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What Story Got Wrong – Federalism, Localist Opportunism and International Law

*Paul B. Stephan**

I. INTRODUCTION

In *Swift v. Tyson*, Justice Story argued that the rules of commercial law were too important to be localized.¹ The case involved a negotiable instrument. This specialized contract depends on wide circulation and acceptance for its value. Uniform rules promote these qualities, and an international body of legal rules already existed for this instrument.² Story concluded that

* Lewis F. Powell, Jr. Professor and Elizabeth D. and Richard A Merrill Research Professor, University of Virginia School of Law. I am grateful to the conference participants for their comments and criticism. They should not be blamed for any of this article's deficiencies. The article draws on my recent work as Counselor on International Law in the Office of the Legal Adviser, U.S. Department of State. The views expressed herein, however, are mine personally and should not be assumed to be those of the Office of the Legal Adviser or of any other component of the U.S. government.

1. "The law respecting negotiable instruments may be truly declared in the languages of Cicero, to be in a great measure, not the law of a single country only, but of the commercial world." *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842) (citation omitted).

2. It is for the benefit and convenience of the commercial world, to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of, and as security for, pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of, or as security for, pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then, by circuitry, to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably, more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would

federal courts, in the exercise of their diversity jurisdiction, should construe their statutory authority so as to disregard local rules that might obstruct the construction of a national common market in harmony with the international financial community.³ Accordingly, the Court ruled that the federal judiciary could ignore a rule developed by the courts of New York, even though New York law governed the negotiable instrument in question.

Implicit in Story's argument is an assumption that state courts will embrace rules of law that harm general welfare. They might do so either because they are foolish or, more likely, because they seek local benefits at the expense of the national interest. At the time of the founding, the principal argument for creating the federal courts' diversity jurisdiction was a belief, based on considerable evidence, that state courts favored local parties to the detriment of the national interest. Story's interpretive strategy resonated with this constitutional determination: State judges are subject to local pressures inimical to interstate commerce and should be marginalized whenever possible.

Story's insight that the actions of local judges reflect local pressures seems indisputable. What he got wrong, however, is the assumption that local actors inevitably have an incentive to act so as to disadvantage outsiders. To be sure, it is an easy mistake to make. In any representative polity, local officials must answer mostly to local interests, because outsiders lack the franchise. But this argument is too primitive. Other mechanisms beside direct political accountability can induce local actors to internalize the effects of their actions on outsiders. Local officials do not always need federal supervision to promote acts that redound to the nation's benefit.

This point is fundamental to any inquiry into the role federalism plays in international law. If Story is wrong, then so are many others. In particular, Story's claim – that in law, localism is pervasive and inevitable, and thus requires federal supervision – underlies prominent arguments for the federalization of international rules within the domestic legal order. Harold Koh, for example, argues:

One need not denigrate the ability or impartiality of state court judges to recognize that the federal judges have *structural* attributes that make them more appropriate adjudicators to rule on international matters that may embroil the nation in foreign policy disputes. Unlike state judges, who are effectively unaccountable to

strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

Id. at 20.

3. To be precise, the Court ruled that Section 34 of the Judiciary Act of 1789, 1 Stat. 73, 92 (the so-called Rules of Decision Act), allows federal courts sitting in diversity to disregard state court decisions that address questions of general law and do not involve the interpretation of otherwise applicable local legislation. 41 U.S. at 18-19.

national institutions on matters of pure state law, federal judges are nominated by a national official (the President), are confirmed by a national body (the Senate), are granted salary independence and life tenure, and render federal common law rulings subject to review and revision by federal appellate courts, Congress, and the executive branch.⁴

Others too have maintained that international law must be federal to avoid local actions that, as Koh put it, “may embroil the nation in foreign policy disputes.”⁵ These scholars walk with Story in seeing the risk of localism as a compelling argument for a nationalist approach to international law – that is, regarding all international law as federal in nature and presumptively enforceable by federal courts at the behest of interested parties.

The core error in Story’s argument is the assumption that the accountability of local actors necessarily depends on direct federal supervision. The nationalist argument is not only primitive, but inconsistent with the assumptions of other arguments that proponents of international law generally embrace. One anti-nationalist critique of customary (that is, non-treaty) international law is that individual nation-states are likely to defect from generally desirable norms due to local opportunism.⁶ In response, international law proponents contend that the iterative nature of international interactions can, if certain conditions are satisfied, alter the incentive to defect from a

4. Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1849 (1998) (emphasis added). For those embracing this argument, the lodestone modern Supreme Court citation is *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (“[T]he competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.”).

5. E.g., John Norton Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248. For a doctrinal, rather than instrumentalist, critique of the nationalist position, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

6. To be precise, these critics argue that many problems supposedly addressed by customary international law have the nature of a prisoners’ dilemma game, which induces defection rather than cooperation. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 23-82 (2005); see also ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* 141-46, 206-12 (2006) (discussing instrumentalist dimensions of recognizing customary international law); Paul B. Stephan, *The Institutional Implications of an Odious Debt Doctrine*, LAW & CONTEMP. PROBS., Summer 2007, at 213 (discussing difficulties with particular customary international law doctrine).

generally desirable cooperative outcome.⁷ But if customary international law can emerge among nation-states without the supervision of an international enforcer, why insist that the U.S. states always must submit to the nationalist discipline of the federal courts?

