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## COSTS OF SOVEREIGNTY

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## COSTS OF SOVEREIGNTY

*K.A.D. Camara*<sup>\*</sup>

### ABSTRACT

*Nationalism holds that states should set private international law to best attain the ends justifying their law as a whole. I situate nationalism against its naturalist and internationalist competitors, tracing the evolution of choice of law theory from naturalism to internationalism and now to nationalism. I then state the nationalist theory, identifying five forms of reciprocally imposed effects of and sanctions for states' claims to sovereignty: "externalities of sovereignty" and "costs of sovereignty;" and explore four paradigm private international law settings a nationalist state might adopt in different substantive areas. I address objections to nationalism, from skepticism about "the ends justifying domestic law" to skepticism about the moral-political right of states to advance those ends exclusively. I then address the relation of nationalism to modern problems in corporate law and the theory of the firm; the ideas of sticky, camouflaged and private sovereignty; and the application of nationalism to a federal entity regulating internal regulatory conflicts. The Article sets the stage for further elaboration of nationalist theory, and for exploration of nationalism in, and nationalist reforms of, the practice of private international law.*

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*K.A.D. Camara*

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## INTRODUCTION

The regulatory interests of states often overlap. Private international law limits the application of a state's domestic law in the face of this *Fact of Overlap*. Traditionally, private international law includes jurisdiction, choice of law and the enforcement of judgments.<sup>1</sup> Jurisdiction determines what disputes a state will purport to resolve; choice of law, what rules it will apply in doing the resolving. Enforcement of judgments is part of a broader set of rules that define a state's responses to other states' regulatory behavior. One response is to deny enforcement of foreign judgments. Others include sanctioning or threatening to sanction parties for procuring foreign judgments;<sup>2</sup> making enforcement of foreign judgments anywhere actionable domestically;<sup>3</sup> and imposing diplomatic, economic or military sanctions on the states rendering these judgments.<sup>4</sup>

This article explains how states should set private international law. Part I identifies three types of normative theories of private international law and uses this taxonomy to shed light on the development of conflicts of law theory. Briefly, naturalist theories bound state law according to an evident or higher law notion of sovereignty; nationalist theories bound state law only so much as a pragmatic pursuit of state interests demands; and internationalist theories bound state law so that due respect is accorded the moral philosophical and other claims to legitimacy of foreign states. Naturalist theories have the ring of nineteenth century, doctrinal private law; nationalist theories, the ring of private law post law and economics;

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<sup>1</sup> "[T]hree consecutive phases ... comprise the process of judicial resolution of most multistate disputes, namely: (1) jurisdiction; (2) choice of law; (3) recognition and enforcement of judgments." SYMEON C. SYMEONIDES, WENDY C. PERDUE & ARTHUR T. VON MEHREN, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* 3 (1998).

<sup>2</sup> Anti-suit injunctions enjoin foreign suit and are backed by the contempt of court apparatus used to enforce injunctions generally. Anti-anti-suit injunctions enjoin the pursuit of foreign anti-suit injunctions. See generally Michael D. Schimek, *Anti-Suit and Anti-Anti-Suit Injunctions: A Proposed Texas Approach*, 45 BAYLOR L. REV. 499, 502 (1993); *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039 (1985).

<sup>3</sup> Claw back statutes make foreign enforcement of some part of a foreign judgment, for example a punitive damages award, itself domestically actionable. See, e.g., Protection of Trading Interests Act, 1980, ch. 11, § 6 (Eng.) (authorizing suits to recover non-compensatory damages); *Laker Airways, Ltd. v. Pan American World Airways*, 559 F.Supp. 1124, 1137 (D. D.C. 1983); *U.S. v. Imperial Chem. Indus., Ltd.*, 105 F.Supp. 215, 228 (S.D. N.Y. 1952).

<sup>4</sup> Including responses to foreign regulatory efforts best considered executive or legislative rather than judicial blurs the boundary between private and public international law. Nevertheless, their inclusion is natural if one accepts that private international law's role is to deal with the Fact of Overlap. Calling the national theory a theory of private international law creates a risk of bias in its favor, however, because nationalist and naturalist views have more intuitive appeal in private law, whereas internationalist or explicitly political philosophic views have more intuitive appeal in public law.

and internationalist theories, the ring of constitutional law or political philosophy. Early twentieth century territorialism,<sup>5</sup> American interest analysis,<sup>6</sup> academic state-subject connection theories,<sup>7</sup> and the modern doctrine of deference to foreign judicial processes within the European Union are all encompassed by this taxonomy. The past century has revealed a progression from naturalist theories to internationalist theories and, more recently, toward nationalism. Nevertheless, nationalist theories remain the ugly duckling of private international law. They receive no sustained defense in the literature and, consequently, provoke little response from defenders of alternative theories.

Part II states and defends a nationalist theory. It holds that states should set private international law with exclusive concern for the attainment of whatever ends justify the rest of their law. When legal decision makers do anything else they elevate the interests of other states over domestic interests with no institutional warrant for so doing. They exhibit a form of inconsistency I call infidelity to law. An important consequence of the nationalist theory is that a private international law uniform across states that differ in their ability to absorb and inflict costly responses to foreign regulation will almost never be justified.<sup>8</sup> So long as the Fact of Overlap holds, a state's laws will impinge on other states' pursuit of the objectives underlying their own laws. Part II.B identifies three ways in which one state can adopt the wrong law from another state's point of view, with

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<sup>5</sup> See JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); see also RESTATEMENT OF CONFLICT OF LAWS; RALEIGH C. MINOR, CONFLICT OF LAWS (1901); A. V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS (2d ed. 1908).

<sup>6</sup> See Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 8 DUKE L. J. 171 (1959); Brainerd Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258 (1960); Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963) (often cited as moderating Currie's view, although I think it merely clarifies what his view had always been); see also Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1957); Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1957); Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958); Brainerd Currie & Herma H. Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L. J. 1323 (1959) (discussing constitutional objections to interest analysis); Brainerd Currie & Herma H. Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960) (same); Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1960); Brainerd Currie & Mark H. Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 9 DUKE L. J. 1 (1960); Brainerd Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719 (1960); Brainerd Currie, *Conflict, Crisis and Confusion in New York*, 12 DUKE L. J. 1 (1963) (also discussing the constitutional challenges); Brainerd Currie, *Ehrenzweig and the Statute of Frauds: An Inquiry into the Rule of Validation*, 18 OKLA. L. REV. 243 (1965).

<sup>7</sup> See, e.g., Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293 (1987); Lea Brilmayer, *Interstate Federalism*, 1987 B.Y.U. L. REV. 949, 968 - 973 (1987); Lea Brilmayer, *Rights, Fairness and Choice of Law*, 98 YALE L. J. 1277 (1989); LEA BRILMAYER, CONFLICT OF LAWS ch. 5 (1991); Lea Brilmayer, *Liberalism, Community and State Borders*, 41 DUKE L. J. 1 (1991). Cf. Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L. J. 1191 (1987) (an alternative internationalist theory).

<sup>8</sup> Professors Ryan Goodman and Derek Jinks observe "extensive *decoupling* between shared purposes and structure on the one hand, and disparate functional demands and results on the other....[S]tructure is not determined by function." Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1759 (2003) (emphasis in original).

respect to conduct in which the second state is interested, thereby imposing an “externality of sovereignty.” Part II.C identifies three ways in which a state can sanction another state for the latter’s adoption of wrong law. States can deter (encourage) regulation that creates externalities of sovereignty by imposing positive (negative) “costs of sovereignty.”

Part III explores the nationalist theory in practice. A state should set its private international law by balancing the benefit of regulating conduct subject to the Fact of Overlap in terms of attainment of the ends justifying its law against the costs of sovereignty likely to be imposed by other states in response to such regulation. States should therefore limit the reach of their laws along those dimensions of private international law about which other states feel most strongly. Part III takes two traditional dimensions of private international law, jurisdiction and choice of law, and identifies four stylized balances a nationalist state might strike. For each, it identifies the considerations that would rightly move states to strike it, and offers examples of actual states that have come near to striking it in specific doctrinal areas.

Part IV addresses further objections to the nationalist theory. Part V discusses possible extensions and connections to the work of others, including important connections to the agency cost analysis of corporate law and the theory of the firm. It also discusses positive claims, the notions of sticky, camouflaged and private sovereignty, and a nationalist theory for a federal organization regulating conflicts of regulatory interests between subsidiary units. Part VI summarizes the foregoing, infers from it several prescriptions for legal decision makers and for further work in the field, and then concludes.

## I. NATURALISM, NATIONALISM AND INTERNATIONALISM: THREE THEORIES OF PRIVATE INTERNATIONAL LAW

Naturalist theories hold that states should set private international law so that their claims to regulatory authority do not exceed bounds specified by a normative source other than the state itself. This higher normative source defines sovereignty—legitimate claims to regulatory authority are those consistent with its edicts. The vested rights theory of Professor Joseph Beale,<sup>9</sup> dominant in the early twentieth century, embodied in the first Restatement,<sup>10</sup> and still followed in a minority of states,<sup>11</sup> is a naturalist

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<sup>9</sup> See JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); see also RESTATEMENT OF CONFLICT OF LAWS; RALEIGH C. MINOR, CONFLICT OF LAWS (1901); A. V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS (2d ed. 1908). Beale’s theory assigns regulatory authority to states based on the geographic location of a critical element determined by the type of the cause of action. For example, in tort cases, the theory assigns regulatory authority to the state in which the injury occurred.

<sup>10</sup> Restatement of Conflict of Laws.

<sup>11</sup> See Symeon C. Symeonides, *Choice of Law in the American Courts in 2000: As the Century Turns*, 49

theory. Naturalist theories have a formalist or legal-metaphysical justification for assignments of regulatory authority. It is in the nature of torts that they are subject to regulation according to the law of the place of injury. Objecting to the “devout and orthodox commitment to the fundamentalist theology of territorialism and vested rights,”<sup>12</sup> and seeking a functional basis for private international law, the legal realists developed interest analysis.

Interest analysis assigns regulatory authority to the forum so long as the policies underlying its substantive laws would be advanced by their application to the conduct in question.<sup>13</sup> Interest analysis eschews consideration of foreign responses to domestic exercises of regulatory authority, which distinguishes it from nationalism. This results in fewer internationalist concessions than under nationalism. Professor Brainerd Currie, the inventor of interest analysis, defended it with the argument that judges are competent neither for the forecasting of foreign responses to regulatory authority required by nationalist theories, nor for the political philosophic balancing and bounding of different states’ interests required by internationalist theories. Interest analysis is offered as correct given the judiciary as the implementing mechanism. It is thus a “second order” naturalist theory since it commands judges to behave as though a naturalist theory were true (that the bounds of sovereignty are immediate interest), but can be consistent with either a nationalist theory (if on balance having judges act this way best advances domestic interests) or an internationalist theory (if on balance having judges act this way best respects the political philosophical claims of other states).<sup>14</sup>

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Am. J. Comp. L. 1, 13 (2001) (identifying conflicts theories used by each American state); Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey*, 53 Am. J. Comp. L. 1, 4 – 5 (2003) (noting no change in the number of vested rights theory states since the 2000 survey).

<sup>12</sup> Currie, *Ehrenzweig and the Statute of Frauds*, *supra* n. XXX at 244.

<sup>13</sup> See Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 8 DUKE L. J. 171 (1959); Brainerd Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258 (1960); Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963) (often cited as moderating Currie’s view, although I think it merely clarifies what his view had always been); see also Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1957); Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1957); Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958); Brainerd Currie & Herma H. Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L. J. 1323 (1959) (discussing constitutional objections to interest analysis); Brainerd Currie & Herma H. Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960) (same); Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1960); Brainerd Currie & Mark H. Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 9 DUKE L. J. 1 (1960); Brainerd Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719 (1960); Brainerd Currie, *Conflict, Crisis and Confusion in New York*, 12 DUKE L. J. 1 (1963) (also discussing the constitutional challenges); Brainerd Currie, *Ehrenzweig and the Statute of Frauds: An Inquiry into the Rule of Validation*, 18 OKLA. L. REV. 243 (1965).

<sup>14</sup> Another way of putting this is that Currie’s interest analysis is directed to judges applying law that is on its face silent as to conflicts of law; interest analysis has nothing to say to legislators, except perhaps that it constitutes a good default if little legislative time is to be put into the conflicts question anyway.

Modern critiques of interest analysis hold that it is insufficiently deferential to the claims to regulatory authority, or, equivalently, to independence from regulation by the forum, of foreign states and their citizens. State-subject theories constrain nationalism by requiring a connection between the party disadvantaged by regulatory action and the regulating state that justifies the disadvantage.<sup>15</sup> Just as a citizen's obligation of obedience to law is conditioned on the validating characteristics of the relationship between citizen and state, so is a state's regulatory authority conditioned on the validating characteristics between it and the party subject to regulation.<sup>16</sup> Law and economics scholars suggest that due respect for non-citizens demands a private international law that maximizes global welfare.<sup>17</sup> On this view, private international law becomes a way of harnessing state behavior in service of the common good. Drawing on the literature on the definition of property rights,<sup>18</sup> some scholars seek a definition and allocation of rights to regulatory authority such that exchange mechanisms will move them to their highest valuing users.<sup>19</sup> Finally, scaffolding theories hold that international cooperation is justified as a bet on the benefits that would arise from a closer international community.<sup>20</sup> Since the nature and value of those benefits is uncertain, scaffolding theories require a certain internationalist faith, which is easier to muster the closer one thinks is the alignment and the swifter one thinks is the convergence of the interests of the states in question. Each of these, focusing as they do on the legitimate balancing of the claims of competing states, is an internationalist theory of private international law.

