversies between states. In any case, the rights and condition of great numbers are often affected in this class of cases, notwithstanding they are neither party nor privy to the litigation.

The rule of increased burden, though apparently never questioned by the Court, could be assailed. For example, as to the dignity of the parties, it is also an affront to leave an eminent litigant remediless in circumstances where a private party might secure relief. Moreover, it seems to denigrate the value of the individual as against the "group" to suggest that greater objective certainty is desired when the rights of many are involved instead of the rights of one man only. It is also just conceivable that the many highly authoritative statements of the rule in the cases were mere makeweight.

Nevertheless, the rule is well settled and, it is believed, sound. A complainant state's case must be fully proved by clear and convincing evidence. The Court as trier of facts seeks and ought to be given, every possible aid to establish the relevant objective facts, not only correctly but conclusively.


Anderson-Tully Co. v. Tingle, 186 F.2d 224, 228 (5th Cir. 1948), cert. denied, 335 U.S. 816 (1948); accord, Florida v. Georgia, 58 U.S. (17 How.) 578, 511 (1854) (Curtis, J.) (dissenting opinion) (titles of hundreds of landowners may be affected by running boundary line in one place rather than another). But see California v. Southern Pac. Co., 157 U.S. 229, 268 (1895) (dissenting opinion). See also Uhlhorn v. United States Gypsum Co., 366 F.2d 211, 217 (8th Cir. 1966).

Philosophically, indeed, it might be suggested that the rule elevates ends over means.

The rule may be contrary to that of international law, under which the burden of proof is sometimes allotted to the defendant and the Tribunal may vary the quantum of proof from case to case and from issue to issue. See, e.g., J. Simpson & H. Fox, International Arbitration 193-94 (1959).

"[E]ven when the case is first referred to a master, [the] . . . Court has the duty of making an independent examination of the evidence, a time-consuming process . . . ." Georgia v. Pennsylvania R.R., 324 U.S. 439, 470 (1945) (Stone, C.J.) (dissenting opinion).
Perhaps the most interesting question relating to the emphasis on certainty in original jurisdiction cases is that of res judicata. The question was adverted to as early as 1792 when Mr. Justice Blair observed that "no right [there Georgia's] can be defeated, in law, unless the party claiming it, has himself an opportunity to support it." Thenceforward to refer to the Court, the problem is quite unsatisfactorily resolved, as pointed up by the recent decision in Durfee v. Duke. Nonetheless, the res judicata problem may help e-
plain the great emphasis in the cases on necessary and indispensable parties.337 For example, Mr. Chief Justice Fuller emphasized that it is especially important that all indispensable parties be joined in such cases: "[I]t does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound . . . ."338

The hearsay rule, as another example, theoretically serves the purpose of certainty in determinations of fact. It is true that many decisions of government, and perhaps most decisions of private life, are based upon hearsay and evidence otherwise inadmissible in a judicial proceeding. Similarly, issues in many (but not all) original jurisdiction cases are more legislative or political in character than typical private litigation. The hearsay rule itself has been subject to substantial attack and there has been an appreciable erosion of the rule. Yet to date all common law courts339 (and even some international law authorities)340 are agreed that, absent special marks of verity, the likely tendency of hearsay to mislead outweighs any possible probative value.341 The idea is that the trier of fact—whether jury or judge—is handicapped unduly when unable to test the sincerity, narrative ability, perception, and memory of the declarant, or even his opportunity to observe, with respect to the facts declared. Cross-examination,342 the confrontation of witnesses and be authoritatively decided, either in an original proceeding between the States in this Court or by a compact . . . that the disputed tract is in Missouri." Id. at 117.

337 See cases cited in notes 163 supra and 338 infra; cf. New York v. Illinois, 274 U.S. 488, 489 (1927) ("The waters are international and their use may require the assent of the Dominion of Canada and the United States."). See also Arizona v. California, 298 U.S. 558, 568, 571-72 (1936) (United States indispensable), and cases there cited.