I first explain the theoretical underpinning of the argument against the inevitability of localist opportunism. I then illustrate the general theory with three examples where the international obligations of the United States can be met without the strong federal supervision that Story deemed necessary and that latter-day nationalists embrace. I first discuss the body of law that was the subject of *Swift v. Tyson*, namely the rules governing negotiable instruments. Story thought that developing a federal common law was necessary to thwart idiosyncratic, and presumably opportunistic, state decisions. Yet both before and after the overthrow of *Swift v. Tyson* in 1938, the United States attained national uniformity in negotiable instrument law without resorting to national supervision. The next examples involve the Hague Child Support Convention and the UNCITRAL Electronic Commerce Convention, two private international law treaties which the United States might relegate to state enforcement. In the conclusion, I discuss the broader implications of these debates and relate them to ongoing controversies over the role of the judiciary in propounding public law and the significance of international law.

II. THE LIMITS OF THE ARGUMENT FROM LOCALIST OPPORTUNISM

One of the main reasons the Founders replaced the Confederation was the unwillingness of the states to meet the commitments made through the 1783 Treaty of Paris.⁸ The United States had promised to honor commercial obligations owed British subjects and to redress expropriations of their property, but state legislatures and courts refused to go along.⁹ The naked interests at stake seem clear enough: Not just national honor, but renewed commerce depended on enforcing the treaty. Yet these benefits attached to the entire nation and, from a local perspective, were diffuse. The rewards from protecting local debtors (including the holders of wrongfully expropriated property) were direct and concentrated. It was another act in the tragedy of the commons, with self-interested and uncoordinated local actors plundering a common resource. For purposes of clarity, I will refer to such behavior as localist opportunism.

There is nothing wrong with the starting point that local officials sometimes have an incentive to disregard a generally optimal legal strategy and instead may reward local actors. Much of international trade theory rests on

7. E.g., George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005).

8. Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

9. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); Wythe Holt, "To Establish Justice": *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421.

this premise, as do bodies of law such as federal preemption doctrine.¹⁰ Story's mistake was to assume that this problem was absolute and thus demanded a categorical solution. Local decisionmaking authority is a necessary, but not a sufficient, condition for localist opportunism. Even though outsiders lack direct political means of influencing local decisionmakers (indeed, that is the definition of an outsider), other means may exist to induce local decisionmakers to account for the effect of their actions on outsiders.

A widely accepted model of the political and economic interests that lead to lawmaking supports the first step in this argument: Not all regulatory issues present a significant risk of localist opportunism. Game theory provides an analytic approach to the general problem of indirect coordination of behavior. Simplifying greatly, two general classes of problems present themselves. Instances where cooperation is desirable but individual actors have an incentive to defect from the cooperative outcome are called collective action problems. Instances where actors lack an incentive to defect and instead search for an outcome around which cooperation can coalesce are called coordination problems. A familiar example of the latter is the rule governing which side of the road to drive on: Once a solution becomes conventional, drivers face strong disincentives to defect even in the absence of state enforcement.¹¹

The solution to coordination problems involves a credible norm entrepreneur, someone who can stake out a position around which others coalesce. This entrepreneur need not be an official body, as long as its position has sufficient notoriety and credibility. Recognition of the norm itself alters the incentives parties face.

In the case of collective action problems, altering the incentive to defect may entail further steps. For example, Congress occasionally will induce states to participate in a collective-action project (that is, a program that produces general benefits if all participants cooperate, but that unfolds in an environment where there exist local incentives to defect) by making funding conditional on cooperation. Consider the minimum drinking age in the United States. Not too long ago, states had unfettered discretion to set that age (a power arguably enshrined in the second section of the Eighteenth Amendment). Because of population mobility, however, a state that sets the age higher than its neighbors faces the risk of low-cost avoidance. Moreover, the

10. See generally Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23 (1983); Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983); Paul B. Stephan, *Redistributive Litigation – Judicial Innovation, Private Expectations, and the Shadow of International Law*, 88 VA. L. REV. 789 (2002).

11. On the general problem of cooperation in the absence of external enforcement, see THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1980). For a discussion of collective action and coordination problems in the context of international relations, see Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923 (1985).

larger the number of states that set a higher limit, the greater the incentive to holdouts to make the age low to attract revenues from outsiders. Congress responded not by enacting a national minimum drinking age (which might face constitutional objections), but by conditioning certain kinds of federal funding on compliance with a 21-year-old floor. The central government, in other words, can alter the incentives by adding some of its own, rather than by directly mandating an outcome.

The central funding approach may not seem to differ all that much from direct supervision. But, as the discussion below of the Child Support Convention will illustrate, the United States has only limited experience with the use of financial incentives, not backed up by legal command, as a means of procuring state compliance with its international obligations. The recent decision of the United States to sign this Convention may represent a new approach in its treaty practice.

More interesting, at least as a conceptual matter, are cases where market forces work to align the incentives of locals with the interests of outsiders. Consider, for example, the longstanding debate about the desirability of federalism in the law of corporate governance. During the middle of the twentieth century, the dominant argument was that of Adolph Berle and Gardiner Means.¹² They saw localist opportunism behind the existing rules governing managerial discretion and the rights of shareholders. Managers, the argument went, could choose where to incorporate, and surely would pick rules that best benefited managers. The result was a “race to the bottom,” which Delaware won by providing the package of rules that best facilitated the exploitation of shareholders by managers. For example, Delaware’s business judgment rule, which stringently limits the authority of a court to review the wisdom of decisions made by a corporate board of directors, allegedly gives corporate managers a free pass at the expense of shareholders who suffer the consequences of bad business decisions. Berle and Means suggested that Delaware adopted such rules because it reaped local benefits from providing a seat to many publicly traded corporations, while the shareholders who suffered from the exploitation resided largely out of state.

