

# ISOLATING LITIGANTS: A RESPONSE TO PAMELA BOOKMAN

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## INTRODUCTION

Several months ago, the world became obsessed with a dress. Depending on the angle from which you looked at it and, more importantly, how your eyes perceived certain colors, the dress appeared white and gold . . . or blue and black. Tens of millions of people viewed and debated it, and nearly everyone who saw it as white and gold (or blue and black) could not begin to imagine how someone else could perceive it in such a radically different way.<sup>1</sup>

In a recent article, *Litigation Isolationism*,<sup>2</sup> Pamela Bookman identifies a phenomenon that similarly changes hue depending on one's perspective or disposition. Bookman argues that four doctrines (personal jurisdiction, forum non conveniens, abstention comity, and the presumption against extraterritoriality)<sup>3</sup> conspire to make U.S. courts significantly less hospitable to transnational litigation.<sup>4</sup> In Bookman's assessment, such isolationism is counterproductive because the doctrines often fail to vindicate their stated goals of respecting the separation of powers, international comity, and defendants' interests.<sup>5</sup> The article is crisp and elegant. It synthesizes disparate areas of law to elucidate a broader development in civil litigation. And it makes an important contribution

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1. See Jonathan Mahler, *The White and Gold (No, Blue and Black!) Dress That Melted the Internet*, N.Y. TIMES (Feb. 27, 2015), <http://nyti.ms/1C4dsYX>.

2. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015).

3. Technically, the fourth "doctrine"—the presumption against extraterritoriality—is a canon of construction. As such, it is not so much the law as a way of interpreting the law. Accordingly, it is the most amenable to congressional tweaking. But such slight nuances are not critical for present purposes.

4. See Bookman, *supra* note 2, at 1089-99. Although "transnational litigation" can be a malleable term, Bookman offers a very useful working definition: "[C]ases involving foreign parties, foreign conduct, foreign law, or foreign effects." *Id.* at 1083-84.

5. *Id.* at 1087; see also *id.* at 1119-33 (describing how each stated goal is undermined by avoidance doctrines).

to a growing literature on how the United States, once a magnet for transnational litigation, has increasingly closed its doors to such cases.<sup>6</sup>

If Bookman is arguing that this dress is white and gold, I don't think of myself as the obdurate naysayer who insists that it is blue and black. Rather, I simply want to suggest that the blue-and-black crowd isn't crazy—that there is a different way to understand the phenomenon, including its genesis and consequences. In many respects, this other perspective is consistent with the account that Bookman offers.

My first and principal contention is that litigation isolationism is not necessarily a coherent or volitional project. Instead, it arose through the confluence of two different strands of jurisprudence—doctrinal coherence and *domestic* litigation avoidance. Second, I suggest that the effect of such isolationism is perhaps more muted than Bookman suggests. For example, U.S. courts seem far more willing to embrace public law cases with a transnational valence even as they eschew increasing numbers of purely private transnational disputes. Thus, the “foreignness” of the cases that Bookman discusses might—counterintuitively—not be the driving force behind the isolationism.

## I. THE HAPPENSTANCE OF ISOLATIONISM

The phenomenon that Bookman describes likely did not arise from an explicit or well-conceived normative commitment to keeping transnational cases out of U.S. courts. To be clear, Bookman presents isolationism as an effect rather than a coherent philosophy that any judge or group of judges has pursued.<sup>7</sup> But exploring the problem's complicated roots can help reveal its true scope and how to mitigate its most deleterious consequences.

I want to situate the doctrines that are at the heart of Bookman's analysis within two broader jurisprudential developments. Doing so reveals that the foreignness of transnational cases probably has only slight explanatory power. Instead, the rejection of such cases arose as two different strands of judicial thought collided: a move to harmonize certain procedural doctrines and an effort to combat litigation excesses.

One might describe the first strand, with perhaps only the slightest overstatement, as Justice Ginsburg's project to fashion doctrinal coherence across a wide swath of procedural law. She has authored opinions in most of the Court's

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6. See, e.g., Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT'L L. 663 (2012); Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995 (2015); David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41 (2014).