338 California v. Southern Pac. Co., 157 U.S. 229, 257 (1895); accord, United States v. Louisiana, 354 U.S. 515, 516 (1957); Texas v. ICC, 258 U.S. 158, 163-64 (1922); Minnesota v. Northern Sec. Co., 194 U.S. 199, 235, 245-47 (1902); cases cited notes 161 and 329 supra. See also Texas v. New Mexico, 344 U.S. 906 (1952), where the Court ordered that "the master is directed, so far as is practicable, to hear first evidence bearing on the indispensability of the United States, if the United States does not enter its appearance in the case."


340 Text accompanying note 277 supra.

341 See, e.g., V Wigmore § 1362; Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948). See also United States v. Oregon, 295 U.S. 1, 19 (1935); authorities cited notes 307 and 311 supra.

342 See Arkansas v. Tennessee, 247 U.S. 461, 462-63 (1918), where the Court's interlocutory decree provided in part: "[S]aid Commission is au-
the aid of countenance-reading (demeanor evidence) are highly valued in the common law tradition.

International evidentiary doctrine might open the door to unsworn extrajudicial statements, affidavits and the like, rankest hearsay not subject to cross-examination, mere supposition and conjecture, all of which is contrary to the desire for certainty avowed in original jurisdiction cases. The radical nature of the change proposed is emphasized when account is taken of the fact that international tribunals historically have had very limited subpoena powers, if any, because most conventions do not provide for compulsory attendance of witnesses. Therefore, in fact, "oral testimony is [only] rarely presented before international tribunals."

Authorized and empowered to make examination of the territory in question, and to adopt all ordinary and legitimate methods in the ascertainment of the true location of said boundary line; to summon witnesses and take evidence under oath; to compel the attendance of witnesses and require them to testify; to call for and require the production of papers and other documentary evidence; such evidence, however, to be taken upon notice to the parties, with permission to attend by counsel and cross-examine the witnesses . . . ." (Emphasis added).

Affidavits have, however, been used on at least one occasion in the original jurisdiction. Wyoming v. Colorado, 309 U.S. 572, 581-82 (1940) (on question of alleged acquiescence as defense to contempt citation for violation of decree). Presumably they would also be appropriate, for example, on motion for summary judgment.


E.g., United States v. Oregon, 295 U.S. 1, 19 (1935) ("testimony . . . often vague and untrustworthy . . . because based on estimates and unaided recollections over long periods of time"); New York v. New Jersey, 256 U.S. 296, 309-10 (1921) ("evidence introduced . . . much too meager and indefinite to be seriously considered as ground for an injunction").


1 Wigmore § 4m at 154. As of 1962, evidence has been heard orally by the International Court of Justice on only one occasion. S. ROSENNE, THE WORLD COURT 112 (1962). On that occasion, lasting fourteen days, there is no record that any justice ever put a question to any witness. Id. In fact, Rosnene speaks of the oral proceedings as "oral pleadings." Id. at 109. Witnesses were also heard orally in the Southwest Africa Case, [1956] I.C.J. 23. See also S. ROSENNE, THE INTERNATIONAL COURT OF JUSTICE 394-404 passim (1957); J. SIMPSON & H. FOX, INTERNATIONAL ARBITRATION 153, 193 (1959); Herzog, THE PROCEDURE BEFORE THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, 41 WASH. L. REV. 438, 454, 469-71, 474-78 (1966).
Such considerations, assuming them to have merit at all, and assuming the enhanced burden rule is sound, not makeweight, are more pertinent in the original jurisdiction context than elsewhere and thus weigh heavily in favor of continued use of common law adjective rules. The same analysis should be equally applicable to other exclusionary rules and may be germane to other elements of trial practice as well.

Conclusion

The complexity (and perhaps the importance) of controversies in the original jurisdiction increases the need for convenient and accustomed practice in order to augment objective certainty. The accumulated weight of historical experience, mechanical application of international law principles of standing and general conflict of laws rules, however conceived, and the policies underlying most (but not all) of the American adjective law all join to impel the conclusion that common law modus operandi should continue to be applied, and generally rigorously, in such cases.