Ralph Winter first challenged this claim, and Roberta Romano later produced a comprehensive response based on extensive empirical evidence.¹³ Managers, Winter and Romano argued, are sensitive to share price, because under conditions of dispersed ownership and efficient capital markets underpriced stock may lead to a takeover of the firm and a resultant firing of the managers. To optimize share price, managers should choose the package of rules that best trade off managerial expertise against outside supervision. Put differently, sensitivity to share price means that the incentives of managers

12. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

13. ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEG. STUD. 251 (1977).

are aligned with those of shareholders. If it wanted to reap the benefits derived from managerial decisions to incorporate under its laws, Delaware had to craft the legal regime that optimally satisfied the interests of shareholders, even though most of these shareholders had no political connection to the state and no direct influence over the decision of where to incorporate.

The corporate governance conundrum illustrates a general point. Competition may discipline localist opportunism. If one thinks of local official actions as a kind of product, then a competitive market for that product would induce the producer (local officials) to behave in a way that consumers (those affected by their actions) will find attractive. Under these conditions, insiders serve as proxies for outsiders.¹⁴

Reality, of course, is messy. Capital markets are not perfectly efficient. Indeed, completely efficient competition is not realized in any sphere of human activity. A more nuanced argument would compare costs generated by imperfect alignment of local and general incentives – the divergence between the interests of management and those of shareholders under conditions of incomplete information in financial markets – with costs generated by government failure – the possibility that mandatory regulation will do worse. Central authorities, whether courts or some executive body, are hardly infallible and may fall prey to any of a number of systemic biases. Information asymmetries plague the regulatory process, whether judicial or administrative. Moreover, the existence of regulatory power itself provides an incentive for interested parties to influence the exercise of that power in their favor. Various structural problems may enable some parties to play this game more effectively than their rivals can.¹⁵

Determining whether government failure problems outweigh market imperfections remains at bottom an empirical exercise. The environments in which legal rules operate change and the balance between these risks may shift. A good case can be made that at the time Story decided *Swift v. Tyson*, competition among banking centers within the United States was too underdeveloped to deter localist opportunism. Thus, Story may have accurately assessed the localist motivation of New York's idiosyncratic rule on the qualifications for holder-in-due-course status. But this particular insight does not justify a general position on the risk of localist opportunism.

14. See generally Paul B. Stephan, *Regulatory Cooperation and Competition: The Search for Virtue*, in TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS 167 (George A. Bermann et al. eds., 2000).

15. See generally Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1996-97).

III. NEGOTIABLE INSTRUMENT LAW IN THE UNITED STATES

Strictly speaking, there is no international law devoted specifically to negotiable instruments. UNCITRAL promulgated a Convention on International Bills of Exchange and International Promissory Notes in 1988, but only a handful of countries have signed or ratified it and entry into force seems unlikely.¹⁶ Instead, municipal (domestic) law apply to these contracts, with choice-of-law rules grounded in international custom determining which nation's law governs.

Without a uniform set of rules and institutions, there exists the possibility that a locality might use its position to accrue local benefits that impose general costs on the global system of negotiable instrument transactions. Several exploitative strategies suggest themselves. First, a jurisdiction might apply idiosyncratic rules to induce outsiders to hire local lawyers and related specialists.¹⁷ Second, a jurisdiction might eschew rules in favor of general standards, also to induce outsiders to hire local experts who would have a great familiarity with the preferences of the judges who would apply these standards.¹⁸ Third, a jurisdiction might engage in bait-and-switch tactics to benefit local interests, discounting the cost of reduced business opportunities in the future. If, for example, debtors were disproportionately local and creditors were disproportionately outsiders, then a jurisdiction might announce a surprising new rule that lets debtors off the hook. This strategy might harm future debtors who might have to pay higher interest rates to offset the revealed legal risk, but local decisionmakers might have a sufficiently truncated time horizon to ignore this effect.

This concern is not merely hypothetical. In *Swift v. Tyson*, it appeared to Story that New York courts had pulled a bait-and-switch on outside

16. United Nations Convention on International Bills of Exchange and International Promissory Notes, G.A. Res. 43/165, U.N. Doc. A/RES/43/165 (Dec. 9, 1988). The United States signed the Convention but the Senate has not consented to ratification.

17. For example, New York until recently had a unique provision in its version of Article 5 of the UCC that allows the issuing bank to specify that a letter of credit would be governed entirely by the rules contained in the International Chamber of Commerce's Uniform Customs and Practice, rather than by Article 5 itself. N.Y. U.C.C. LAW § 5-102(4) (Consol. 1999), *repealed by* 2000 N.Y. Sess. Laws ch. 471, § 1. If one assumes that New York, as an international banking center, already enjoyed a positional monopoly, then authorizing a special legal regime for a common banking transaction might have induced out-of-state customers to use New York banks and lawyers to maximize familiarity with the applicable law, rather than to go elsewhere to obtain letters of credit.

18. Ehud Kamar has argued that this dynamic, rather than incentives to promulgate rules that maximize shareholder value, explains Delaware's corporate law. See Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998).

creditors. Commercial law then, as now, allowed a holder in due course to enforce a debt even if the original creditor had committed fraud in the course of the initial transaction. A holder in due course is someone who pays a valuable consideration for the debt and has no notice of the original creditor's fraud. At the time of the case, courts generally treated the discharge of a preexisting debt as the equivalent of a direct payment and thus as valuable consideration. New York's courts, however, had waffled on this point, and the lower court in *Swift v. Tyson*, a federal court exercising diversity jurisdiction, decided that the discharge of a preexisting debt would not count. As a result, the (local) debtor could raise a fraud defense against an unwitting, and presumably outsider, downstream creditor. The downstream creditor presumably overpaid for the debt because he assumed that he would enjoy the rights of a holder in due course, an assumption that a general knowledge of the law would have supported.¹⁹ To rectify this perceived injustice, the Court ruled that a federal court sitting in diversity was not bound by a state's judge-made law, but instead could develop and apply federal common law.