Law and economics scholars have also fielded the theory closest to nationalism. Professors Jack Goldsmith and Eric Posner argue that states should set private international law so as to maximize domestic welfare,<sup>21</sup>

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<sup>15</sup> See, e.g., Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293 (1987); Lea Brilmayer, *Interstate Federalism*, 1987 B.Y.U. L. REV. 949, 968 - 973 (1987); Lea Brilmayer, *Rights, Fairness and Choice of Law*, 98 YALE L. J. 1277 (1989); LEA BRILMAYER, *CONFLICT OF LAWS* ch. 5 (1991); Lea Brilmayer, *Liberalism, Community and State Borders*, 41 DUKE L. J. 1 (1991). Cf. Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L. J. 1191 (1987) (an alternative internationalist theory).

<sup>16</sup> Public international law has long been burdened by analogies between the society of states and the society of individuals within a state. See generally Edwin D. Dickinson, *The Analogy Between Natural Persons and International Persons in the Law of Nations*, 26 YALE L. J. 564 (1916).

<sup>17</sup> See Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L. J. 883, 884 - 885, 894 (2002); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1651; Paul B. Stephan, *The Political Economy of Choice of Law*, 90 GEO. L. J. 957 (2002) (applauding this general approach).

<sup>18</sup> See RONALD COASE, *THE FIRM, THE MARKET AND THE LAW* (1988); Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

<sup>19</sup> See Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 1 (2000).

<sup>20</sup> I associate this view with, for example, Professor Arthur von Mehren.

<sup>21</sup> "One [argument] focuses on *U.S. national interest* and maintains that *the welfare of U.S. citizens would be enhanced* in the fairer, safer, and more prosperous world that would result from increasing assistance to others... I have no quibble with this form of argument, which in my view properly focuses on what is best for U.S. citizens." Jack L. Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1668 (2003) (emphasis in original). Professor Goldsmith goes on to compare this argument with one that favors internationalist

just as they think states should set other aspects of their law. This welfare maximization theory is the only instance of nationalism in the literature. It is a weak form of nationalism because it combines the claim that private international law should maximize the attainment of state objectives with the claim that state objectives should be some function of the welfare of citizens or other relevant persons. The strong form nationalism here defended holds that states should set private international law to maximize the attainment of whatever objectives underlie the rest of their law. Unlike the welfare maximization theory, and unlike naturalist and internationalist theories, strong form nationalism does not limit state interests.

First order views require commitment to the characteristic claim of their type, whereas second order views hold only that particular legal decision makers should act as though a first order view of their type were true. For example, first order nationalism requires commitment to the claim that states should set private international law to maximize the attainment of their objectives. A second order nationalist theory, on the other hand, might hold only that federal judges should act as though states should set private international law so as to maximize the attainment of their objectives. This theory would be consistent with a first order internationalist theory if federal judges tended to make more internationalist concessions than would be appropriate under the first order internationalist theory. Because first and second order views of different types can be consistent, disagreement over first order views does not necessarily preclude agreement on what legal decision makers should do. The holder of a first order nationalist view who needs to convince others in order to put his ideas into effect can convince them either of the truth of that view, or of the excessive internationalist bias of the relevant legal decision makers. The second approach skirts philosophical matters in favor of an empirical question, although with the flavor of a sneak attack. It is useful when it is costly to

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concessions for their own sake, or out of “cosmopolitan duty.”

Most of this literature is advanced as descriptive, although its authors appear to endorse welfare maximizing nationalism as a normative matter. See, e.g., Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999) (arguing that customary international law results merely from the coincidence of interests of the states involved and lacks any further binding authority, for example, moral); Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEG. STUD. 115 (2002) (replying to arguments that states’ use of moral and legal rhetoric is evidence to the contrary); Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901, 1918 (2003) (“The more plausible view is that the law is built up out of rational self-interest.”). A theory of why private international law decision makers would maximize domestic welfare is notably absent. See, e.g., Posner, *Do States Have a Moral Obligation*, *supra*, at 1918 (noting the arguments that legal decision makers may be “under the spell of a legalistic ideology; they may make unrealistic assumptions about the enforceability of international law; or they [may] simply make some other error in moral reasoning” but finding that “none of these seems plausible.”). Compare Jack L. Goldsmith, *Liberal Democracy and Constitutional Duty*, 55 STAN. L. REV. 1667 (2003) (the design of liberal democracies makes it difficult to sacrifice national welfare) with Casey B. Mulligan, Ricard Gil & Xavier Sala-i-Martin, *Do Democracies Have Different Public Policies than Nondemocracies?*, 18 J. ECON. PERSPECTIVES 51, 52 (2004) (“democratic institutions have important effects on the degree of competition for public office, but otherwise have effects on public policies that are insignificant”).

simply walk past those who disagree.<sup>22</sup>

## II. NATIONALISM

### A. *Fidelity to Law: The Institutional Argument*

When hard cases test the scope of legal rules, judges check to see if applying the rule in question to the type of case at bar would advance the ends that justify the rule.<sup>23</sup> Analogical reasoning in law depends on identifying similarities and differences between the facts of the case at bar and sets of facts to which the rule in question is admittedly applicable. A factual distinction matters only if it is relevant; that is, if it alters the degree to which application of the rule would advance its justifying end.<sup>24</sup> The

<sup>22</sup> The following table classifies the leading theories of private international law using the offered taxonomy, and roughly dates each to give a sense of the historical development in American private international law theory.

	<b>Naturalist</b>	<b>Nationalist</b>	<b>Internationalist</b>
<b>First Order</b>	Territorialism and Vested Rights Theories (c. Beale 1935)	Attainment of State Objectives (strong form) (Camara 2004)  Domestic Welfare Maximization (weak form) (c. Goldsmith & Posner 1999)	State-Subject Connection (c. Brilmayer 1987)  Global Welfare Maximization (Guzman 2002)  Scaffolding / International Framework
<b>Second Order</b>	Interest Analysis (c. Currie 1960)  Consistency / Predictability	Correcting International Bias (Camara 2004)	Correcting Domestic Bias (Camara 2004)

*Table 1: Normative Theories of Private International Law*

<sup>23</sup> “[W]hen [judges] are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.” BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 67 (1921); *see also* William F. Baxter, *Choice of Law and the Federal System*, 16 *STAN. L. REV.* 1 (1963). Before the relation of the facts of the case to the purposes of a rule is checked to test for the rule’s applicability, there is a preliminary question of the rule’s validity: its normative claim to be applied if applicable. A legal system’s test for validity is its rule of recognition, *see* H.L.A. HART, *THE CONCEPT OF LAW* 100 - 110, or, for concreteness, its constitution. *Cf. United Mizrahi Bank Ltd. v. Migdal Village*, 49(4) P.D. 221 (Israel 1995) (Barak, C.J.) (“when the constitution is silent [the rule] depends upon the culture and tradition of the legal system”).

<sup>24</sup> So it is rightly taught in first year courses on legal argument. Consider, for example, a common law court that in *Crown v. Williston* fined Williston for stabbing Corbin during a heated argument over the parole evidence rule. In variation one, the court authorizes the fine “to deter similar stabbings.” In variation two, the court authorizes the fine “to satisfy the tastes of citizens for retribution.” A year later, the Crown prosecutes Corbin for stabbing Williston to avenge his invaluable honor, seeking the same fine the court imposed in *Williston*. In scenario A, the *Williston* rule is not applicable because the cases are unlike on the relevant dimension: Corbin could not have been deterred because his honor is, to him, invaluable. In scenario B, the *Williston* rule is applicable because the cases are alike on what is, this time, the relevant dimension: there was a stabbing giving rise to public tastes for retribution.

On analogical reasoning in philosophy, *see, e.g.*, AMARTYA SEN, *RATIONALITY AND FREEDOM* 39 (2002) (the concept of rationality must specify appropriate ends to exclude the person who intelligently and systematically cuts off his toes); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 86 (1981) (“Classification ... takes place within an assumed or already given abstract space wherein points differ in closeness....If the dimensions were changed by which closeness was judged, if different dimensions were salient, a different [classification] would result.”). On analogical reasoning in law, *see, e.g.*, Cass R. Sunstein, *On Analogical Reasoning*, 106 *HARV. L. REV.* 741, 745, 753 - 754, 756 - 757, 773 - 774 (1992) (although Sunstein emphasizes

ends of law emerge from and are justified by a state's political practice.<sup>25</sup> Judges' failure to decide cases with reference to these ends is what unifies formalism, or decision abstracted from purpose; naturalism, or decision for purposes floating free of the law; and skeptical legal realism, or decision for the judge's purposes.<sup>26</sup> Each of these involves infidelity to law because each replaces the political process ordinarily responsible for the ends of law with some other normative source--a formal system, the judge's breakfast or, in the private international law case, political systems of which the judge is not an official. When the outcome of a case changes as a result, the judge has put the force of the state in back of law not legitimated by passage through its political process: extra-constitutional law. Nationalism's central claim is that extra-constitutional law, like unconstitutional law, not only can claim no right to be applied by a legal decision maker of the state in question, but is such that its application by such a person is an affirmative wrong, an act for which his office offers no warrant.

That the legal decision maker in question is not a judge makes no difference. Legal decision makers can be thought of as primary or subsidiary. Subsidiary decision makers owe fidelity to an externally specified body of law. The judge applying a statute is the paradigm, but administrative officers carrying out executive orders or legislative mandates are in a similar position. Primary decision makers, by contrast, themselves endow bodies of law with legal authority. The legislator framing a statute is the paradigm, but the judge deciding a novel question at common law is in a similar position.<sup>27</sup> Actual legal decision makers will fall between the

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that analogical reasoning on the ground operates at a low level of generality, *id.* at 747, 753, he agrees with me that the end of analogical reasoning must be ultimate principles, *id.* at 753 - 754, 778, 785 - 786, and, conversely, that analogical reasoning fails in the face of ultimate disagreement, *id.* at 769 - 770); James R. Murray, *The Role of Analogy in Legal Reasoning*, 29 U.C.L.A. L. REV. 833, 850, 852, 853, 870 (1981) (importance of relevance); Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy and Realism*, 48 VILL. L. REV. 305, 317, 356 - 358 (2003) (labeling what I call analogy as realism). On analogical reasoning in practice, *see, e.g.*, Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 EMORY L. J. 1197, 1214 - 1229 (2001) *citing* Alan L. Tyree, *Fact Content Analysis of Case Law: Methods and Limitations*, 22 JURIMETRICS 1 (1981); ALAN L. TYREE, *EXPERT SYSTEMS IN LAW* (1989); JAMES POPPLE, *A PRAGMATIC LEGAL EXPERT SYSTEM* (1996). *See generally* Sunstein, *On Analogical Reasoning*, *supra* at n. 3 (collecting sources); Hunter, *Reason is Too Large*, *supra* at n. 25 (collecting sources).

<sup>25</sup> Legal rules are applicable when their purposes are furthered by that application. When two or more legal rules with origins of equal normative weight come into conflict, we refer to the process of resolution as "balancing." Balancing requires that the purpose that unifies the conflicting legal rules, either a weighting of each against the others or a true resolution that avoids the apparent conflict, be identified and the rule applied that best advances that purpose. Although I rely on legal decision makers being able to do something of this sort, I do not elaborate the process of decision with reference to legal purpose further. Instead, I adopt by reference RONALD DWORKIN, *LAW'S EMPIRE* ch. 7 (1986) ("propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice") and Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, particularly 1103 - 1105 (1975) (hard cases are decided according to "the political morality presupposed by the laws and institutions of the community").

<sup>26</sup> Analogical reasoning with reference to the purposes animating valid rules of law results in "a particular conception of community morality [being] decisive of legal issues; ... the political morality presupposed by the laws and institutions of the community." Dworkin, *Hard Cases*, *supra* n. XXX at 1105.

<sup>27</sup> *But see, e.g.*, DWORKIN, *LAW'S EMPIRE*, *supra*, n. XXX (judge constrained by dutiful interpretation of

paradigms. The Securities and Exchange Commission endows rules with legal authority, but is constrained in doing so by the terms of its congressional mandate. The minister of trade may be authorized to decide whether prosecution of agribusiness or Microsoft would best advance competitive markets, but not to decide whether to advance competitive markets or, instead, to protect a favored domestic industry.

Primary decision makers create law for reasons. These include, for example, crude self interest, as where the moneyed interests purchase laws; command from a higher authority, for example the church or the party; and moral or political obligations realized after reasoned reflection, for example utilitarianism or libertarianism. These personal reasons are justified bases for law because of the position of those who hold them: primary decision makers are the part of the political system that makes the law. If a primary decision maker sets out to make a body of law and finds that his reason for so doing, the end the body of law is to serve, is *X*, then he should pick for each component of that body of law the rule that, in combination with the others, best advances *X*. To fail to do so is to fail in the pursuit of *X*; to make law the primary decision maker has no reason, no warrant, to make; that is, to make extra-constitutional law. For slightly more concreteness, consider a senator writing an antitrust statute. Suppose that after reasoned reflection (and everything else the constitution calls on senators to do) his view of his duty is to write laws that maximize the welfare of the citizens of his state. Seeking to do so, he consults with economists and concludes that he would fulfill that duty best if he wrote the antitrust statute to promote competitive markets. Seeking to do so, he consults economists and lawyers and concludes that the definition of anticompetitive behavior should be such and such because that definition best promotes competitive markets. Now, he should also set the other components of the antitrust statute—its rules for calculating damages, its applicability to non-profits, its empowerment of prosecutors and rulemaking administrators, &c.—in the way that best promotes competitive markets. It would be inconsistent for the senator to pick one of these rules and set it to serve a different end. More than that, it would result in extra-constitutional law because of the senator's decision that, all things considered, his duty in this case is to write the law that best promotes competitive markets.<sup>28</sup>

The process by which legal decision makers should test the applicability of legal rules in difficult cases does not change merely because what makes the case difficult is the Fact of Overlap. The goal of the legal decision

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institutional practice). I join.