It is an extraordinary fact that, until Michigan’s motion, no justice, no master, and no advocate, so far as appears, had suggested international law practice—as distinguished from substantive law—as the mode of proceeding in original jurisdiction cases. A great accumulation of precedent, albeit all in the context of “power,” or merely in casting about for practical solutions,—and without international law adjective rules being offered as an alternative—stands against the claim. Conceivably, Michigan considered that the strong, laudable desire and highly desirable goal of ending international strife, might induce the Court to seize upon its theory as a preliminary step, or even as a mere gesture of good will, toward that end. The consummation in mind is certainly highly attractive. Assuming that is what Michigan had in mind, it might presuppose that some of the Justices labor under the “compulsion of internationalist and altruist ideals.” But this is unfair to the Court. As a Supreme Court must, the Court has expressed strong concern about questions plumbing beyond national boundaries: “Our concerns are planetary, beyond sunrises and sunsets.” That is precisely where our concerns should be.

International law adjective rules are, for the time being at least, a seemingly unusable tool for cases in the original jurisdiction, unless

\[348\] See text accompanying note 17 supra.


one takes the optimistic view that rules of any kind are not needed.\footnote{351}
Mr. Justice Jessup, speaking of substantive law, puts it this way:

Transnational law . . . includes both civil and criminal aspects, it
includes what we know as public and private international law, and it
includes national law, both public and private. There is no inher-
ent reason why a judicial tribunal, whether national or international,
should not be authorized to choose from all of these bodies of law the
rule considered to be most in conformity with reason and justice
for the solution of any particular controversy. The choice need not
be determined by territoriality, personality, nationality, domicile, ju-
risdiction, sovereignty, or any other rubric save as these labels are
reasonable reflections of human experience . . . .\footnote{322}

Yet reason and justice are not equally revealed to all: The Southwest
Africa Case\footnote{353} 555 was decided by a vote of 8 to 5.

A “true principle,” common as well to Athens as to Rome, enduring
now as in ancient Sumeria, “una eademque lex,” may have exist-
ence somewhere. Such a towering personality as Marcus Tullius
Cicero thought that this was so.\footnote{354} On the other hand, it may be
that such “universal” law is known, and knowable, only to the

\footnote{351 See The Trail Smelter Arbitration (United States v. Canada), 3
U.N.R.I.A.A. 1905 (1941), quoted in Green, supra note 62, at 777, 782, which
states a Rule of Procedure adopted by the United States-Canada Arbi-
tral Tribunal: “With regard to any matter as to which express provision is
not made in these rules, the Tribunal shall proceed as international law, jus-
tice and equity may require.” But see Schwarzenberger, The Inductive
Approach to International Law, 60 Harv. L. Rev. 539, 549 (1947), where it is
stated that the “admittedly time-saving device of recourse to [the lofty realms
of] ‘the general principles of law recognized by civilized nations’ is ‘as eclec-
tic and arbitrary—and as easily liable to abuse—as any straight-forwardly
naturalist and deductive treatment.’ See also Le Mesurier v. Le Mesurier,
[1895] A.C. 517, 539, where it is stated that “[t]he introduction of so loose a
rule into the jus gentium would, in all probability, lead to an inconvenient
variety of practice, and would occasion the very conflict which it is the object
of international jurisprudence to prevent.”}

\footnote{355 P. Jessup, Transnational Law 106-07 (1956). “The problem of de-
veloping transnational law is not actually so difficult as it is sometimes made
to appear.” Id. at 108. This view would seem rather far removed from the
“cold and assiduous inquiry” advocated by more cautious men. J. Stone,
Aggression and World Order 174 (1958). Neither does it embody Stone’s
pessimistic (and more realistic?) outlook. E.g., id. at 148-49; Stone, Book
See also W. Rappard, The Quest for Peace: Yesterday and Today 41-42 (1954);
Falk, The Role of Domestic Courts in the International Legal Order, 39 Ind.