Within the United States, however, the subsequent development of the law of negotiable instruments has confounded Story's assumption about localist opportunism. The states first superseded the federal common law by adopting a uniform statute, namely the Uniform Negotiable Instruments Law.²⁰ In 1938 the Supreme Court overthrew completely the federal common law regime created by *Swift v. Tyson*.²¹ Rather than leaping into a race to the bottom after *Swift's* reversal, the states continued to pursue a cooperative strategy of legal harmonization. In 1952 the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated Article 3 of the Uniform Commercial Code (UCC). This statute, now in effect in all the states, ensures that the primary legal rules governing negotiable instruments achieve nationwide uniformity. Indeed, the UCC categorically resolves the precise issue in dispute in *Swift v. Tyson*, namely whether satisfaction of a prior debt constitutes value sufficient to qualify the person acquiring an instrument as a holder in due course.²²

What explains the defeat of localist opportunism here? One clue is that both of these uniform laws reflected the preferences and efforts of a relatively homogenous interest group, specifically the banking industry. To be sure, during the first half of the twentieth century, banking in the United States was largely state-based rather than national, especially regarding services such as negotiating checks and bills of exchange. But the industry employed national organizations for purposes of lobbying and coordinating its policy positions.

19. For a general discussion of the use of surprising new rules by courts to harm outsider creditors and investors, see Stephan, *supra* note 10.

20. The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Law in 1896, and by 1924 all the then-states had adopted it.

21. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

22. The UCC reaches the same conclusion as did *Swift v. Tyson*, namely that it does. U.C.C. § 3-303(a)(3).

These organizations essentially dictated the statute that NCCUSL drafted and ensured that the state legislatures would fall in line. The industry, in turn, sought a legal regime that would capture the benefits of standardized nationwide rules, essentially economies of scale and scope.²³

Moreover, during the modern period there existed no local interests with a clear incentive to oppose the banking industry. There are many aspects of banking transactions that have distributional consequences and might pit the industry against its customers, or creditors against debtors, but the negotiation of commercial paper does not present many opportunities for exploitation of the unwary. The customers tend to be merchants, which is to say sophisticated commercial actors who can be both creditors and debtors. The expansion and deepening of the national common market since Story's day means that it is less likely for any one jurisdiction to be disproportionately representative of debtors or creditors. Transparency and standardization have obvious value to both. In the United States, improvements in transportation and communication led to intensified competition among banks, which generally deters the promulgation of one-sided, harmful rules. In short, by the end of the nineteenth century there existed in the United States economic conditions that encouraged voluntary cooperation by the states to adopt generally desirable rules governing negotiable instruments.

Finally, one might infer something from the failure of the 1988 UNCITRAL Convention on international bills of exchange to gain any traction. Merchants increasingly operate internationally and look beyond their home countries to negotiate instruments generated by these transactions. Although money transfers between banks for retail customers remain remarkably cumbersome, transactions in commercial paper among merchants generally proceed without too great a cost. One might infer that the present pattern of national laws satisfies the needs of these merchants, making an international regime unnecessary. Arguably, the same set of incentives that operates at the state level in the United States also allows international transactions in commercial paper to proceed in the absence of a single set of international rules. The banks can find their way to uniform rules without requiring an international (or national) legislator to enact them.

23. See generally Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

IV. THE HAGUE CHILD SUPPORT CONVENTION

In November 2007 the Hague Conference on Private International Law produced a Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.²⁴ This treaty confronts a growing problem resulting from international mobility, namely enforcement of support rights against a parent who lives in a different country from the child. In essence, the Convention establishes mechanisms for the recognition of a foreign child support order and forbids discrimination against orders emanating in a foreign judicial system.

One might imagine that the enforcement of foreign child support orders presents a collective action problem. If states prefer the interests of their residents to outsiders, then they might prefer both to enforce support orders in favor of resident children and to shelter resident parents from the obligation to pay money to nonresident dependents. A cooperative equilibrium of non-discriminatory enforcement might be optimal, but each state has an incentive to defect in favor of its residents. The problem for the lawmaker, then, is to overcome this incentive so that states give equal treatment to orders in favor of nonresident children.

In theory, the Convention responds to this need. The question remains, however, why states would comply with its requirements. Absent credible assurances that other states will adhere to its rule, no single state would have any reason to cooperate with the desired collective solution. The Convention does not itself provide any enforcement mechanism.

Reaching the cooperative outcome presents another layer of complexity in the United States, which was the first country to sign this Convention. Under the U.S. federal structure, the states have primary responsibility for the promulgation and enforcement of child support orders. The federal government provides indirect support, for example through the tax system, but state domestic relations courts do the actual work in obtaining compliance with support obligations. Thus, to ensure that it meets its international obligation, the United States must procure conforming behavior on the part of the states.