<sup>28</sup> Extra-constitutional law can be both unconstitutional and binding on other legal decision-makers, for example judges. A constitutional preamble commanding laws "for the general welfare" might be violated by a statute enacted to benefit the Ballihurton Corporation, even though a judge would be bound to give the statute full effect.

maker remains to identify the rule of law the application of which would best advance the ends justifying domestic law. The rule chosen need not be the domestic rule in any of the interested states, for example if adopting a compromise would induce other states to adopt it also, with a better result than if each state had applied its own domestic rule to those cases within its de facto jurisdiction.<sup>29</sup> The Fact of Overlap is likely to be relevant in selecting the optimal rule because other interested states' responses to application of a legal rule may affect how much it winds up advancing the ends justifying domestic law. After a brief detour to correct a doctrinal distortion in the literature,<sup>30</sup> the balance of this Part sets out the ways in which the Fact of Overlap can constitutionally change the applicable rule of law.

Just as this normative framework applies to private international law in the same way as to the rest of law, so too does it apply equally to all doctrinal branches of private international law. A branch is important to the extent it affects a state's claims to regulatory authority. Those who believe choice of law rules can control outcomes so that cases heard in France and Kentucky, or in London and Beijing, will come out in essentially the same way so long as both courts agree that English law is applicable will think choice of law more important than jurisdiction.<sup>31</sup> On the other hand, those who believe that variations in institutional quality, or in other social, economic, political or cultural factors, strongly affect outcomes in spite of a formal choice of applicable law, will place relatively more weight on jurisdictional rules.<sup>32</sup> The outcome of this debate turns on an empirical question. More important is to realize that arguments advanced in the choice of law scholarship on the assumption that choice of law is the dominant doctrinal branch are often equally applicable to jurisdiction or enforcement of judgments on the contrary assumption that one of these is dominant. Neglect of this point has led to an unfortunate splintering of the literature addressing the relevance of the Fact of Overlap to legal decision

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<sup>29</sup> See Arthur von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974). One of Professor von Mehren's examples concerns the domestic policy favoring uniformity of judgments, which might best be advanced by adoption of a distinct rule for international situations if adopting that rule would induce its reciprocal adoption by other states with de facto regulatory power over the situations of interest. See *id.* at 365 - 370; see also Elissa A. Okoniewski, *Yahoo!, Inc. v. LICRA: The French Challenge to Free Expression on the Internet*, 18 AM. U. INT'L L. REV. 295, 337 (2002).

<sup>30</sup> Doctrinal divisions in the law school curriculum--here, the separation of jurisdictional rules in courses on civil procedure and federal courts from choice of law rules in courses on conflicts of law or private international law--often distort functionalist legal thinking. See generally K.A.D. CAMARA, CASES AND MATERIALS ON AMERICAN LAW, preface (draft ed. 2003) (identifying the doctrinal distortion in legal scholarship generally).

<sup>31</sup> E.g., "To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdiction purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether." Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978); James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1979) (arguing that contacts sufficient to support specific jurisdiction are a prerequisite to legitimate application of forum law).

<sup>32</sup> I thank Professor Arthur von Mehren for making this point clear to me.

making: the basic problem of private international law.

The relevance of the Fact of Overlap can be assessed in two steps. First, ignoring it, the decision maker can determine whether the ends justifying the domestic rules in question would be advanced by application of those rules to the case at bar. This, the ordinary judicial process familiar from purely domestic cases, establishes a *prima facie* case for application of the rules in question. Here enters private international law: does consideration of the Fact of Overlap alter the applicability of the legal rules in question? More contentiously, are internationalist concessions such as the application of foreign law ever consistent with nationalism?

Yes. Nationalism demands only that any deviations from the result in a purely domestic case be justified in terms of the ends justifying domestic law. Applying the domestic rule in the face of the Fact of Overlap may cause other interested states to respond in ways that negatively affect attainment of these ends. By declining to apply domestic law, legal decision makers can avoid these undesirable responses. In a world of nationalists, internationalist concessions come only at the price of reciprocal concessions. The more a state has to offer in terms of furthering the ends of other states, the greater are the internationalist concessions other states will be willing to make in return. For example, nationalism would justify French enforcement of a Russian judgment contrary to French law only if, for example, this would likely lead to reciprocal Russian enforcement of French judgments. China ought not to apply a human rights law it would not otherwise apply unless, for example, Europe would then make its product markets more accessible to the Chinese. These are the sorts of justifications that support nationalist claims for the application of anything other than domestic law.

When a state regulates in the presence of the Fact of Overlap, it necessarily interferes with other states' pursuit of their own regulatory interests. I call the foreign effects of a state's claims to regulatory authority *externalities of sovereignty*. A state can also purposefully interfere with other states' pursuit of their regulatory interests. I call this, imposing *costs of sovereignty*. The next subparts identify three types of externalities of sovereignty and three types of costs of sovereignty, including the purposeful imposition of externalities of sovereignty. Costs of sovereignty are the negative effects in terms of attainment of the ends justifying a state's law that might justify a change in its legal rules in the face of the Fact of Overlap. For a nationalist, they are the determinants of private international law.

### *B. Externalities of Sovereignty*

Regulation by one state (the *imposing state*) of conduct in which another state (the *spillover state*) is interested adversely affects the attainment of the ends justifying the spillover state's law when the imposing state's law is wrong from the perspective of the spillover state. The simplest case of wrong law is where the legal rule applied by the imposing state serves ends different than those served by the legal rule the spillover state would prefer. Further, however, the imposing state generates externalities of sovereignty when its regulation, although aimed at the same end and equally effective alone, interacts negatively with the concurrent regulation of the spillover state; and when its regulation, by limiting the enforcement power of the spillover state, effectively forecloses the spillover state's most preferred regulatory option. Each type of externality of sovereignty is ultimately a form of wrong law: the imposing state's regulation of conduct by a legal rule other than that the spillover state would prefer.

### 1. Wrong Law *Simpliciter*

A state imposes a *wrong law simpliciter* externality when it applies law that does not advance as far as possible the ends justifying the spillover state's law. The imposing state declines to cede authority over a class of disputes in which the spillover state is interested. Wrong law *simpliciter* arises in a variety of situations. States may disagree on first principles: for example, state *A* might have the maximization of its citizens' welfare as the justification of its laws, and in service of that end might punish crimes with excruciating yet cheap to inflict pain; while state *B* might have the maximization of welfare constrained by a ban on cruel punishments,<sup>33</sup> such as those of state *A*, as the justifying end of its laws. If *A* applies its punishment in a case in which *B* is interested, the attainment of *B*'s ends will be hindered. An externality of *A*'s claim to sovereignty in inflicting its chosen punishment is the cost to *B* in terms of deviation from the ends justifying its laws.

A state may impose wrong law externalities even though its formal choice of law selects the law of the spillover state. State *A* and state *B* might agree on that *A*'s law is applicable, and yet *B* might be incapable of applying that law in precisely the way that would a court of *A*. If *A* law refers a damages issue to the jury, *B* may agree this law controls, but the result in *B* may nevertheless be different because, for social, cultural, economic or other reasons, *B* juries award higher or lower damages than do *A* juries. If the end justifying *A*'s referring damages issues to juries is connected to the size of the resulting jury award, then *B* may, by hearing a case in which *A* is interested, impose a wrong law externality even though it

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<sup>33</sup> E.g. U.S. CONST. Am. VIII (prohibition of cruel and unusual punishment).

refers the damages issue to a jury in accordance with *A* law. On the other hand, there may be no such externality if the end justifying *A*'s law is unrelated to the resulting jury award, but is, for example, satisfaction of popular tastes for juries. The presence and magnitude of wrong law externalities is always measured in terms of the legal ends of the states involved. Consider another example. State *D* might agree that the law of state *C* controls a particular issue, but be unable to determine *C* law. *D* courts will either get *C* law wrong, or will fall back on erroneous presumptions about *C* law.<sup>34</sup> In these *A-B* and *C-D* cases, the wrong law externality arises unintentionally, as a consequence of the inability of *B* and *D* to apply a particular foreign law. Limits in private international law technology such as these are a significant way in which jurisdictional rules acquire importance beyond the costs of travel.

## 2. Inconsistent Law

An imposing state can apply *inconsistent law*, law that would equally serve the ends justifying the spillover state's law, but for the concurrent application by that state of its own law. For example, states *A* and *B* may both want adequately informed capital markets for whatever, possibly different, higher order reasons. Mandatory disclosure and merit regulation, under which the state investigates a firm's operations before licensing its participation in the capital markets, may be equally effective means of pursuing this end.<sup>35</sup> The concurrent application of both systems, however, may be worse in terms of obtaining adequately informed capital markets than the application of either system alone. Concurrent application may constitute excessive regulation.<sup>36</sup> In this situation, *A*'s mandatory disclosure regime imposes a cost of inconsistent law when applied to cases in which *B* applies its merit regulation regime. And vice versa: *B*'s application of a merit regulation regime to these cases imposes a cost of inconsistent law on *A*.

Either state may have adopted its regulatory form for reasons that make adopting the alternative undesirable. A disclosure regime might be cheaper for *A* because it already has a scalable disclosure enforcement system in place, say, for the regulation of public utilities. Merit regulation might be cheaper for *B* because it already has a general policy of licensing commerce. Either state might eliminate the inconsistent law externality by, instead of adopting the alternative regulatory form, simply allowing the other state to be the sole regulator. This may be costly, however, because

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<sup>34</sup> See, e.g., Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 979 – 980 (1958) (citing cases and further commentary).

<sup>35</sup> See, e.g., LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 32 – 45 (2004).

<sup>36</sup> I thank Professor Andrew Guzman for suggesting the example.

the regulating state will have to bear the administrative cost of the increased case load;<sup>37</sup> it may be difficult to distinguish cases in which both states are interested and so the Fact of Overlap and the internationalist compromise come into play, from those in which domestic regulation would be best; domestic political systems may be designed to resist regulatory delegation to foreign entities, which might be a good or bad design with respect to attaining a state's ends;<sup>38</sup> and deferring now may make regulating later in light of a divergence in state ends more costly. All of these problems can be reduced to a single cost of the cheapest regime that would satisfy both states. Nationalist states would then adopt that cheapest regime if and only if the inconsistent law externalities for each state exceed the cost of the cheapest regime.<sup>39</sup> This process is more complicated when regulation concurrently imposes inconsistent law and wrong law externalities. The presence of both explains why nationalist states may resist unifying changes that would avoid inconsistent law externalities at the cost of what appear from the outside to be more details, but which, given the justifying ends of a state's law, it would entail accepting large wrong law externalities to sacrifice.

Externalities of inconsistent law include not only situations like the securities regulation example, where concurrent regulation is possible but on balance detrimental, but also situations in which the alternative laws are flatly inconsistent: drive on the left side of the road versus drive on the right. What makes this particular case easy (and, though simple, notice that it is real), is that it is easy to assign classes of case to regulatory rules on the basis of physical territory (the costs of the cheapest regime, including the costs of sorting cases, are low) and the precise outcome is much less important than the avoidance of concurrently applied conflicting laws from the perspective of all states involved (the inconsistent law externality dwarfs the wrong law externality). Still, non-unification imposes transaction costs on private parties operating across legal regimes. The international driver must investigate and keep track of the side of the road

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<sup>37</sup> See, e.g., Laurence Helfer, *Whither the UDRP: Autonomous, Americanized, or Cosmopolitan*, Princeton Program in Law and Public Affairs Research Paper No. 03-010 at 8, available at <http://ssrn.com/abstract=437182> (2003).

<sup>38</sup> Cf. Jack L. Goldsmith, *Liberal Democracy and Constitutional Duty*, 55 STAN. L. REV. 1667 (2003) (noting effects of the liberal democratic structure for a state's ability to discount national welfare).

<sup>39</sup> Consider a simple case where there exists some cheapest equally effective regime that could be implemented entirely by either state acting alone. The cost of this regime for either state is  $C$ , and the cost of the current regulatory regime of each state is  $C_A$  and  $C_B$  respectively, so that the marginal cost of adoption of the cheapest regime for each state is  $C - C_A$  for state A and  $C - C_B$  for state B. The cheapest regime in the text will then be adoption of the cheapest regime by the state for which the marginal cost of adoption is least: assume it is state A. If the marginal cost of adoption exceeds the cost of inconsistent laws state A suffers,  $I_A$ , but is exceeded by the sum of the costs of inconsistent laws for both states,  $C - C_A < I_A + I_B$ , state B will pay state A to induce state A to adopt the cheapest regime. More generally, the cheapest regime might involve implementation in part by state A and in part by state B; so long as the sum of the costs of inconsistent laws for all states exceeds the sum of the marginal cost of adoption for all states, there is room for a deal of this sort.

on which he is to drive. These costs will constitute externalities of sovereignty to the extent costs inflicted on private parties factor into the ends of the states involved.