It is noteworthy too that that the creator of such law might constitute
“a will which, being the source, cannot be the object of laws, and is therefore
despotic.” Lord Acton, Political Causes of the American Revolution, in Essays


\footnote{357 Cicero, De Legibus I, xv at 344-45 (Loeb ed. 1928); id. at II, iv, 380-83;
Cicero, De Re Publica III, xxii at 210-11 (Loeb. ed. 1928).}
The advocates of caution and restraint still take the view of Mr. Justice Field:

I cannot assent to the doctrine that there is an atmosphere of general law floating about all the states, not belonging to any of them, and of which the Federal judges are the especial possessors and guardians, to be applied by them to control judicial decisions of the state courts whenever they are in conflict with what those judges consider ought to be the law.355

Justice Brandeis' jurisprudence and the contemporary Weltanschauung of most jurists may have to give way again to that of Joseph Story, Lord Mansfield and Cicero. But just as "the range of acknowledged ignorance will grow with the advance of science,"357 so the difficulty of dispensing a just "justice" will wax as the universe of subjects expands. Moreover, as the scale increases, the measure of agreement on the hierarchy of ends will probably decrease, and the necessity to rely on force or coercion grow.358 There are many "social relations and interests" that Erich Voegelin, Hans Kelsen, or any other


356 Baltimore & O.R.R. v. Baugh, 149 U.S. 368, 399 (1893) (Field, J.) (dissenting opinion). But see Erie R.R. v. Tompkins, 304 U.S. 64, 84 n.1 (1938) (Butler & McReynolds, JJ.) (concurring opinion): "The dissent by Justice Field failed to impress any of his associates . . . . He joined in applying the doctrine for more than a quarter of a century before his dissent. The reports do not disclose that he objected to it in any later case." Cf. A. Camus, Resistance, Rebellion and Death 124 (J. O'Brien transl. 1961): "If absolute truth belongs to anyone in this world, it certainly does not belong to the man or party who claims to possess it. When historical truth is involved, the more anyone claims to possess it, the more he lies." See also Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175, 208-09 (1863) (dissenting opinion).


358 See, e.g., the result of the decision of the Supreme Court of California voiding Proposition 14, which would have repealed the state's "Fair Housing" Law. Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966). "The immediate effect of the ruling was to release $22 million in federal funds for redevelopment in California cities. The money had been held up because the state law conflicted with federal regulations." Seattle Times, May 10, 1966, at 1, col. 6 (night sports final ed.) (emphasis added). Compare H. Finer, Road to Reaction xi-xii (1945), with A. Camus, Resistance, Rebellion and Death 191 (J. O'Brien transl. 1961).

See also Arkansas v. Texas, 346 U.S. 368, 373 (1953) (Jackson, J.) (dissenting opinion).
thinking person of whatever persuasion, would “like to have protected. [B]ut such wishes are of a subjective nature;”369 they change, depending upon whose ox is being gored.360 So long as there is any possibility that judicial dispositions of controversies can be mere “arrangements to be projected on a computer or predicted from the bias of a judge,”361 common law adjective rules would seem preferable to the “common sense”362 (or substantially nonexistent) international law modus operandi. The answer to the claim that no rules are needed, but only an appeal to “that larger reason,”363 is perfectly expressed by Professor Freund: “Judges are circumscribed by rules of evidence, by precedent . . . by all the constraints that make it tolerable to sit in judgment on the responsibility of others, that serve to remind the judge . . . that he is not God.”364

361 See 62 Martin Luther, Works 449 (1854).
363 See authorities cited note 280 supra.
364 “The rules . . . which govern public treaties . . . are not to be read as rigidly as documents between private persons governed by a system of technical law, but in light of that larger reason which constitutes the spirit of the law of nations.” Choctaw Nation v. United States, 119 U.S. 1, 28 (1886) (Matthews, J.) (emphasis added).