One approach that the United States might take is to adopt the Convention as federal law. Perhaps private persons, such as nonresident claimants under foreign child support orders, could sue states that fail to honor the Convention's requirements. Alternatively, the federal government might have an

24. The full text of the convention and information about the status of its adoption is available at the Hague Conference's web site. See Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=131 (last visited Oct. 10, 2008) (The United States signed the convention on November 23, 2007, but has not yet determined what steps it will take before seeking Senate consent to ratification. No other country has yet signed the Convention.).

exclusive right to sue noncomplying states. Either way, the judiciary would provide the enforcement mechanism that the Convention itself leaves out.

The existing structure of U.S. law in this area, however, points to a different enforcement mechanism. Statutes already in force require states to enforce foreign child support orders.²⁵ The U.S. government, specifically the Department of Health and Human Services, monitors compliance. When it detects deficiencies in state behavior, the Department has a powerful weapon to redress them, namely legislative authority to withhold funds otherwise due the state to support its welfare program.²⁶ The amounts at stake far exceed the sums involved in foreign child support orders.

In light of the existing regime, does the United States need to do anything more to meet its obligations under the Convention? The Executive already has all the authority it needs to police and sanction noncomplying behavior by the states. Adding a layer of judicial enforcement would increase the risk of nonuniform outcomes, leading to confusion and possibly sabotaging exactly the international cooperation that the Convention seeks to promote.²⁷

For some, the practical wisdom of excluding judicial enforcement of this Convention is beside the point. In their view, the Supremacy Clause constitutionally disables the Executive, acting with the consent of the Senate, from entering into a treaty that has no direct legal force, unless the treaty by its terms so provides.²⁸ Perhaps the United States could circumvent this supposedly insuperable obstacle by implementing the Convention through legislation, rather than submitting it to the Senate as a Treaty. But some would claim that approach also violates the Constitution.²⁹ Were this a convincing account of how the Constitution works, judicial supervision of a treaty such as the Child Support Convention would be ineluctable.

There is reason to doubt, however, whether these objections carry much weight. First, the Supreme Court on at least three recent occasions has expressed its confidence that the Executive and the Senate have the capacity to

25. 42 U.S.C. § 654 (2000).

26. 42 U.S.C. §§ 659(a), 666 (2000).

27. I develop this point more fully in a forthcoming paper provisionally titled *The Privatization of International Law*.

28. E.g., Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995); Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301 (1999); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002); cf. *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 185-91 (1st Cir. 2005) (Howard, J., dissenting) (questioning constitutionality of non-self-execution of treaties).

29. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); cf. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302 (11th Cir. 2001) (treating issue as nonjusticiable political question).

free treaties from judicial supervision.³⁰ These statements, although not precisely holdings in cases that depended on resolution of the issue, may give official decisionmakers, if not skeptical academics, some comfort with the preclusion of judicial enforcement. More fundamentally, the Supremacy Clause represents a mechanism designed to combat localist opportunism. To the extent that the Executive and at least one, if not both, branches of the legislature have taken adequate steps to combat this evil, insistence on an inescapable judicial role smacks more of fetishism than careful constitutional analysis.

In sum, the United States does not need to make the Hague Child Support Convention binding federal law enforceable by lawsuit to ensure that the states will honor the Convention's obligations. A system of financial sanctions administered by the Department of Health and Human Services can align the incentives of the states sufficiently to induce compliance. Giving private persons who are dissatisfied with a state's performance under the Convention a power to sue will add little if anything to these incentives and may even confound U.S. compliance.

V. UNCITRAL ELECTRONIC COMMERCE CONVENTION

Stipulation of formalities – a low-cost act that signals an intent to engender legal consequences – presents a classic coordination problem. Once a lawmaker promulgates a formality, distributional issues largely disappear.³¹ Suppose validation of a testamentary disposition turned on using the right formality, say affixing a blue ribbon or a red ribbon. Until the law embraces a particular choice, users of red ribbons would have diametrically opposed interests from users of blue ribbons. But once the law came to rest, all testators going forward would have a common interest in choosing the designated formality based on its legal consequences.³²

With the explosion of e-commerce – transactions involving contracts formed and executed electronically through the internet – comes the issue of what formality will have an effect equivalent to a signed piece of paper in the

30. *Medellin v. Texas*, 128 S. Ct. 1346 (2008); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 & n.10 (1989).

31. Distributional issues might lurk behind the choice of a formality if, for example, the required form mandated the use of a local good or the cost of employing the formality disproportionately burdened discrete groups. In the case of choosing a form to validate electronic signing of commercial contracts, however, neither of these consequences is plausible. The choice of a form to apply *ex post facto* to preexisting transactions might, however, have significant distributional consequences.

32. As a matter of game theory, this problem presents what is called a battle of the sexes. See DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 41-42 (1994). *Ex ante*, it does not have a fixed equilibrium, but going forward once a rule has been picked, there is no incentive to depart from it.

dead-tree world. The question of what should count as a valid and legally binding electronic signature can be reduced to one of how to attain clarity and breadth of acceptance. In a global marketplace nested in a wired world, adoption of a standard is far more consequential than the choice of which standard to use.

International coordination of these rules dates back to the 1996 UNCITRAL Model Law on Electronic Commerce.³³ UNCITRAL is a component of the United Nations that, among other things, drafts and endorses conventions and model laws related to international commerce.³⁴ UNCITRAL endorsement of a convention constitutes the opening of a multilateral treaty for signing and ratification. Promulgation of a model law is not equivalent to making a treaty and creates no international obligation. Rather, a model law serves as a focal point for coordination. States that implement a model law do not signal anything about their attitude towards international obligations, but they do indicate a willingness to participate in a cooperative solution to a coordination problem.