### 3. Inefficient Scope

An imposing state's refusal to cooperate may force the spillover state to apply laws of *inefficient scope*: second best laws installed because first best laws would require enforcement too costly in light of the imposing state's refusal to cooperate. For example, consider the bankruptcy of a corporation with operations in states *A* and *B*.<sup>40</sup> On the facts of this bankruptcy, state *A* would prefer reorganization to liquidation if all of the firm's assets are available for reorganization, but would prefer liquidation otherwise. Some of the assets are under the effective control of *B* in that it would be very costly for *A* to control their disposition. For example, seizure of these assets might require intrusion by officers of *A* into the territory of *B*, which invasion would be forcibly resisted by *B*. *B*'s bankruptcy law has no provision for reorganizations. *B* bankruptcies always result in liquidation. In this situation, *B*'s mandatory liquidation rule coupled with its effective control of some of the assets imposes an externality of inefficient scope on *A* in that *A*, unable to involve all the assets in its reorganization, is driven to adopt its second best rule, liquidation. The effect is that all of the assets, both those in *B* and those in *A*, are liquidated.

The boundary between each type of wrong law externality, but particularly between wrong law *simpliciter* and inefficient scope, is blurred. In the bankruptcy hypothetical, *B*'s liquidation of the assets under its control can be thought of as wrong law *simpliciter*, and the cost in terms of attainment of the ends justifying *A*'s law a wrong law externality. Still, the bankruptcy case is usefully distinguished because in the ordinary case of wrong law, *A*'s preferred rule can be applied independently to conduct within *A*'s effective control, whereas in the case of inefficient scope, *A* cannot apply its preferred rule unless *B* cooperates, even to conduct within *A*'s effective control. By contrast, if the disagreement between *A* and *B* is over the enforceability of substantively unconscionable contracts, *A* and *B* can enforce or decline to enforce contracts within their effective control, imposing wrong law externalities on one another without blocking each other's ability to do the same. The need for cooperation gives rise to externalities of inefficient scope.

One reason why problems of inefficient scope merit special attention is

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<sup>40</sup> I thank Professor Andrew Guzman for suggesting this example. See also Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 18 (1997) ("A successful reorganization depends on keeping assets spread across various countries in the firm.").

that the disagreement on the best rule between the states involved may seem quite minor from the perspective of one of the states involved. The wrong law externality may be small relative to the inefficient scope externality. Consider, again, the bankruptcy hypothetical, except that both *A* and *B* think reorganization desirable. Their disagreement is only over particulars. For *A*, it is critical that the headquarters of the reorganized firm be in its territory because it values very much the ability of its courts swiftly to intervene in corporate affairs. In the absence of *A*'s interest, *B* would place the headquarters of the reorganized firm in its own territory, but *B* cares much less about the location of the headquarters than about there being a successful reorganization. There is an externality of inefficient scope imposed on *B* if *A* moves to liquidation instead of enforcing *B*'s decision on placement of the headquarters, and this externality far exceeds the wrong law externality that would have been imposed had the outcome been reorganization, but with the headquarters in *A*'s territory.

In situations like this, nationalist states should cut a deal: the state for which the location decision is minor (*B*) should defer to the state for which it is major (and which therefore blocks reorganization in cases where the location decision is made wrongly, forcing liquidation) (*A*), or pay the state for which it is major an amount that makes that state neutral between accepting the wrong location decision plus the payment and blocking the reorganization by moving to liquidation.<sup>41</sup> This sort of deal would suffer from a variety of complications. Deference may be administratively costly, as where there are lots of apparently minor issues having this characteristic; that is, if one state feels strongly on apparently minor issues 1, 2 and 3, but the other feels strongly on apparently minor issues 4, 5 and 6, one state cannot simply hand over the entire reorganization to the other. There will need to be an understanding by the state running the reorganization of the preferences of the other state as to those issues it feels strongly about. Conveying this information may be costly because experts in foreign law may be costly, and because joint adjudication mechanisms, which would be an alternative to courts of the reorganizing state learning about foreign preferences second-hand, may be costly. These costs may be especially large in the context of an apparently minor issue since the importance of the issue for the state for which it is a major issue may be difficult for a legal decision maker steeped in the view that the issue is minor to grasp: there is

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<sup>41</sup> Let there be an issue, *I*, over which state *A* and state *B* have differing preferences, such that the cost to state *A* of accepting state *B*'s preferred resolution of *I* is  $I_A$ , and the cost to state *B* of accepting state *A*'s preferred resolution of *I* is  $I_B$ . Let reorganization, *R*, be available only if both states prefer it to liquidation, *L*, and let *L* be the cost of using liquidation rather than reorganization. *I* is an apparently minor issue if either  $I_A > L$  and  $I_B < L$ , or  $I_A < L$  and  $I_B > L$ . Take the second case. We would expect state *A* either to defer to state *B* on *I*, or to pay state *B* some amount *x*, which would result in state *B*'s being indifferent between accepting the wrong decision on *I* plus the payment, and blocking the reorganization,  $I_B - L < x < L$ . A state will defer rather than pay when  $L - I_A < x$ .

a greater likelihood of a cultural barrier to understanding. The payment alternative may be difficult because it may be costly to value in terms of currency the wrong decision on an apparently minor issue. In particular, states may dislike the very idea of being bought off in this fashion; as a matter of practice, however, this seems to depend on the area of law in question.<sup>42</sup>

Inefficient scope also includes distortions of private behavior caused by limits on the enforcement power of states. For example, a state's bankruptcy preference for certain sorts of creditors may distort firms' investment decisions in favor of investment in places beyond the reach of the mechanisms by which that state enforces its bankruptcy preference.<sup>43</sup> By investing in such places, the firm is able to shift some of the downside risk of a venture onto the formerly preferred creditor.<sup>44</sup> More generally, consider an asset protecting state into which private parties can funnel funds to secure them from the enforcement mechanisms of other states. Such a state will attract more assets than will a state that is less protective of private assets, all else equal; and the movement of assets into such a state might hurt objectives that look favorably on wealth maximizing investment. Whether a particular distortion of private behavior is a negative or positive externality of inefficient scope (or of any sort) will depend on the particular objectives with reference to the advancement or undermining of which the distortion is assessed: that is, a private distortion may be favorable, of no concern, or unfavorable from the point of view of a legal decision maker seeking to maximize the attainment of the ends justifying a particular state's law. It may be that the distortion of private behavior caused by the asset protecting state's asset protection in fact furthers the objectives of another state, say to protect the wealth expropriated by its dictatorial masters. In such a case, the distortion would not be a cost of inefficient scope, but rather a service extended by the asset protecting state.

### C. Costs of Sovereignty

To deter (encourage) the imposition of negative (positive) externalities of sovereignty by other states, states can purposefully raise (lower) the cost of externality-creating exercises of sovereignty by imposing costs of

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<sup>42</sup> For example, selling the right to travel through a nation's airspace, or to use a nation's territory as the basis for military operations seems less troublesome than selling the recognition and enforcement of foreign marriages or a more favorable securities regulation regime. Cf. Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 397 – 406 (1999) (suggesting explanations for hostility to money transactions over certain rights).

<sup>43</sup> The example is from Lucian A. Bebchuk & Andrew Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J. L. & ECON. 775 (1999).

<sup>44</sup> *Id.*

sovereignty.<sup>45</sup> The more important is the area of the imposition to the target state, the costlier will the imposition be to that state and so the greater will be the deterrent effect. Often, the best way to discourage imposition of externalities of sovereignty in one area will not be to impose costs of sovereignty in the same area, but rather to target an area more important to the target state. For example, if regulating conduct *X* is most important to state *A*, but regulating conduct *Y* is most important to state *B*, then *A* can better deter *B* from wrongly regulating *X* by imposing costs on *B*'s regulation of *Y* than on its regulation of *X*. In deciding to apply domestic law in the face of a foreign interest, the doctrinal focus on the sacrifice of a state's own ends immediately related to the area in question<sup>46</sup> makes the inquiry incomplete; attention is also due the possibility of using this opportunity for imposition to win advance domestic ends in other, more important areas. Courts should refuse to enforce punitive damages awards on grounds of public policy whenever, all things considered, that enforcement would undermine the attainment of ends justifying domestic law, even if the particular ends so advanced are unrelated to punitive damages.

### 1. Externalities of Sovereignty as Imposed Costs

The externalities of sovereignty examined already can themselves constitute costs of sovereignty. One way in which a state might penalize another state for its wrong law of antitrust is by adopting a wrong law of bankruptcy in cases in which the other state is interested. Another is by declining to cede regulatory authority over securities issues even though the other state's regulatory regime is equally effective. And still another is to erect barriers to enforcement of the other state's laws strong enough to force the other state to adopt a law different than that it otherwise would adopt.

### 2. Legal Impositions

A state's ordinary legal-judicial proceedings may constitute "legal impositions" on other states. One type of legal imposition is that resulting from the protection by a state of its jurisdiction over a certain category of conduct. Suppose that states *A* and *B* are concurrently interested in regulating some particular private conduct. *A* can make it more difficult for

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<sup>45</sup> See, e.g., Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 Law & Contemp. Probs. 11, 11 (1987) ("The application of American ... antitrust law [and] securities regulation [has provoked] increasing irritation on the part of certain foreign trading partners, but also occasional retaliatory legislation by foreign governments.").

<sup>46</sup> "The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there." *Cuba Ry. v. Crosby*, 222 U.S. 473, 478 (1912).

*B* to regulate by making it harder for parties to make use of legal remedies provided by *B*. Most simply, *A* can deny its aid in enforcing judgments of *B*.<sup>47</sup> *A* need not necessarily stop with recognition and enforcement. *A* might, for example, grant anti-suit injunctions on petition against a private party making that party liable in contempt in courts of *A* if that party invokes legal remedies provided by *B*. State *A* might also grant an anti-anti-suit injunction, enjoining the pursuit by a private party of an anti-suit injunction from a court of *B* in aid of its jurisdiction.<sup>48</sup> Denial of recognition and enforcement bars access to assets within the control of the denying state; a state might go further, however, and make the enforcement of a foreign judgment abroad itself actionable domestically.<sup>49</sup> Not only would a party with a judgment from *B* be unable to enforce it on assets in *A*'s effective control, but if he enforced it by levying on assets in *B*'s effective control, he would become liable in courts of *A* for the value of those assets--conversion with sovereign accomplice.

Legal impositions can also be made in choice of law. Just as *A* can deny recognition to a judgment on the grounds that the rendering state lacked jurisdiction, so too can it deny recognition on the grounds that the law applied by the rendering state was wrong. Substantive review of arbitral awards is an example. Just as in the jurisdictional case, stronger impositions are also available: injunctions not to invoke the wrong law (like the anti-suit injunction) and affirmative liability for invoking other states' legal apparatus in aid of wrong law (like the claw back statute).

The above legal impositions are variations in substantive law determining when and to what extent a foreign judgment will be honored. Procedural variations can also constitute legal impositions. For example, judgments of *B* are more easily enforced if all one must do is present them to a sheriff of *A* than if one must present them, and explain and justify the foreign law underlying them, to a court of *A*. A requirement that parties plead and prove the content of foreign law is more of a ;ega; imposition than a regime in which judges inquire into foreign law *sua sponte*; and a presumption that unproved law is the same as domestic law may be a very serious imposition if domestic law is far from the international norm. A state's rules with respect to extradition, access to court records (and hence pre-collected evidence), and access to evidence, including persons, within the state's control all may constitute serious legal impositions in much the

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<sup>47</sup> See, e.g., *Yahoo! Inc. v. La ligue Contre le Racisme et l'Antisemitisme*, 169 F.Supp.2d 1181 (N.D. Cal. 2001) (denying enforcement to French judgment because of inconsistency with American policies embedded in the First Amendment).

<sup>48</sup> See generally Schimek, *Anti-Suit and Anti-Anti-Suit Injunctions*, *supra* n. XXX; Note, *Antisuit Injunctions and International Comity*, *supra* n. XXX.

<sup>49</sup> This is called a claw back law. See, e.g., Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, n. 13 (2000); Joseph Griffin, *Extraterritoriality in U.S. and E.U. Antitrust Enforcement*, 67 ANTITRUST L. J. 159 (1999) (cited in Tarullo).

same way.

There are also legal impositions even more clearly substantive than those first considered. For example, a state's willingness to consider legal outcomes elsewhere in making its own legal conclusions can aid or retard the achievement of other states' regulatory objectives by aiding or retarding the international convergence of substantive law. In order from imposing most to imposing least cost, a state might take the positions, for example, first, that foreign legal outcomes are entirely irrelevant; second, that foreign legal outcomes are useful for their reasoning<sup>50</sup> and for the light they shed on empirical outcomes under different legal rules;<sup>51</sup> and third, that the fact that foreign legal systems have arrived at some outcome, say the illegality of capital punishment, is itself a reason to reach that outcome domestically.<sup>52</sup> A state can aid the advancement of the objectives of another state by viewing the legal decisions of that state with more respect.

### 3. Political Impositions

Finally, states have access to political impositions. These are distinguished from legal impositions only in that they are more traditionally political-executive than legal-judicial. They include, for example, a state's law regarding complex cooperation in regulation, investigation and enforcement; the application of diplomatic pressure; trade sanctions such as tariffs, special preferences, bans and blockades; the granting or withholding of aid, whether it be financial, in the nature of training or other services, or goods such as medicine or food; and, ultimately, the application of military force.

The precise location of the border between political and juridical

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<sup>50</sup> See, e.g., *30 Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch.) 191, 198 (1815) (Marshall, C.J.) ("The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect."). Justice Kennedy's citation of *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. 52 (1981) (ban on consensual homosexual conduct violates European Convention on Human Rights), in *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (same law unconstitutional) appears to fall within this category. But see *Lawrence*, 123 S. Ct. at 2494 – 2495 (Scalia, J., dissenting) ("Much less do [fundamental rights] spring into existence, as the court seems to believe, because *foreign nations* decriminalize conduct.") (emphasis in original).