7. See Bookman, *supra* note 2, at 1084-85, 1089.

recent cases grappling with personal jurisdiction,<sup>8</sup> jurisdictional sequencing,<sup>9</sup> and the appropriate use of the term “jurisdictional” (and the consequences of truly jurisdictional rules).<sup>10</sup> In most—but importantly, not all—of these cases and their progeny, Justice Ginsburg has been on the winning side.

There are common themes running through Justice Ginsburg’s opinions, as I’ve explored at greater length in earlier work.<sup>11</sup> To characterize these opinions at a high level of abstraction, she has focused on defining certain structural interests, like jurisdictional doctrines, with specificity<sup>12</sup> as well as fostering greater flexibility and efficiency among lower courts.<sup>13</sup> Perhaps most critically for present purposes, she has sought to alleviate discord between the procedural regimes of the United States and those of other countries.<sup>14</sup> In so doing, Justice Ginsburg has explicitly addressed one of the problems that Bookman explores: the concern that idiosyncratic U.S. doctrine could put U.S. litigants in a far worse position than their foreign counterparts.<sup>15</sup> In other words, Justice Ginsburg is the opposite of a litigation isolationist.

How then did a Justice who is so attuned to transnational questions author three of the isolationist opinions that Bookman discusses?<sup>16</sup> Although Justice

8. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2794 (2011) (Ginsburg, J., dissenting).

9. *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323 (2010); *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422 (2007); *Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999).

10. *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Kontrick v. Ryan*, 540 U.S. 443 (2004).

11. See generally Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501 (2015) [hereinafter Trammell, *A Tale of Two Jurisdictions*]; Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099 (2013) [hereinafter Trammell, *Jurisdictional Sequencing*].

12. See Trammell, *Jurisdictional Sequencing*, *supra* note 11, at 1141 & n.192.

13. Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725, 742 (2009) (noting that efficiency justifications were “certainly foremost” in motivating *Sinochem* and *Ruhrigas*); see Trammell, *Jurisdictional Sequencing*, *supra* note 11, at 1101-10 (describing the flexibility of a liberal jurisdictional-sequencing regime); see also, e.g., *Kontrick*, 540 U.S. at 454-56 (noting that mere “claim-processing rules,” in contrast to truly jurisdictional rules, are more flexible and subject to forfeiture).

14. *Daimler AG v. Bauman*, 134 S. Ct. 746, 762-63 (2014); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803-04 (2011) (Ginsburg, J., dissenting).

15. See *Nicastro*, 131 S. Ct. at 2803-04 (Ginsburg, J., dissenting) (noting that U.S. plaintiffs, unlike foreign plaintiffs, do not necessarily have the ability to sue where a harmful event occurred); Bookman, *supra* note 2, at 1107 & n.172 (same).

16. See *Daimler*, 134 S. Ct. at 753-58 (limiting the availability of general jurisdiction); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854-57 (2011) (same); *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 429-35 (2007) (permitting forum non conveniens dismissals even before a federal court has verified its subject matter jurisdiction).

Ginsburg has developed a comprehensive and coherent theory of personal jurisdiction writ large, a majority of the Court has signed on to only part of that project. In broad strokes, she has embraced the functionalist jurisdictional regime that several scholars in the mid-twentieth century envisioned<sup>17</sup>—one that cabins the traditional approach (general jurisdiction)<sup>18</sup> and concomitantly endorses the breadth and flexibility of the modern approach (specific jurisdiction).<sup>19</sup> But Justice Ginsburg's expansive view of *specific* jurisdiction has constituted a minority position within the Court.<sup>20</sup> At the same time, her opinions constricting the scope of *general* jurisdiction have commanded nearly unanimous support.<sup>21</sup>

If the Court had adopted a generous view of specific jurisdiction, one that would have allowed far more transnational cases into the United States, the narrowing of general jurisdiction would have proved far less problematic (or isolating). The same is true with respect to *Sinochem*, the forum non conveniens opinion authored by Justice Ginsburg. In context, dismissing the case was quite sensitive to transnational concerns because the United States had hardly any connection to, or interest in, the lawsuit.<sup>22</sup> Put simply, although Justice Ginsburg's broader project is attuned to transnational problems, the rest of the Court has not wholly joined that project.

The second strand, which at times has collided with the doctrinal-coherence strand, concerns the development of a series of domestic litigation avoidance doctrines. Most conspicuous among these are the new plausibility pleading standard and the ever-stronger presumption in favor of arbitration.