Because state rather than federal law governs most aspects of commercial transactions, the United States responded to the Model Law on Electronic Commerce in a manner that reflects the shared authority of the two levels of government. The National Conference of Commissioners on Uniform State Laws, a body that has no direct lawmaking authority but coordinates cooperation by state officials, drafted the Uniform Electronic Transactions Act (UETA) to implement the Model Law.³⁵ Congress in turn enacted the Electronic Signatures in Global and National Commerce Act.³⁶ The federal statute does two things. Section 7001 provides a general, but limited, authorization of the use of electronic signatures in international and interstate commerce. Section 7002 then provides that UETA, where it applies, will preempt and supersede Section 7001. All but a handful of states have adopted UETA, and Section 7001 ensures that the core features of the Model Law will apply as a matter of federal law in those few states that have not.³⁷

33. Model Law on Electronic Commerce, G.A. Res. 51/162, U.N. Doc. A/RES/51/162 (Jan. 30, 1997).

34. For more on UNCITRAL, see Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 753-54 (1999).

35. See National Conference of State Legislatures, Uniform Electronic Transactions Act, <http://www.ncsl.org/programs/lis/CIP/ueta.htm> (last visited Oct. 11, 2008).

36. Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. §§ 7001-06, 7021, 7031 (2006)).

37. According to the NCCUSL web site, all but four states, as well as the District of Columbia and the U.S. Virgin Islands, have adopted the UETA. See The National Conference of Commissioners on Uniform State Laws, *A Few Facts About the . . . Uniform Electronic Transactions Act*, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ueta.asp (last visited Sept. 30, 2008). The holdouts are Georgia, Illinois, New York and Washington, each of which has legislation that provides a functional equivalent to UETA. Georgia Electronic Records and Signatures

In 2005 UNCITRAL adopted a Convention dealing with electronic commerce.³⁸ It converts the elements of the Model Law into a treaty, thereby obligating parties to incorporate the rules of the model law into their legal systems.³⁹ In considering whether to join such a Convention, the United States must determine whether implementation of this obligation by existing state legislation suffices to ensure U.S. compliance.

Unlike the Child Support Convention, the Electronic Commerce Convention would not come bundled with financial incentives to the states. Unless Congress were to adopt new legislation, only Section 7001 would govern transactions arising in states that had not adopted UETA. Section 7001 honors the spirit, but does not contain all the requirements, of the Convention. Although it bars states from refusing to recognize electronic signatures, Section 7001 does not specify what standards are sufficient to make an electronic signature legally valid. To meet fully its obligations under the Convention, the United States either would have to enact implementing legislation, wait until the four holdout states (including critically important New York) enact UETA, or determine that the existing law in the holdout states satisfies the obligations of the Convention. Moreover, the United States would have to assess the risk that states might repudiate UETA down the road, either through an outright repeal or by adopting inconsistent law. Put broadly, can the United States enter into an international agreement that would depend on

Act, GA. CODE ANN. §§ 10-12-1 to 10-12-5 (2000 & Supp. 2007); Illinois Electronic Commerce Security Act, 5 ILL. COMP. STAT. ANN. 175/5-105 (West 2005); New York Electronic Signatures and Records Act, N.Y. STATE TECH. LAW §§ 301-309 (McKinney Supp. 2008); Washington Electronic Authentication Act, WASH. REV. CODE ANN. §§ 19.34.010-.903 (West 1999 & Supp. 2008).

38. Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, U.N. Doc. A/RES/60/21 (Dec. 9, 2005). See generally Charles H. Martin, *The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law*, 16 TUL. J. INT'L & COMP. L. 467 (2008). A total of 18 countries signed the Convention, but none has ratified it. The Convention is no longer open for signing, but countries that did not do this, such as the United States, may accede to it at any future date. The Convention will enter into force at a set period following three ratifications.

39. The Electronic Commerce Convention admonishes its parties to interpret its rules with "regard . . . to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade" as well as "in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." G.A. Res. 60/21, *supra* note 38, art. 5. The Uniform Law contains a similar injunction, Uniform Law Article 3, but UETA does not. Whether the absence of interpretative aspirations constitutes a significant difference between the Convention and the current legislation in force in the states is debatable. For the argument that the difference is significant, see Charles H. Martin, *The UNCITRAL Electronic Contracts Convention: Will It Be Used or Avoided?*, 17 PACE INT'L L. REV. 261 (2005). For skepticism about the significance of interpretative admonitions in international commercial treaties, see Stephan, *supra* note 34.

the states for implementation without creating some kind of federal supervision of state behavior?

A. Is Federal Law Necessary?

The modern-day proponents of federal power over international law might argue that a federal override is essential. Otherwise, states could put the United States in breach of its international obligations. But a federal override is neither a necessary nor a sufficient mechanism for guaranteeing strict compliance with international law. As the examples of negotiable instruments and the Child Support Convention illustrate, international cooperation can proceed without enforceable federal law.

First, a federal law is not necessarily a guarantor of complete compliance with an international obligation. No one disputes, for example, that state and local police must do what the Vienna Convention on Consular Relations requires, namely inform an arrested foreign national that he may contact a consular official if he wishes. The federal government has made a considerable effort to publicize this obligation and otherwise to encourage compliance. But, as the decade of litigation stemming from Vienna Convention violations indicates, the police frequently fail to make the effort.⁴⁰ The litigation in turn has been about providing remedies to persons harmed by a failure to receive the required notice, not about preventing violations as such. Although some of the remedies proposed by litigants might have a deterrent effect going forward, no one has systematically demonstrated a link between any particular remedy and future compliance.