<sup>51</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 976 – 977 (The experience of other nations "may ... cast an empirical light on the consequences of different solutions to a common legal problem.") (citing European authorities); *Schriro v. Summerlin*, Slip Op. No. 03-526 at 8 (2004) (Scalia, J.).

<sup>52</sup> See generally Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

The last position might rest on a view that the legal reasoning processes of legal decision makers are imperfect signals of an objective reality. That is, all legal decision makers are striving toward the same goal, but each particular decision maker's view of the path is blurred. Under these circumstances, the fact that lots of other legal decision makers see the path as extending in a certain way is evidence that the path does extend that way since the probability that their vision has led them all on the same wrong path is less than the probability that their vision has led them all on the same correct path. If everyone thinks this way, however, there is a substantial risk that an initial wrong decision by one or several legal decision makers will cascade into a series of wrong decisions by all observers. See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

impositions—for example, is withholding cooperation on antitrust investigations a juridical or a political imposition?—is arbitrary. On the political side of the line is the territory of the international relations specialists. In this literature, it is the realists who are closest to my own view, although much of the realist work in international relations theory purports to be positive.<sup>53</sup> The nationalist theory is not that realism is an accurate description of the world, particularly in the realm of legal impositions, where the special forms and curious formalities of the law more than occasionally outweigh pragmatic considerations,<sup>54</sup> but rather that behavior in accord with realist predictions is normatively desirable for legal decision makers setting private international law.<sup>55</sup> In any event, there is nothing particularly legal about the political impositions—it is sufficient to note their presence as potential costs of sovereignty.

### III. NATIONALISM APPLIED

#### A. *Scales of Sovereignty*

The most obvious way in which states can economize on costs of sovereignty is by exercising less of it. Private international law governs the degree to which a state yields sovereignty in light of the Fact of Overlap. We can place states' settings of private international law along a scale of sovereignty stretching from complete abdication of adjudicative functions—an abandonment of any claim to the right to set the rules, regardless of whether state ends would thereby be advanced—to a complete assumption of legislative functions—a claim to the right to set the rules under all circumstances. More precisely, a state's private international law is an

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<sup>53</sup> In the legal literature, *see, e.g.*, Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999) (arguing that customary international law results merely from the coincidence of interests of the states involved and lacks any further binding authority, for example, moral); Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEG. STUD. 115 (2002) (replying to arguments that states' use of moral and legal rhetoric is evidence to the contrary); Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901 (2003) (no). *Compare* Jack L. Goldsmith, *Liberal Democracy and Constitutional Duty*, 55 STAN. L. REV. 1667 (2003) (the design of liberal democracies makes it difficult to sacrifice national welfare) with Casey B. Mulligan, Ricard Gil & Xavier Sala-i-Martin, *Do Democracies Have Different Public Policies than Nondemocracies?*, 18 J. ECON. PERSPECTIVES 51, 52 (2004) ("democratic institutions have important effects on the degree of competition for public office, but otherwise have effects on public policies that are insignificant").

<sup>54</sup> *Cf.* Goodman & Jinks, *Toward an Institutional Theory of Sovereignty*, *supra* n. XXX, at 1752 – 53 (global legal norms shape state behavior); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981) (carving law off from the "big picture" disciplines of moral philosophy and that branch of it which passes under the name of normative economics). I think the argument of Goodman and Jinks is more plausible in the context of juridical than of political sanctions, since pragmatics will generally be clearer in the latter than in the former.

<sup>55</sup> Again, however, I should emphasize that I take no position on the substantive ends that ought to underlie a state's law, whereas some forms of international relations realism take or recommend that those ends be the maximization of a state's "power" or international influence. My normative framework transcends the issue of what ends a state ought to pursue, of what ends ought to underlie the law of a state.

object in an abstract, multidimensional space. The multiple dimensions represent different aspects of private international law: for example, jurisdiction, choice of law and the enforcement of judgments; or the sets of facts on which these three depend. Each dimension is a scale with many possible values: for example, a choice of law rule might point either to a foreign state's rule, to some commonly developed substantive law, to a domestic law specially tailored to compromise ordinary domestic objectives somewhat in light of the regulatory interests of other states,<sup>56</sup> or simply to the ordinary rule applied in entirely domestic cases. Similarly, a jurisdictional rule might assign a case to the foreign court, to some international or private tribunal, or to domestic courts; and all of the above might be exclusive or available by election of the parties. In general, the greater the dimensions necessary fully to represent a state's private international law, the more particularistic are its determinations as to when a state should make claims to sovereignty.

Nationalist legal decision makers set private international law rules so as best to attain the ends justifying the law of the state they serve, keeping in mind that regulation of conduct in which other states are interested may result in costs of sovereignty. It is useful to consider four objects in sovereignty space--sets of claims to sovereignty--that a nationalist legal decision maker might adopt. For each such set, I identify considerations that might move a nationalist legal decision maker to adopt it, and I identify situations in which actual states have adopted similar positions. In identifying paradigmatic positions, I pick four points by varying my hypothetical state's position along the dimensions of jurisdiction and choice of law. In so doing, I occasionally obscure the distinct positions that a legal decision maker might adopt by extending or limiting claims to sovereignty along other dimensions of sovereignty space.

### *B. Domestic Jurisdiction and Domestic Law*

Least internationalist of the paradigm positions is a claim to domestic jurisdiction and the application of domestic law. The actual severity of this type of claim depends on how vigorously it is enforced. Least severe would be simply to accept jurisdiction when cases come before the court, and to apply domestic law in those cases. More severe would be to refuse to enforce judgments of foreign courts on the ground that those courts were without jurisdiction, or to refuse to enforce those judgments to the degree they differ from those that would result under domestic law. Still more severe would be to enjoin at the instance of a party the pursuit of foreign legal remedies, with the injunction backed up by fines or criminal penalties.

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<sup>56</sup> See Arthur T. von Mehren, *Special Rules for Multistate Problems*, *supra* n. XXX.

And more severe yet would be to criminalize the pursuit by any person of foreign legal remedies, with enforcement by the normal criminal complex—in the United States, police, district attorneys, grand juries, criminal trials and prisons.

More severe forms of domestic jurisdiction and domestic law often cross the line into public international law. For example, the American invasion of Iraq in response to its imposition of costs of wrong law (failure to deter terrorist groups, say by penalties, indoctrination or education) would be an extreme example of a claim to domestic jurisdiction and domestic law. Another example is the American Servicemembers' Protection Act of 2002 (ASPA),<sup>57</sup> which adopts a fairly stiff domestic jurisdiction and domestic law position as against the International Criminal Court (ICC).<sup>58</sup> The congressional findings in ASPA declare that "[t]he United States will not recognize the jurisdiction of the International Criminal Court over United States nationals,"<sup>59</sup> that "[m]embers of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court"<sup>60</sup> and that "[t]he United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by the International Criminal Court."<sup>61</sup> To back up this claim, ASPA bars any "agency or entity of the United States Government or of any State or local government, including any court"<sup>62</sup> from, among other things, cooperating with formal ICC requests for cooperation,<sup>63</sup> extraditing persons to the ICC for trial,<sup>64</sup> sharing certain classified information with the ICC,<sup>65</sup> and using congressionally appropriated funds to support the ICC.<sup>66</sup> Further, ASPA forbids the participation of American troops in United Nations peacekeeping operations without guarantees that they will not be subject to ICC jurisdiction,<sup>67</sup> prohibits American military assistance to states participating in the ICC (with exceptions for certain allies),<sup>68</sup> and authorizes the use of "all means necessary and appropriate" to recover Americans

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<sup>57</sup> 116 Stat. 899 §§ 2001 – 2002, 2004 - 2008 (2002).

<sup>58</sup> On the recent opposition of the United States to the International Criminal Court, *see generally* Allison M. Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 STAN. L. REV. 1633 (2003).

<sup>59</sup> 116 Stat. 899 § 2002(11) (2002).

<sup>60</sup> *Id.* § 2002(8).

<sup>61</sup> *Id.*

<sup>62</sup> *E.g. id.* § 2004(e). Other provisions use slightly different language, e.g. "no United States Court, and no agency or entity of any State or local government, including any court," but the differences are minor for our purposes here.

<sup>63</sup> *Id.* § 2004(b).

<sup>64</sup> *Id.* § 2004(d).

<sup>65</sup> *Id.* § 2006.

<sup>66</sup> *Id.* § 2004(f).

<sup>67</sup> *Id.* § 2005 (there is an exception for participation certified by the president as in "the national interests of the United States").

<sup>68</sup> *Id.* § 2007.

being subjected to ICC jurisdiction.<sup>69</sup>

Still another example of an area in which states make claims to domestic jurisdiction and domestic law is the recognition of marriages for purpose of civil benefits, criminal prohibitions (e.g. on bigamy or adultery) and divorce.<sup>70</sup> In the United States, the Full Faith and Credit Clause<sup>71</sup> has been interpreted to afford states virtual *carte blanche* in declining to recognize foreign marriages as contrary to public policy.<sup>72</sup> The recent authorization by Vermont of same sex civil unions,<sup>73</sup> and the recent decision by the Supreme Judicial Court of Massachusetts that the Massachusetts constitution requires the authorization of same sex marriages in that state,<sup>74</sup> are placing new pressure on the use of public policy to deny recognition of foreign marriages valid where entered into. Over thirty-five states have passed Defense of Marriage Acts (DOMAs) announcing their intent not to recognize foreign same sex marriages.<sup>75</sup> Courts in Georgia<sup>76</sup> and Connecticut,<sup>77</sup> interpreting the body of their state law pertaining to marriage, have denied recognition to Vermont same sex domestic partnerships on public policy grounds.<sup>78</sup> It is likely that the DOMA states will follow suit, and unlikely that there will be any constitutional bar to their doing so. (Even if there were a constitutional bar, what we are here interested in is the adoption by a state of a domestic jurisdiction and domestic law policy, not the acceptability of that policy under federal or other higher standards.) Precedent for state refusals to recognize immoral—

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<sup>69</sup> *Id.* § 2008.

<sup>70</sup> On these incidents of marriage, see e.g. *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (Cordy, J.) (advisory opinion on legislative proposal of civil unions in response to *Goodridge*); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (denying marriage to same sex couples violates Massachusetts constitution).

<sup>71</sup> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U.S. CONST. art. IV, 1.

<sup>72</sup> See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). It is important to distinguish the choice of law issue—whether to recognize as married a couple married elsewhere—from the enforcement of judgments issue—whether to honor a foreign judgment premised on a couple's marriage. States are not permitted to decline enforcement of judgments as contrary to public policy under the federal statute implementing the Full Faith and Credit Clause. See generally Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 B.Y.U. L. REV. 1235 (including a discussion of these and other cases).

<sup>73</sup> 15 Vt. Stat. Ann. § 1201 et seq. (authorizing same sex civil unions); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (requiring an accommodation for same sex couples).

<sup>74</sup> See *Goodridge*, *supra* n. XXX.

<sup>75</sup> These are modeled on the federal DOMA, passed in response to *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (state failure to recognize same sex marriages was sex discrimination under state constitution) (mooted by HAW. CONST. art. I, 23 limiting marriage to opposite sex couples). The federal DOMA provides that "[n]o State ... shall be required to give effect to any public act, record, or judicial proceeding ... respecting a relationship between persons of the same sex that is treated as a marriage." 28 U.S.C. § 1738C.

<sup>76</sup> *Burns v. Burns*, 560 S.E.2d 47 (Ga. App. 2002); see also Katie Eyer, *Related Within the Second Degree? Burns v. Burns and the Potential Benefits of Civil Union Status*, 20 YALE L. & POL'Y REV. 297 (2002) (commenting on the then-pending appeal in *Burns*).

<sup>77</sup> *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. 2002).

<sup>78</sup> *But see Langan v. St. Vincent's Hospital*, 765 N.Y.S.2d 411 (N.Y. S.Ct. 2003) (same sex partner under Vermont civil union statute was spouse for purposes of New York wrongful death statute; court reserved decision on spousal status for other purposes under New York law).

polygamous, incestuous, juvenile, &c.—marriages is plentiful;<sup>79</sup> the same sex issue is merely the latest focus in a long tradition of state claims to domestic jurisdiction and domestic law in this area of the law of persons.<sup>80</sup>

A firm domestic jurisdiction and domestic law position will often be the position that imposes the greatest externalities of sovereignty on other states. When the United States undermines participation in the ICC, it undermines the objectives of those states that want to see a regularized international adjudication mechanism for war crimes. When Texas refuses to honor Massachusetts same sex marriages, it undermines the objective of protecting homosexuals from the harm that flows from treatment as an outlaw class.<sup>81</sup> (Assuming, of course, that this is in fact an objective underlying the law of Massachusetts; that is, either that *Goodridge* made it that way, or that *Goodridge* was correctly decided in a more traditional sense.) It therefore makes sense to take this position only when the gain from so doing in terms of the advancement of the ends justifying domestic law is great, or the ability of the other states affected to respond is small. The first justification will hold when the subject matter is very important in terms of domestic objectives, and when the alternative (deference to international or foreign law, or to an international or foreign dispute resolution mechanism) is quite different from the domestic rule. Some of the alternatives in the ICC and same sex marriage examples are easy to see: the United States could defer to the ICC, and Texas could recognize Massachusetts same sex marriages. Intermediate alternatives are possible, for example, recognizing ICC jurisdiction for very serious violations of international law (*ius cogens* or some further subset) and recognizing Massachusetts same sex marriages for some purposes (wrongful death standing) but not others (divorce, alimony, adoption).<sup>82</sup> The less important the subject is, and the less difference being obstinate makes, the less is gained by being obstinate. Where fine gradations are possible, claims to domestic jurisdiction and domestic law should generally be limited to the areas most important to the state and in which the state's substantive stance is furthest from those of its neighbors.