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17. *The Supreme Court: 2013 Term—Leading Cases*, 128 HARV. L. REV. 311, 311 (2014). See generally Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144, 1164 (1966) (describing the envisioned regime).

18. See *Daimler*, 134 S. Ct. at 753-58 (restricting general jurisdiction to the limited number of places where a corporation is “at home”). General jurisdiction is based on a tight connection between the forum and the defendant, such that the defendant is amenable to any suit in that location, even when the lawsuit has nothing to do with the forum. For decades though, lower courts had exercised such jurisdiction based on shockingly loose connections between the forum and the defendant. See Trammell, *A Tale of Two Jurisdictions*, *supra* note 11, at 511-12.

19. See *Nicastro*, 131 S. Ct. at 2797-803 (Ginsburg, J., dissenting) (arguing for an expansive approach to specific jurisdiction that focuses primarily on fairness and reasonableness). Specific jurisdiction is predicated on a relationship between the forum and the lawsuit itself.

20. See *id.* at 2794 (garnering only three total votes).

21. See *Daimler*, 134 S. Ct. 746 (eight votes); *Goodyear*, 131 S. Ct. 2846 (unanimous).

22. See *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 435 (2007) (calling it a “textbook case for immediate forum non conveniens dismissal” as the parties were Chinese or Malaysian companies and proceedings had already commenced in China).

One might justifiably include a number of other doctrines in the discussion,<sup>23</sup> but the pleading and arbitration cases are especially relevant because they take direct aim at the perceived inefficiencies of contemporary civil litigation. Whether the motivating problems are real or chimerical—and scholars have argued all sides of that debate—the doctrines explicitly seek to regulate litigation as a whole rather than domestic or transnational cases as such.

Since 2007, the Court has required plaintiffs to plead “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”<sup>24</sup> Scholars overwhelmingly have recognized that the plausibility pleading standard has raised the bar that plaintiffs must clear to survive a motion to dismiss.<sup>25</sup> Despite the criticism that commentators have voiced, they largely agree that the Court was attempting to counter what the Court saw as the unwieldiness and rising costs of litigation. In particular, the Court was responding to fears about burgeoning discovery costs and the resulting pressure to settle even meritless cases.<sup>26</sup> Myriad questions remain about the new pleading standard, but the Court’s agenda is clear: combating perceived inefficiency by making it harder for litigants to get into court.

A similar trend is apparent with respect to arbitration. Since the early 1980s, the Supreme Court has embraced a sweeping vision of the Federal Arbitration Act<sup>27</sup> and “a liberal federal policy favoring arbitration agreements.”<sup>28</sup> To the extent that litigation has grown cumbersome, unwieldy, and expensive, arbitration—in the Court’s view—appears to offer an antidote. The Court has lauded arbitration’s informality as cost effective, streamlined, and expedi-

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23. See *supra* note 6. For example, some scholars also consider choice-of-law doctrines, forum selection clauses, and the Supreme Court’s recent class action jurisprudence. See Noll, *supra* note 6, at 58-62 (choice of law); *id.* at 66-70 (forum selection); Childress, *supra* note 6, at 1034-36 (class actions).

24. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

25. See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 833 (2010); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 19 (2010); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 4 (2009).

26. See, e.g., Clermont & Yeazell, *supra* note 25, at 852; Miller, *supra* note 25, at 53-71.

27. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2013)); see Salvatore U. Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1147 (2015) (noting that the Court has construed the Federal Arbitration Act to “govern arbitration in nearly all circumstances”).

28. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

tious,<sup>29</sup> and since 2010, the trend toward favoring arbitration—and thereby keeping certain disputes outside the realm of litigation—has only accelerated.<sup>30</sup>

These two strands—doctrinal coherence and domestic litigation avoidance—interact to produce most of the isolationism that Bookman elucidates. To be clear, though, that phenomenon is not simply the international manifestation of the domestic litigation avoidance doctrines that I have briefly sketched. Rather, the two strands compound one another in the transnational context. The *Nicastro* case nicely illustrates how the doctrinal coherence cases—particularly the personal jurisdiction jurisprudence—create hurdles in transnational cases separate from those created by the domestic litigation avoidance cases. In *Nicastro*, a British manufacturer sold an industrial shearing machine that harmed a worker in New Jersey, but the manufacturer was not subject to specific jurisdiction there.<sup>31</sup> The specific jurisdiction determination—that because the manufacturer had not expressly targeted the forum state, it was able to avoid jurisdiction there—would have been the same if the manufacturer had been a domestic corporation.