The broad lesson to be learned from the Vienna Convention episode is that some obligations by their nature fall largely on local actors and that any form of federal supervision will be incomplete. Regulation of post-arrest conduct necessarily implicates mostly local police forces, not the F.B.I. or state police forces, because these officers carry out most of the arrests in our country. It is not obvious what mixture of incentives and disincentives will optimize local compliance with the norm, and perfect compliance almost certainly would be too costly. The only way to guarantee perfect adherence to the requirements of the Vienna Convention would be to eliminate arrests. More to the point, it is not unreasonable to doubt that the kinds of judicially administered disincentives used to encourage compliance with constitutional

40. Cases in the Supreme Court alone include *Medellin v. Texas*, 128 S. Ct. 1346 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Medellin v. Dretke*, 544 U.S. 660 (2005); *Torres v. Mullin*, 540 U.S. 1035 (2003); *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999); and *Breard v. Greene*, 523 U.S. 371 (1998). Dozens more cases have been litigated in the lower courts. In almost all, there is no dispute about the failure of the United States to honor its international law obligation.

requirements (principally the exclusionary rule) represent the best tool to exercise federal supervision over local police conduct.⁴¹

Second, as the negotiable instrument issue and the Child Support Convention illustrate, direct federal enforcement is not always necessary to achieve a high degree of uniformity in state and local law. In the case of the law governing negotiable instruments, the banking industry recognized its interest in legal stability and predictability and worked for legal codification on a state-by-state basis. In the case of the Child Support Convention, the federal government influences state lawmaking and local practice through financial incentives.

B. Alternatives to Federal Law

There are many ways to distribute responsibility for compliance with an international obligation within a federal structure. Consider the case of the International Health Regulations (IHRs) promulgated in 2005 under the auspices of the World Health Organization. These international commitments deal with the organization of responses to international health emergencies. A diplomatic note from the United States accompanying its acceptance of these regulations stated that the United States

reserves the right to assume obligations under these Regulations in a manner consistent with its fundamental principles of federalism. . . . To the extent that such obligations come under the legal jurisdiction of the state governments, the Federal Government shall bring such obligations with a favorable recommendation to the notice of the appropriate state authorities.⁴²

A letter from the Secretary for Health and Human Services expanded on the point:

In the United States, State and local governments – not the Federal Government – have primary responsibility for exercising certain powers necessary to respond to serious public-health emergencies within their borders. Thus, any response to a serious public-health emergency in the United States likely would require cooperation between these levels of Government.

41. A majority of the Court so concluded. *Sanchez-Llamas*, 548 U.S. at 348-50. Almost all lower courts previously had reached the same conclusion. More precisely, these courts considered the case for the exclusionary rule sufficiently problematic to require some positive evidence that the political branches anticipated this remedy at the time that the United States entered into the Vienna Convention.

42. OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, 2007 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (forthcoming 2008).

. . . The United States fully recognizes its obligations under the IHRs, and intends to satisfy those obligations through appropriate Federal, State, and local action in accordance with the U.S. Constitution. In this regard, the Federal Government will exercise every effort to ensure that the provisions of the IHRs are given full effect by the pertinent authorities in the United States. In this sense, our reservation is largely about the internal modalities of fulfilling our obligations under the IHRs.⁴³

The operative word is “cooperation,” as distinguished from coercion. Public health services engage in a complex mix of funding, standard-setting, and monitoring, with most contact with the general public undertaken by state and local, rather than federal, agencies. Coercive oversight and aggressive second-guessing by the federal government of the decisions and actions of the bodies responding directly to an emergency is unlikely to be effective, even though the United States might be answerable internationally for any lapses that occur. The United States incorporated this simple but fundamental insight into its acceptance of its international obligations.

This episode suggests the array of mechanisms that are available to the United States to accede to the Electronic Commerce Convention. As with the IHRs, primary responsibility for implementation will fall on the states. At the same time, the problems addressed by the Uniform Law and the Convention are structurally the same as those governed by negotiable instruments law. In both cases, the law seeks to facilitate private commercial transactions by specifying the legal incidents of particular formalities. Although electronic commerce involves a wider set of interests and transactors than does negotiable instruments, it presents the same fundamental problem: There is no coherent group, defined geographically or by direct economic interest, that can predict with confidence whether it would do better with a liberal or stringent formality rule, and all transactors have some interest in specifying some formality as the prerequisite for validating transactions.

In these circumstances, the risk that any state will deviate from the common standard for validating electronic signatures seems vanishingly remote. The widespread adoption of UETA and the enactment of equivalent legislation in the remaining four states have established a coordination point from which no state, and no discrete group capable of influencing state decisionmaking, has an interest in departing. Although a state conceivably might act against the interests of its citizens, the risk of such action seems tolerable.

In sum, the United States could sign and ratify the Electronic Commerce Convention without adopting any further legislation or taking any steps to make the Convention effective within the domestic legal order. It could accompany its ratification with a reservation and explanation along the lines of those employed for the IHRs. In the unlikely event that a state subsequently

43. *Id.*

were to abandon its current commitment to validating electronic signatures, Congress then could act to correct whatever problem arises.

A nationalist might object that the United States should never assume an international obligation without ensuring it has the means to guarantee compliance. But what constitutes a guarantee of compliance? Coercive enforcement through the judiciary, the mechanism of choice for the nationalist approach to international law, introduces a risk of indeterminacy without necessarily producing a sufficient offsetting benefit. Reasonable judges can disagree about the interpretation of the more open-ended provisions of the Convention and can draw opposite inferences about the meaning of its lacunae. Given the already strong incentives to induce state compliance with the Convention's obligations, the marginal increase in compliance that federal judicial enforcement can bring about is likely to be small, if not nonexistent.