### C. International Jurisdiction and Domestic Law

The second paradigm position concedes jurisdiction to an international

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<sup>79</sup> See *Developments in the Law: III. Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028 (2003) (an excellent review of the cases).

<sup>80</sup> Cf. *Scott v. Sandford*, 60 U.S. 393 (1857) (chattel slave not a United States citizen for purposes of federal jurisdiction).

<sup>81</sup> Cf. Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan as Amici Curiae, 1994 U.S. Briefs 1039, in *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>82</sup> See, e.g., *Langan*, *supra* n. XXX (recognizing Vermont same sex civil union for purposes of New York wrongful death statute).

body on condition or on the understanding that it will apply domestic law. Again, this can be done with different levels of firmness. The international dispute resolution body might be the court of a foreign state, the court of a federal entity with regulatory authority over other matters, or a genuinely international court not attached to any federal entity with a more general purpose. The constraint of domestic law can vary in tightness, and the mode by which that constraint is enforced can vary in severity. The domestic law constraint would be very tight if the dispute resolution body were tied to explicit, authoritative declarations of domestic law made by domestic institutions. It would be looser if it were merely a requirement that the outcome not be an outrageous interpretation of domestic legal materials. The mode of enforcement would be less severe if it were simply a practice, or a matter of fidelity to federal or international law on the part of the dispute resolution body. It would be more severe if it involved the nullification by domestic institutions of decisions falsely purporting to apply domestic law. The greater the stringency with which such a nullification procedure is applied, the less is the degree in fact of the jurisdictional delegation to the international dispute resolution body. In the limit, domestic institutions would simply be engaging in plenary review.

The American law of federalism presents some nice examples of states taking a position like this on the scale of sovereignty. Consider, for example, the authority of the federal courts under *Erie*.<sup>83</sup> *Erie* holds that the grant of diversity jurisdiction, unlike the grant of jurisdiction over suits between states, for example, is not a grant of federal common lawmaking power.<sup>84</sup> In the absence of that power, federal courts must turn to state law for rules of decision. We can regard this as a decision by states (albeit one bundled with the decision to accept a variety of other rights and responsibilities as against other states) to cede jurisdiction in certain cases where non-state jurisdiction might be thought desirable, without also ceding their right to determine the applicable regulatory rules. This reservation is strengthened by the doctrine of *Murdock v. City of Memphis*,<sup>85</sup> which obliges the federal courts to obey authoritative state constructions of state law rather than construing that law independently. *Murdock* has the effect of tightening the constraint that the reservation by states of the right to set the law imposes on federal courts.

Weaker claims of international jurisdiction and domestic law are possible under the New York Convention.<sup>86</sup> The New York Convention

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<sup>83</sup> See, e.g., *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938); *Hanna v. Plummer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958); *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996).

<sup>84</sup> See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986) (setting out and defending this reading of *Erie*).

<sup>85</sup> 87 U.S. 590 (1874).

<sup>86</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York,

obliges parties to it to honor arbitral judgments rendered abroad, but preserves the applicability of domestic law with respect to arbitrability and when enforcement “would be contrary to ... public policy.”<sup>87</sup> Although states such as the United States have exercised this authority sparingly in recent years,<sup>88</sup> it does provide room for them to take the position that arbitrations in certain subject areas will be enforced only if undertaken in accordance with United States law. That would be a claim to international jurisdiction and domestic law. In fact, the United States has in the past refused to enforce arbitral awards where the contract to arbitrate is invalid under United States law in certain cases (cases in which the connection of the parties to the United States is such that the contract is subject to United States law).<sup>89</sup> That is a delegation of international jurisdiction (to decide on the validity of the contract), but only under domestic law (a restriction backed by denial of recognition and enforcement). The larger are the areas subject to review for compliance with domestic law, the closer a position of international jurisdiction and domestic law slips toward one of domestic jurisdiction and domestic law.

An internationalist position on jurisdiction coupled with an insistence on domestic law can be particularly useful when other states are more concerned about the dispute resolution institutions of the state in question than about its law, and when the areas of domestic law on which the state wishes to insist are relatively narrow and do not require processes unique to domestic dispute resolution institutions. The first would be true when the concern of other states is with the partiality of decision making institutions, for example the old justification for American federal diversity jurisdiction that state courts would be partial to their citizens; when the concern of other states is with the competence, sophistication, or speed of decision making institutions, for example the courts of third world countries, or the particularly slow pace of Italian litigation; or, more generally, when the concern of other states is with corruption or other agency cost deviations of dispute resolution institutions from their state’s own law. The second would be true when domestic issues are likely to arise as smaller parts of large cases, for example the issue of the validity of a contractual arbitration clause in a complex commercial arbitration; it would not be true, for example, where domestic decision making institutions are charged with the protection of the interests of third parties, of whose interests arbitrators who

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1958).

<sup>87</sup> Compare *id.* art. V(2) with Federal Arbitration Act, 9 U.S.C. § 10(a) (restricting review of arbitral awards to procedural grounds, e.g., fraud, corruption and exclusion of relevant evidence).

<sup>88</sup> See, e.g., Note, *U.S. Supreme Court Subordinates Enforcement of Regulatory Statutes to Enforcement of Arbitral Awards: From The Bremen’s License to the Sky Reefer’s Edict*, 30 Vand. J. Transnat’l L. 59 (1997) (charting the Court’s retreat from substantive scrutiny of arbitral awards).

<sup>89</sup> See generally J. Stewart McClendon, *Enforcement of Foreign Arbitral Awards in the United States*, 4 NW. J. INT’L L. & BUS. 58 (1982) (reviewing cases).

receive their business from the parties might be insufficiently protective—for example, incompetent class members or the general public.

#### *D. Domestic Jurisdiction and International Law*

The third paradigm position retains domestic jurisdiction, but concedes the applicability of international law. Domestic jurisdiction might be available at the election of the parties, or it might be exclusive of the jurisdiction of foreign and international dispute resolution bodies. A claim to exclusivity can be defended with various levels of ferocity, from a simple statement of exclusivity to the refusal to enforce judgments rendered by other courts to the issuance of anti-suit and anti-anti-suit injunctions in defense of jurisdiction or even to the issuance of writs of prohibition directed at foreign courts and backed by the threat of military enforcement. Similarly, a state can defer entirely or only partially to international law, taking a broad or narrow view of the contents of international law, and accepting all or only part of what it views as international law as trumping contrary domestic law. This can take the place of requiring good evidence of international law, for example formalized, written agreements as opposed to longstanding custom proven by past statements of officials, diplomatic correspondence and the like.<sup>90</sup>

This position is quite common: for example, the United States' rejection of the International Criminal Court coupled with its acceptance of its own Alien Tort Claims Act (ATCA),<sup>91</sup> which authorizes the application of central norms of international law (*ius cogens*) by domestic courts,<sup>92</sup> amounts, with respect to those central norms, to a concession of the applicability of international law conditioned by a refusal to entrust application of that law to an international dispute resolution body. There is considerable controversy about how much of international law ATCA makes applicable in the federal courts. Some argue for a restrained view, restricting it to international law at the time of ATCA's passage or to current *ius cogens*, while others argue for an interpretation so broad as to encompass what are ordinarily thought of as purely domestic crimes or merely taking advantage of a state's particularly loose regime of labor laws.<sup>93</sup> The narrower the interpretation of international law, the less of a

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<sup>90</sup> See generally Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (critiquing traditional approaches and urging a narrower view)

<sup>91</sup> 29 U.S.C. § 1350.

<sup>92</sup> See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); see generally Note, *Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act*, 54 STAN. L. REV. 1359 (2002) (providing a crisp walk through of the principal ATCA precedents).

<sup>93</sup> See, e.g., Joshua Ratner, *Back to the Future: Why A Return to the Approach of the Filartiga Court is Essential to Preserve the Legitimacy and Potential of the Alien Tort Claims Act*, 35 COLUM. J. L. & SOC. PROBS. 83 (2002) (setting out the debate, including citations to cases taking narrower views, and arguing for a broad view); Note, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for*

difference there is between this claim and a claim of domestic jurisdiction and domestic law.

Uniform laws such as the Uniform Commercial Code or preemptive federal trademark law are an even more common example of domestic jurisdiction and international law. When a state agrees to abide by such international legal norms even though they deviate from what it would adopt in the absence of the Fact of Overlap, it is making a concession along the choice of law scale in favor of international law. Similarly, when a state consents to an international agreement that imposes substantive legal requirements, either by signing or by declining to withdraw from such an agreement, it adopts a domestic jurisdiction and international law position.

This sort of position is particularly useful where the factors justifying an international jurisdiction and domestic law position are reversed. For example, where the state's principal concern is not with the applicability of international norms, but rather with bias or procedural unfairness in their application by an international tribunal, it economizes on sovereignty by insisting on domestic jurisdiction but not on domestic law. Similarly, in circumstances where it would be highly disruptive for parties, witnesses or evidence to travel to a distant jurisdiction with a significant interest in having its law applied, a state might accommodate these conflicting interests by claiming jurisdiction domestically, but applying the rule of decision of the distant jurisdiction. If the substantive areas in which a state wants to defer to international law are likely to arise in combination with areas in which it wants to insist on domestic law, and if it is better at defining these areas than international dispute resolution bodies, that too would be a justification for a domestic jurisdiction and international law position.

### *E. International Jurisdiction and International Law*

Most internationalist of the paradigm positions is the concession of international jurisdiction and the applicability of international law. At its most absolute, it would be a complete abdication of regulatory authority—of sovereignty—in a particular subject area. Such a position can be moderated by increasing the level of domestic scrutiny afforded the

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*Human Rights Violations?*, 23 BROOK. INT'L L. J. 928 (1998) (arguing for a broad view) Steve Kuan, *Alien Tort Claims Act—Classifying Peacetime Rape as an International Human Rights Violation*, 22 HOUS. J. INT'L L. 451 (2000) (arguing that ATCA should cover rape); Note, *The Utility of ATCA and the "Law of Nations" in Environmental Torts Litigation: Jota v. Texaco, Inc. and Large Scale Environmental Destruction*, 7 WIS. ENVTL. L. REV. 93 (2000) (arguing that ATCA should cover certain environmentally harmful conduct). The most restrained view is that ATCA provides no cause of action at all; rather, Congress must specifically provide causes of action for violations of international law, e.g. Torture Victims Prevention Act, 28 U.S.C. 1350 (creating cause of action for state authorized "torture or extrajudicial killing"). See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring).

international dispute resolution body's decision that a particular dispute falls within its jurisdiction; or by confining the scope in which the international body is free to select the applicable law. That is, the acceptance of international law may be conditional on that law falling within certain parameters; truly outrageous international law will not be accepted. The stricter are these constraints on the scope of delegation, the closer is the approach of a particular position to one of the earlier paradigms.

Full-scale internationalist concessions often depart the doctrinal realm of private international law and become reclassified as issues of federalism. For example, the recognition by states of the United States Supreme Court's authority, indeed the authority of the entire federal judiciary, to promulgate and apply federal law, is an example of an international jurisdiction and international law position. It is helpful to remember that this authority has not been taken for granted at all times in American history. Consider, for example, Southern states' initial outright refusals to recognize Northern assaults on slavery and, later, on segregation.<sup>94</sup> Controversial decisions of the European Court of Justice and of the European Court of Human Rights are similarly illustrative of the international jurisdiction and international law positions adopted by member states of the European Union. The World Trade Organization's Dispute Resolution Body, and the Administrative Panels convened pursuant to the Uniform Domain Name Dispute Resolution Protocol (UDRP) are smaller scale examples of similar delegations. Additionally, full-scale internationalist concessions may be so longstanding as to feel inevitable: for example, a state's decision not to interfere with the resolution of purely domestic disputes by another state despite the first state's generalized interest in the doing of justice. (Such generalized interests do not seem at all uncommon. Consider for example the taste of many in the United States and Western Europe for the avoidance of human rights violations on non-strategic grounds in parts of the world no matter how distant or how divorced from matters of immediate concern, such as petroleum prices.)

An international jurisdiction and international law position will be desirable where other states are strongly interested in regulating certain conduct and are likely able to back that interest up in ways that would be particularly harmful to the state in question. Threats of military force, as in the case of disobedient American states or of the failure of the United States and of Europe to intervene militarily against human rights abuses in North

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<sup>94</sup> *Cooper v. Aaron*, 358 U.S. 1 (1958). "This case ... raises questions of the highest importance...It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution...We reject these contentions." *Id.* Under the duress of superior forces—the federal military—Arkansas and the rest of the Southern states again conceded jurisdiction and lawmaking authority in this area to the federal courts.

Korea or China, will often be a principal justification for full-scale internationalist positions.

#### IV. OBJECTIONS TO NATIONALISM

Objections to nationalism usually come in three flavors. First, and most frequently put, are objections to the idea of “the ends justifying domestic law,” which nationalism holds legal decision makers ought to serve. Second and third are two varieties of internationalism. The first argues that nationalism encourages judges to overlook important internationalist interests that would be important even on a nationalist calculus, properly done. The second argues that nationalism is unsound as a moral-philosophical matter; that its view of states operating in a state of nature is unsound; that the moral duties of man to man conduct to judges and other legal decision makers through the political processes that authorize them to exercise power over others.