But under the newly narrowed approach to general jurisdiction, foreign defendants receive vastly different treatment. A domestic corporation is subject to general jurisdiction in at least one place in the United States,<sup>32</sup> whereas a foreign corporation need not be. The upshot is that in a case like *Nicastro*, a foreign manufacturer whose product causes harm in the United States might not be suable in any U.S. court.<sup>33</sup> In the transnational context, then, the personal juris-

29. See J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3074-83 (2015) (analyzing cases and describing the recent trend in favor of arbitration and its perceived advantages).

30. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308, 2312 (2013) (refusing to invalidate an arbitration agreement that prohibited class arbitration, even when proceeding as a class offered the only economically viable way to bring antitrust claims); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750-51 (2011) (holding that the Federal Arbitration Act preempts a California court's ruling that prohibited consumer contracts of adhesion from containing class-arbitration waivers); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010) (holding that the Federal Arbitration Act prohibits class arbitration unless the parties expressly agreed to such procedures).

31. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786, 2790-91 (2011) (plurality opinion) (basing its holding partly on the fact that the machine passed through an out-of-state distribution chain rather than arriving directly in New Jersey).

32. A domestic corporation will be subject to general jurisdiction at least in the state (or states, if they are different) where it is incorporated and where it maintains its principal place of business. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

33. There is an argument that the defendant in *Nicastro* could have been subject to specific jurisdiction in Ohio, where its exclusive distributor was located. See generally *Nicastro*, 131 S. Ct. at 2796 (Ginsburg, J., dissenting) (noting the distribution relationship). Even that is not certain. In any event, the plurality opinion essentially provides a roadmap for foreign corporations to avoid being amenable to personal jurisdiction anywhere in the United States. See *id.* at 2795 (noting that a corporation “need only Pilate-like wash its hands of a product by having independent distributors market it” to avoid being haled into court).

diction jurisprudence keeps even more cases out of U.S. courts than would the domestic litigation avoidance doctrines alone. Thus, the acute inhospitality to certain transnational disputes seems to be the collateral consequence of two coherent, but orthogonal, agendas that are largely domestic in nature.

## II. ISOLATIONISM'S MUTED EFFECTS

Regardless of its causes, the problem that Bookman elucidates is real. But it does not manifest itself with equal force across all transnational cases. Although private transnational disputes are becoming more difficult to litigate in the United States, the Supreme Court has evinced much less reticence regarding public law disputes that have transnational and international consequences. This conclusion is more tentative, but figuring out what is *not* contributing to isolationism can be equally fruitful in discerning the phenomenon's contours.

Bookman brackets other doctrines—specifically the political question and act of state doctrines—that theoretically might seem to contribute to isolationism but, in fact, do not.<sup>34</sup> In the Supreme Court's most recent pronouncement on the political question doctrine, *Zivotofsky ex rel. Zivotofsky v. Clinton* (*Zivotofsky I*),<sup>35</sup> the parents of a U.S. child born in Jerusalem wanted the child's U.S. passport to state that his place of birth was "Israel." An act of Congress expressly allowed parents to make that choice, but State Department policy required that the passport record the birthplace simply as "Jerusalem" so as to avoid taking sides in the enduring debate about Jerusalem's status.<sup>36</sup> Few cases could have more profound consequences for foreign relations or domestic separation of powers. Yet the Court found that the case did not present a nonjusticiable political question.<sup>37</sup> Instead, *Zivotofsky I* seemed to further narrow the political question doctrine to only its classical elements<sup>38</sup> and, notwithstanding the case's foreign-relations overtones, exuded an air of judicial confidence.<sup>39</sup>

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(quoting Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995))).

34. See Bookman, *supra* note 2, at 1089 n.34. A case presents a nonjusticiable political question when "there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . .'" *Nixon v. United States*, 506 U.S. 224, 228 (1993) (omission in original) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The act of state doctrine prevents federal courts from sitting in judgment of certain acts of foreign states that have occurred within the foreign sovereign's territory. See *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990).