VI. THE PUZZLING PERSISTENCE OF STORY'S MISTAKE

These technical issues of treaty implementation raise fundamental questions. Why do so many international lawyers insist on the federalization of international obligations? As we have seen, the states have managed to surmount the risk of localist opportunism in a number of instances. U.S. treaty practice may yet embrace the conclusion that when conditions are right, the United States can satisfy its international obligations without resort to direct enforcement by the federal judiciary. Leading scholars, however, resist this result and what it implies.

One might respond to this criticism of federalization with a burden-of-proof type of argument. A nationalist defender of federalization might agree that under certain circumstances states may have the right set of incentives to implement U.S. international obligations, but assert that these circumstances are not sufficiently commonplace to justify complacency. Rather, the political branches might determine on a case-by-case basis whether reliance on the states is appropriate. The default should remain federalization, subject to an express override by the Executive and Congress.⁴⁴

A decision by the United States to accompany its adoption of the Child Support and Electronic Communications treaties with an express disavowal of an intent to create federal law would be consistent with this position. But what if the actions of the Executive and Congress are ambiguous, perhaps silent with regard to domestic effect? Should the judiciary carve out a role for itself, even in the absence of a convincing case that its help is needed to combat localist opportunism?

The Supreme Court over the last decade has entertained exactly this debate, using the Vienna Convention on Consular Relations to explore these

44. See Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008).

issues.⁴⁵ Even after six Supreme Court decisions, the matter is not yet at rest.⁴⁶ A majority of the Court in *Medellin v. Texas* resolutely refused to provide any general guidance on the matter, although individual Justices have staked out competing positions on what presumption should apply.⁴⁷ A global solution would require the United States to reach a consensus about the capacity of the judiciary to influence international relations and the importance of international law compliance in international relations. Such agreement does not seem likely any time soon, whatever international lawyers might think about the obviousness of the desired outcome.

Debates about judicial capacity infuse all issues of public law enforcement, international law included. Part of the debate involves competing claims about the judicial function. To some, judicial decisions most importantly express the community's moral sense. By shaping the way society talks about moral principles, the judiciary influences social decisionmaking and thus social order. We might call this an expressive function. To others, judicial decisions resolve concrete disputes involving material liberty and property interests and indicate how similar disputes will be resolved in the future. People, including governmental decisionmakers, then take this information into account in planning their actions. We might call this an instrumental function. The functions sometimes overlap but also can conflict, as when a court articulates a moral judgment in a case that has no immediate consequences (say, because the defendant is judgment proof). Both judicial practice and scholarly arguments are available to support either perspective.⁴⁸

Ironically, the most extensive articulation of the instrumentalist position by the Supreme Court became the foundation for those seeking to expand the federal court's expressive function. In *Banco Nacional de Cuba v. Sabbatino*,⁴⁹ Justice Harlan defended a refusal to recognize a particular rule said to reflect customary international law by arguing that courts seldom had the capacity to resolve international disputes. He noted that their control over significant assets arises only adventitiously and their actions otherwise have little influence over the array of interactions that make up international

45. See cases cited *supra* note 40.

46. See *supra* note 40. The lower courts are split as to whether a person who has not received the notice required by the Vienna Convention may bring a tort suit under 28 U.S.C. § 1350 or 42 U.S.C. § 1983 against local authorities. Compare *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007) (cause of action available), with *Gandara v. Bennett*, 528 F.3d 823 (11th Cir. 2008) (no cause of action), and *De Los Santos Mora v. New York*, 524 F.3d 183 (2d Cir. 2008) (same), and *Cornejo v. County of San Diego*, 504 F.3d 853 (9th Cir. 2007) (same).

47. 128 S. Ct. 1346 (2008).

48. See Paul B. Stephan, *A Becoming Modesty – U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627 (2002).

49. 376 U.S. 398 (1964), *superseded by statute*, Foreign Assistance Act, Pub. L. No. 87-195, 75 Stat. 424 (1961) (codified as amended at 22 U.S.C. § 2370(e)(2) (2000)).

relations. Yet later commentators and courts found in an antecedent component of that decision – its holding that the application of a common-law international law issue presented a federal question for purposes of federal court jurisdiction – a basis for the argument that all international law issues create federal court jurisdiction and thus invite federal judicial development of the law.⁵⁰ In a world where such doctrinal jiu-jitsu can happen, expecting the law to come to rest at any one place seems unrealistic.

The question of how much compliance with international law is optimal remains even more fraught. Some would privilege international obligations as distinct moral commitments that transcend cost-benefit analysis. Others regard these obligations as contingent, ephemeral and never sufficient to require a sacrifice of national interest. As the substantive claims resting on arguments about international obligation shift, so do the arguments about the compulsory nature of such obligations. Again, it seems fanciful to expect these arguments to reach a satisfactory resolution any time soon.

Although these fundamental questions remain hanging, the United States still must continue to negotiate and implement treaties. Its actions will feed these debates but certainly will not resolve them. By challenging the premise of the nationalist position – that localist opportunism inevitably threatens compliance with the international obligations that the federal government undertakes – I may have added to the uncertainty that dogs the United States as it inevitably acts. Yet my argument also points to greater possibilities for the formation of international law. Rather than limiting itself to international law that its courts will enforce, the United States, I argue, is free to explore a wide range of options for implementing the obligations that it undertakes. If the goal is more, and more effective, international cooperation, this should be welcome news.

50. See Bradley & Goldsmith, *supra* note 5.