##### A. *“The Ends Justifying Domestic Law”*

Bartholomew, a friendly critic, might at this point interject, “I’m not quite sure about this idea of ‘the ends justifying domestic law.’ I gather from what you’ve said so far that they are something like the most coherent story that can be told of the past institutional practice of the political system of which the legal decision maker is a part. Now that sounds nifty, but in reality the ends of the law are many and conflicting. I suspect their resolution into ‘the ends justifying domestic law’ is not possible, and I am confident it is not something done by judges deciding actual cases.”

Judges deciding cases in which objectives conflict implicitly prioritize or weigh those objectives against each other. Where policy *A* suggests outcome *X*, but policies *B* and *C* suggest outcome *Y*, the judge’s arrival at *X* implies that *A* either is prioritized or else outweighs *B* and *C*. Because cases with conflicting objectives are common, Bart’s objection is not special to private international law. In purely domestic cases, judges are obliged in reaching decisions to assign weights, at least implicitly, to the competing considerations. Together, these competing policies and their weights define a function that maps the policies involved in particular fact situations to a legal outcome. The origin of the policies and their relative weights determines the outcome of cases--it constitutes the law. Its validity therefore depends on the political philosophical bases of the law; on the justificatory institutions, like legislatures, elections, filibusters and life tenure, that support the power of law. This function, so justified, is what I mean by the “ends justifying domestic law,” the attainment of which

nationalist legal decision makers, in private international law and elsewhere, find themselves obliged to maximize.<sup>95</sup>

Nationalism demands of the legal decision making system that it pursue the ends justifying domestic law. Having each legal decision maker independently work upward to a crisp statement of the ends justifying domestic law by examining, prioritizing and weighing conflicting policies; then take that crisp statement and descend through successively more specific policies down to the facts of the case to determine what outcome best advances the crisp statement up top is not the best way for the legal decision making system to do this. Limits on the time, dedication and intellectual capacity of actual legal decision makers make it more effective for the system if particular legal decision makers localize their efforts. Thus, judges might consider only the policies directly in play in the case at bar, and might give weight to earlier resolutions of conflicts among policies without undertaking directly the work and incurring the risk of error of a direct resolution of those policies.<sup>96</sup> The judicial system might be set up such that fundamental conflicts of policies, or conflicts discovered, by the failure of other legal decision makers consistently to resolve them, to be difficult to resolve, are decided by the best interpreters, or by legal decision makers specializing in the unification, by prioritizing and weighing, of conflicting policies at a high level. Where policies that require swift, flexible and ad hoc adjustment of outcomes are involved in the conflict, the assignment of the resolution may be not to judges at all, but to officers of the executive: the president, his secretaries, generals and commissioners.<sup>97</sup> Nationalism as a statement of the ends legal decision makers should serve does not assume a particular structure of the legal decision making system.<sup>98</sup> Objections based on the incapacities of a particular structure are

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<sup>95</sup> In cases where one or another policy will control, we can think of this function as a surface lying in however-many-policies-there-are dimensional space. For example, where there are two competing policies, the weighing or prioritizing of one against the other defines a line in two dimensional space that separates the points (policy balances) at which one policy wins out from the points at which the other does. In cases where the policies both contribute to an outcome, we get a mapping from policy space to outcome objects in however-many-characteristics-there-are-of-outcomes dimensional outcome space.

<sup>96</sup> In Professor Sunstein's words, it is not necessary that judges in every case make a complete conceptual ascent, only that the legal system aims at what such an ascent would reveal. Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 786 (1992); see also Ronald M. Dworkin, *Does Law Have a Function? A Comment on the Two-Level Theory of Decision*, 74 YALE L. J. 640, 646 - 647 (1964).

<sup>97</sup> Cf. Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11, 20 - 21 (1987) (arguing judicial ineptitude at considering "general concerns" such as comity).

<sup>98</sup> The primacy of legislatures in a political system says nothing about the desirability of placing private international law decisions in their hands. We might accept that legislatures have authority to identify the ends justifying domestic law—promoting competition with the antitrust law or whatnot—and yet maintain that to determine how these ends are best advanced in the face of the Fact of Overlap, the legislature is not the most competent institution. But see Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO STATE L. J. 459, 468 (1985). Professor Brilmayer finds something upsetting about urging courts to defer to legislatively defined ends while telling legislators how to set private international law. Oughtn't deference to encompass private international law too? This argument is not well put against nationalism, however, because the binding nationalism requires of legal decision makers to the ends justifying law applies to *all* legal decision

not objections to nationalism.

“All well and good,” Bartholomew might say, “but we know that in fact it doesn’t work that way. Statutes are not enacted as the best expression of past institutional history blah blah blibbity blah;”<sup>99</sup> rather, they reflect some balance between the moneyed interests, popular movements and legislators’ often overwhelmed senses of civic duty. Even if the various legal outputs of a state can be woven together, even if they must, at least implicitly, be woven together in deciding particular cases, if they are not meant to be woven together, then why ought legal decision makers, in private international law or elsewhere, concern themselves with the whole?”<sup>100</sup>

One answer with which I am sympathetic is that legal decision makers should concern themselves with the coherence of law because this coherence, or at least the effort of the system toward it, provides some of the justificatory force of law. Law binds, in part, because it is principled; because it is not the ad hoc exercise of power, policy *A* winning here against *B* and *C* not because of priority or weight attached to it itself, but merely because of priority or weight attached to it *here*, in this case, by this decision maker.<sup>101</sup> Stated this way, coherence is part of the rule of law: the independence of the judgments, the tradeoffs, made by the law from certain situational features like the identities of the decision maker or the parties, their wealth, or their present popularity. The search for legal coherence--for the ends justifying domestic law--is thus a contribution of legal decision makers to the justification of law; a part of their competitive strategy against other normative sources, like economics, media, the church and the charismatic leader.

Further along this line is the point that what Congress ought to do is independent of what it actually does. That legislators often err, succumbing to the moneyed interests or to the manufacturers of popular hysteria, is no objection to the normative claim that they ought to be maximizing the attainment of the ends justifying domestic law. It does raise the question, however, how subsidiary legal decision makers ought to treat norms generated by processes other than pursuit of the ends justifying domestic law: the question, is extra-constitutional law unconstitutional? One response is to declare extra-constitutional law, law not motivated by coherent considerations, unconstitutional forthrightly; another is to minimize the effect of that law, for example as “in derogation of the common law,” or in silence; and yet another is to take what the law actually

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makers, including legislators. Fidelity to law is not the same as judicial restraint.

<sup>99</sup> Cf. *Inca Mummy Girl*, 2 *BUFFY THE VAMPIRE SLAYER* 4 (1997) (“Slaying entails certain sacrifices blah blah blibbity blah, I’m so stuffy give me a scone.”).

<sup>100</sup> I thank Professor Mark Ramseyer for putting this objection to me forcefully in a workshop. At that time, I had no satisfactory answer. Now I have, at least, learned to dodge.

<sup>101</sup> Cf. Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

does, the words of the enactment, and to include them *as though* they were the sincere product of a search for the ends justifying domestic law, to treat them as evidence of those ends. On the premise that legislators mainly err, the last is a noble lie. Subsidiary legal decision makers might accept it for the justificatory power it lends the law. To trump outright legislative statements on the grounds of their motivation by the moneyed interests, popular hysteria or simple horse trading might undermine too much the (illusion, myth or perception of) democracy on which the subsidiary legal decision makers rely.

A second response is more forgiving of the legislative behavior that so upsets Bartholomew. The justificatory force of law may lie not in the complicated preservation of an illusion that legal decision makers strive for coherency, but rather in the ability of all sorts of people, all sorts of policies, now and again to have the benefit of an ad hoc decision. The system in any particular case isn't fair, but on balance it all works out. In performing the prioritizing and balancing of conflicting policies, instead of the overriding policy of coherence, there is the overriding policy of fundamental fairness in the process; but substituting even distribution of ad hoc outcomes for reflection of a coherent system in each individual case doesn't undermine the concept of the ends justifying international law. The difference is simply that what would have appeared to be inconsistent outcomes between policies in different cases on the coherence view are, on this view, consistent because of the addition of the further policy in back of even distribution of ad hoc outcomes.

Finally, the weight borne by the concept of the ends justifying domestic law is light. Its role is simply to distinguish the output of the domestic political system, to which nationalism asserts legal decision makers owe exclusive fidelity, from the output of other normative sources, most importantly the output of foreign political systems.<sup>102</sup> A wide variety of things can serve as "the output of the domestic political system" without undermining the distinction between that and "the output of foreign political systems." Further precision is not necessary for the argument in favor of nationalist theories, although some theory of how to discover the output of the domestic political system is necessary to put a particular nationalist theory in practice.

Bartholomew, never at a loss for words, however, might press on: "That sounds a little fishy, but I'm willing to accept that there's something different between domestic ends and foreign ends. Often, however, domestic ends include foreign oriented behavior: for example, sending

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<sup>102</sup> Professor Dworkin's critique of the assumption of a function for law, for example, is not apposite against nationalism because its use here is only to distinguish national ends from foreign ends; not to aid legal decision makers in determining those national ends. See Ronald M. Dworkin, *Does Law Have a Function? A Comment on the Two-Level Theory of Decision*, 74 YALE L. J. 640, 644 (1964).

AIDS drugs to Africa, or ensuring the Chinese peasantry doesn't starve. Surely nationalism doesn't foreclose these ends?"

Certainly it does not. To the extent that internationalist concessions are among the ends or are rightly derived from the ends justifying domestic law, nationalism affirmatively commands that legal decision makers pursue them. Nationalism's quarrel is with the judge who writes, "After a careful survey of our law and institutional practice, I conclude that the ends justifying our antitrust laws mandate their application extraterritorially to this case; however, such application would invade the sovereignty of another state, and so we lack power to make that application," not with the judge who honestly concludes, "After a careful survey of our law and institutional practice, which manifests a concern for the freedom of other nations to regulate themselves, I conclude that although some of the ends justifying our antitrust laws suggest their application extraterritorially in this case, on balance those ends mandate restraint."<sup>103</sup> Neither does nationalism have a quarrel with persons who agree that the ends justifying domestic law do not presently warrant certain internationalist concessions, but who argue that those ends ought to be changed. Nationalism has nothing to say about what the ends justifying domestic law should be; it merely insists that there are not other ends, trumping ends, in the context of private international law.

Some of the traditional private international law policies, for example predictability, are more likely included in the ends justifying domestic law than others, for example the maximization of global welfare. If the maximization of global welfare were the end justifying domestic law, we would expect to see it manifested not only in private international law, but also in antitrust and intellectual property. Still, the forthright arguer for change might justify treating private international law as though internationalist trumping ends did exist with an argument that change in the whole of the law should begin with private international law. I note that arguments for this view based on the low profile of private international law, the "let's meddle here because we can get away with it" argument, seem unconvincing.

### *B. Second Order Internationalism*

"Perhaps in theory it all works out," Bartholomew might continue, "but in practice, if you hook judges and other legal decision makers on nationalism, they will refuse to make internationalist concessions that

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<sup>103</sup> Nationalism does not merely require legal decision makers or opposing commentators to state their conclusions using magic language. There is a difference between according internationalist concessions the weight they deserve as a domestic matter, and according them independent weight as against the whole sum of domestic interests.

would be justified on your ‘enlightened’ nationalist theory. For example, before refusing to make an internationalist concession, an enlightened nationalist would consider the possibility of reciprocity, for example a reciprocal withholding of jurisdiction in a case where the dominant interests are reversed; the possibility of reciprocity in other areas, for example cooperation in disclosure of bank holdings in exchange for cooperation in extradition of war criminals; and the possibility of reciprocity in unforeseen areas, for example cooperation in antitrust investigations in exchange for flyover permission granted in the wake of a terrorist attack sometime in the future. An enlightened nationalist would consider the benefits of an international rule of law, under which concessions are made according to rules, not the shifting power of competing states. Where a current concession is exchanged for the expectation of future reciprocity, a regime of mutual trust or of credible commitment may make many better off. More than that,” Bartholomew might say, “your enlightened nationalist would realize that internationalist concessions could facilitate a beneficial exchange of ideas; a sounder understanding of the policies and interests underlying foreign law; and so a firmer basis for cooperation or even a reconsideration of the ends justifying domestic law. Indeed, enlightened nationalism doesn’t seem so different from internationalism. Perhaps cooperation in private international law is necessary scaffolding, a first step toward greater cooperation or political unification. These are things the enlightened nationalist would consider. The trouble,” Bartholomew might insist, “is that actual legal decision makers are unavoidably immersed in the domestic legal system. Their absorption of its ends, of its perspective, will cloud their view of the benefits of internationalism and make them unduly stingy in their internationalist concessions.”<sup>104</sup>

First, it is not clear that the bias of legal decision makers is nationalist rather than internationalist.<sup>105</sup> On the one hand, there is the problem of immersion identified by Bartholomew; but on the other, there is the insulation of many legal decision makers, for example federal judges in the United States, from direct political pressures. Further, great academic energy is devoted to encouraging legal decision makers to make internationalist concessions for internationalist reasons. Legal decision makers are not immune to educational and social pressures imposed by their

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<sup>104</sup> See, e.g., Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 *Law & Contemp. Probs.* 11, 19 (1987) (arguing benefits of sovereignty more apparent to judges than costs, in international context); Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 *MICH. L. REV.* 392, 411 (1979) (arguing for consideration of “system-coordinating values”).