35. 132 S. Ct. 1421 (2012).

36. See *id.* at 1425-26.

37. See *id.* at 1430-31.

38. Compare *Baker*, 369 U.S. at 217 (describing six factors that courts use in assessing whether a case presents a political question), with *Zivotofsky I*, 132 S. Ct. at 1427 (mentioning only the first two factors from *Baker*). See generally Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*,

In a similar vein, the Supreme Court's last significant word on the act of state doctrine came twenty-five years ago,<sup>40</sup> when it arguably narrowed the doctrine's scope.<sup>41</sup> To be sure, lower courts sometimes use the act of state doctrine as a means of avoiding certain questions presented in transnational litigation.<sup>42</sup> But in an era in which the Supreme Court has reinvigorated (and even invented) some domestic litigation avoidance doctrines, its reluctance to use other avoidance levers is telling.

What distinguishes the doctrines that Bookman analyzes from the political question and act of state doctrines is largely the distinction between private and public law litigation. I concede that I am painting with a very broad brush and that one certainly can point to exceptions. But I am skeptical whether the foreignness of a dispute has driven the overarching phenomenon that Bookman describes.<sup>43</sup> Indeed, the Supreme Court has embraced its role in deciding controversial and salient international public law questions, including many concerning the war on terror.<sup>44</sup> And the Court just answered the underlying merits question from *Zivotofsky I*.<sup>45</sup>

If I am right that a dichotomy has emerged between private and public litigation, two questions immediately come to mind: What explains the dichotomy, and why does it matter? The first is difficult, if not impossible, to answer. Certainly those commentators who see the Roberts Court as overly solicitous of business interests might view the dichotomy as further evidence of their thesis.

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102 COLUM. L. REV. 237 (2002) (describing the Court's post-*Baker* return to the "classical" version of the doctrine).

39. See *Zivotofsky I*, 132 S. Ct. at 1428.

40. *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400 (1990).

41. See Andrew D. Patterson, *The Act of State Doctrine is Alive and Well*, 15 U.C. DAVIS L. REV. 111, 121-22 (2008); Steven R. Swanson, *A Threshold Test for Validity: The Supreme Court Narrows the Act of State Doctrine*, 23 VAND. J. TRANSNAT'L L. 889, 918 (1991).

42. See, e.g., *Hourani v. Mirtchev*, Nos. 13-7088, 13-7089, 2015 WL 4590324, at \*7-9 (D.C. Cir. July 31, 2015) (dismissing a defamation action predicated on statements published by a foreign embassy); *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 147-48 (2d Cir. 2012) (dismissing an action questioning the legality of the Soviet government's appropriation of property in 1918).

43. See Bookman, *supra* note 2, at 1089. Perhaps the one exception to this is the presumption against extraterritoriality. As a canon of statutory interpretation, though, Congress can override it. Moreover, it is only one piece of the puzzle.

44. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 567-68 (2006) (evaluating the legality of a military commission set up to try terrorists); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (considering enemy combatants' due process rights); *Rasul v. Bush*, 542 U.S. 466, 483-85 (2004) (holding that U.S. courts had jurisdiction to hear challenges to foreign nationals' detainment at Guantanamo Bay).

45. *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2094 (2015) (holding that the President alone has the power to recognize foreign sovereigns and that Congress could not authorize passports that contain birthplace information contradicting the President's determinations).



The second question, though, is far more interesting. It cuts to the ultimate problem that Bookman and others engage—how to mitigate the worst effects of isolationism, such as excluding cases that actually have strong ties to the United States. If my initial diagnosis is correct, scholars and litigants who are trying to reverse the trend should be less concerned about the foreignness of cases. Instead, they should focus on the more quotidian concerns that appear to impel the doctrines: concerns about litigation inefficiencies, discovery costs, and the like, which might ultimately be driving the phenomenon.

#### CONCLUSION

The landscape of U.S. procedure has changed dramatically in the last decade, and for all of the careful and insightful work that scholars like Bookman already have done, intriguing questions and puzzles remain. Although this debate probably will not break the Internet the way “the dress” did, it is still a worthy enterprise.