<sup>105</sup> Compare Jack L. Goldsmith, *Liberal Democracy and Constitutional Duty*, 55 *STAN. L. REV.* 1667 (2003) (the design of liberal democracies makes it difficult to sacrifice national welfare) with Casey B. Mulligan, Ricard Gil & Xavier Sala-i-Martin, *Do Democracies Have Different Public Policies than Nondemocracies?*, 18 *J. ECON. PERSPECTIVES* 51, 52 (2004) (“democratic institutions have important effects on the degree of competition for public office, but otherwise have effects on public policies that are insignificant”).

intellectual peer groups. If the commentary to which legal decision makers are exposed is biased in favor of internationalism, that is a further reason to fear excessive concessions. The magnitude and direction of bias no doubt depend on the particular legal decision maker in question--judges will have different biases than ambassadors eager to reach a deal or senators facing an upcoming election.

In any event, an opponent of nationalism who has slipped to Bartholomew's present argument has already made the most important concession. Bartholomew is no longer disputing that the legal decision making system ought, in private international law as elsewhere, to pursue the ends justifying domestic law. He is merely saying that the best way to do this may be to trick certain legal decision makers into thinking an internationalist theory is correct so as to counter their bias against internationalist concessions. Bartholomew has retreated to second order internationalism, conceding nationalism along the way.

### *C. First Order Internationalism*

Aghast, Bartholomew might object, "No, no, I'm hardly conceding that. Fixing bias one way or the other is one set of arguments, but my objection to nationalism is deeper: nationalism is morally bankrupt, and in a way that reveals a gross internal inconsistency. Legal decision makers' obligation to advance the ends justifying domestic law rests on the justificatory characteristics of the political system in place; that is, on the rightness of its rule of recognition, or the legitimacy of its constitution. Nationalism therefore recognizes that citizens of the same state have political philosophic claims against one another, for example that a law not be applied into which each did not have an opportunity for formal input. Nationalism holds, however, that these interpersonal political obligations end at the national border: while legal decision makers' binding a citizen is premised on justificatory characteristics of the political process, legal decision makers' binding a non-citizen is not. If the need for the justificatory characteristics of the political process in the domestic case has to do with something other than citizenship, for instance simple personhood, then the line between citizen and non-citizen is arbitrary. My objection is that nationalism treats foreigners not merely as non-citizens, but as non-people, or as having inexplicably weaker political philosophic claims to respect than do citizens."

I agree with Bartholomew that nationalism requires a political philosophical foundation.<sup>106</sup> It is not itself a way of avoiding questions of

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<sup>106</sup> That is, I agree with Professor Brilmayer that "the question must be phrased in" terms of "what might count as an adequate justification" for the "exercise [of] coercive authority over [a foreign] individual." Lea

that sort; rather, it allows legal decision makers operating after its adoption to avoid questions of that sort, which are more likely to arise under an internationalist regime. Its defense, therefore, requires at least some initial steps toward such a foundation. Like any moral philosophical story, the acceptability of this foundation is a matter of personal taste. All that can be done is to write for both sides persuasively, to identify consequences and analogies, and to urge reflection in the hope that agreement can be reached.

Bartholomew's view, the internationalist view, imagines rights bearing unites—call them people—that exist antecedently to state and owe political duties to each other by virtue of their common status as people. These duties are not lost when a subset of people band together and, putting in place justificatory political processes, bind themselves together under law. Instead, on the internationalist view, the duties owed by people to each other are conducted by the justificatory political process up to the legal decision makers so empowered. Duties to non-citizens are part of the justification for the binding effect of law, at least with respect to those non-citizens.<sup>107</sup>

The nationalist view has a different initial picture. Although it admits of certain duty creating transactions like taking something in use by another or the accidental causing of harm to another, it views *political* duties as created by the association of people one with another. When a subset of people band together and put in place justificatory political processes to bind themselves under law, there are no duties to non-members of the band (non-citizens) that might conduct themselves up by virtue of the association's founding or the state's constitution. The creation with others of a state, as against non-citizens, is a duty free transaction. This freedom of people from each other is an important basis of the nationalist theory.

Another argument for the internationalist view relies on an analogy between duties created among citizens on the constitution of a state, and duties, if any, that exist among states so constituted. It is important at the outset to note an important distinction between the case of co-citizenship within a state and the case of co-existence of states. Many commentators have found appealing the idea that individual merit, for example superior intelligence, strength or birth, is undeserved, so that its holder is not entitled merely for that reason to whatever fruits it yields in the prevailing social and economic system. Differences in the relative power of states, however, may have to do with the quality of their political processes or of the decisions arrived at through those processes, which may be deserved in a

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Brilmayer, *Interstate Federalism*, 1987 B.Y.U. L. REV. 949, 972.

<sup>107</sup> See, e.g., Lea Brilmayer, *Interstate Federalism*, 1987 B.Y.U. L. REV. 949, 972 (1987) ("I realize that this way of phrasing the issue leads inevitably into a natural law thicket. The relevant natural law precept is simply that no government is entitled to exercise coercive authority over an individual without adequate political justification.")

way individual merit is not. There is something odd to the notion that the rights incident to sovereignty do not depend on who it is that erects the new sovereign state and how they do the erecting. In sum, I take Bartholomew's central point, that nationalism requires a moral philosophical basis just as much as internationalism does. At least, I hope that the clear statement of the nationalist view and this sketch of the responses to the moral philosophical objections that leap immediately to mind will suffice to establish nationalism as plausible.

Before proceeding, however, theories that bind legal decision makers to bodies of law must always confront the problem of evil law. The standard example in the literature is the judge in Nazi Germany, for whom the correct thing to do is not to carry out Nazi atrocities. Reams have been spent on whether this is best called a limitation of Nazi law because of its inconsistency with some higher law so that the judge when he does the right thing is following law; or instead whether it is best to say the judge is violating the law when he does the right thing. I prefer the latter. When a legal decision maker discovers that the ends justifying his law are evil, he may have a moral obligation to the parties affected by his decision to decide otherwise than by law. Nationalism does not assert that the duty to serve the ends justifying domestic law is absolute; merely that no weightier duty arises simply from the Fact of Overlap.

## V. CONNECTIONS AND EXTENSIONS

### A. *Positive Claims, State Structure and the Theory of the Firm*

Nationalism is a theory about how legal decision makers *ought* to set private international law. It would obviously be interesting, whatever one's view of nationalism as an ideal, to see in what ways actual legal decision makers approach or deviate from nationalist prescriptions. Doing so is complicated by the difficulty of measuring the incremental advancement of the ends justifying a state's law resulting from a change in private international law, and the costs likely to be imposed by other states on account of such changes--the benefits and costs of sovereignty. Nevertheless, the broad outlines of nationalism can be tested by focusing on major trends in the costs and benefits of sovereignty, or both, and seeing whether states make the expected increased or decreased claims to sovereignty.

If the frequency and intensity of conflict in state regulatory interests increases, for example because technological change expands the geographic impact of certain conduct, the costs to any state of regulating that conduct are likely to rise. If the ends served by that regulation are

localized, then the benefits are not likely to rise at the same pace. As a consequence, if legal decision makers behave in accord with nationalism, we should expect to see reductions in claims to sovereignty because the costs of such claims will have increased. The rise of the Internet has this type of effect on defamatory speech and the business practices of firms selling to customers online; the internationalization of capital flows has this type of effect on securities regulation and accounting rules; the proliferation of destructive weaponry has this type of effect on education and indoctrination. Similarly, if the regulatory ends of states converge, for example as more and more states see the capitalist or democratic light, we should see a decrease in claims to sovereignty because the benefits of such claims will have decreased. The growing body of European substantive law should have this type of effect on the private international law of member states (and the introduction of new and different member states should have the opposite effect), for example. Studies of these sorts of cost- or benefit-altering events are likely the easiest way to test for nationalism in practice.

Also of interest would be the connection between certain structures of the state and the adherence of the state to nationalism. Even if nationalism is accepted as an ideal, there remains the problem of allocating authority within a state's lawmaking structure so as to achieve a nationalist private international law. The modern corporate law literature addresses the same basic problem: identifying the control mechanisms that best constraint directors to pursue the maximization of shareholder wealth.<sup>108</sup> The private international law context highlights a lesson that has only recently emerged in the corporate law literature: that the types of incentives that work, market/financial, social/moral philosophic or political, depend on the relative levels of insulation of particular decision makers from each type of force.<sup>109</sup> A theory of the optimal structure of the state is thus a theory of the optimal deployment of insulation and force.

Finally, on the corporate connection, it is neat to notice a connection between the nationalist theory and the theory of the firm. Professor Coase's theory of the firm holds that the firm expands until the marginal cost of absorbing more factors of production and subjecting them to internal control mechanisms equals the marginal cost of contracting for them on the market.<sup>110</sup> The existence of costs of contracting or *transaction costs*, and costs of internal organization or *agency costs* results in an optimal size of the firm. Similarly, in the private international law context, nationalism commands states to extend their laws until the marginal costs of sovereignty

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<sup>108</sup> See, e.g., K.A.D. Camara, *Shareholder Voting and the Bundling Problem in Corporate Law*, 2004 WISC. L. REV. XXX (discussing existing control mechanisms and replying to proposals for reform).

<sup>109</sup> See, e.g., K.A.D. Camara, *Classifying Institutional Investors*, 30 J. CORP. L. XXX (2005) (discussing the three types of forces and the concept of insulation).

<sup>110</sup> I mean, e.g., Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA (N.S.) 386 (1937).

equal the marginal foregone benefits of sovereignty (the cost of accepting a non-domestic regulation of conduct). Costs and benefits of sovereignty lead to an optimal size of the state in sovereignty space.

### *B. Sticky Sovereignty and the Technology of Sovereignty*

Sovereignty is chunky. In the course of regulating *target conduct*, a state may wind up regulating *sideswiped conduct* as well.<sup>111</sup> This is undesirable for the regulating state if regulation of the target conduct alone furthers the ends justifying its law, but regulation of the sideswiped conduct as well does so to a lesser extent. For example, other states might care more about regulation of the sideswiped conduct than the target conduct. Cases like this feature a failure of *private international law technology* in that a state cannot discriminate in its private international law between target conduct and sideswiped conduct. If the state could discriminate, there would be no problem of sideswiped conduct being tied to target conduct because the state could regulate target conduct alone. Because it cannot discriminate, the state must either regulate both target and sideswiped conduct, or neither.

Consider, for example, a state that wants to protect its citizens from harmful speech, say racist or anti-Semitic speech, on the Internet. If Internet technology is such that the state can only prevent its citizens from accessing this speech by forcing the speech producers to shut down entirely, that is, if there is no way for speech producers or no way to force speech producers to screen citizens from non-citizens, then the state in question will at best be forced to decide between regulating access to the speech everywhere, or not at all. If it chooses to regulate at all, by hypothesis, it will shut down all production of the speech on the Internet, which might be bad from the perspective of other states that takes the harm caused by viewing the speech less seriously, or find the interest in free exchange concerning such matters more important. The regulating state will be imposing a cost of wrong law, not as a penalty for anything, but simply incidentally to its regulation of speech reaching its citizens. A geographic filtering mechanism for Internet access<sup>112</sup> would alleviate this problem by allowing the state to frame its regulation as a mandate to use the filtering mechanism, which would allow other states to regulate the access to bad speech of their own citizens in whatever way they think best.

Or consider a state that finds jurisdiction very important in a particular

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<sup>111</sup> The terminology is from Professor Charles Fried, who applies it in the context of constitutional analysis, for example of regulation that targets speech versus regulation that merely sideswipes speech on the way to some other end.

<sup>112</sup> My law school classmate Mike Zarren is working on a practical method of doing this, for example. See Michael Zarren (forthcoming 2004).

sort of case, say because it is highly disruptive for evidence and witnesses to be displaced, but finds the application of its particular law not very important. Think of an ordinary marriage or divorce.<sup>113</sup> If other states feel strongly about their law, it would often make sense for this state to strictly assert jurisdiction, but to be at the same time quite flexible about applying the law of other states. In this way, it would claim the aspect of sovereignty (advance the position of its private international law along the dimension of sovereignty) most important to it, while minimizing cost by yielding less important aspects to other states. Sovereignty moves to its highest valuing user. This scheme fails, however, if the state claiming jurisdiction cannot apply the law of foreign states. For example, its family law courts might be corrupt or incompetent, or its judges and juries might infuse the conceptual apparatus of foreign law with domestically determined meaning—what constitutes good cause for divorce will vary across cultures. These features of the state's law application system mean that when it claims jurisdiction it necessarily claims a bit of choice of law as well. A reform of its law application system to increase its ability to apply foreign law would allow it to make finer grained claims to sovereignty.

It is sometimes useful to distinguish the type of absence of private international law technology in the Internet hypothetical from that in the family law hypothetical. In the Internet hypothetical, there are *fact chunks*--chunkiness as a feature of the factual architecture; in the family law hypothetical, there are *law chunks*--chunkiness as a feature of the regulatory process. Chunkiness can be desirable for states. It can allow a state to credibly insist on regulating sideswiped conduct because of the admitted importance to that state of regulating target conduct--chunkiness becomes an architectural commitment device. A theory of the optimal private international law technology would be an interesting extension of the nationalist analysis.

### C. Camouflaged Sovereignty

A state incurs costs of sovereignty imposed by other states to deter it from its more excessive claims to sovereignty. In response, the sanctioned state might decrease its claims to sovereignty. Alternatively, however, it might camouflage its exercises of sovereignty so that other states see them as originating elsewhere or nowhere. If other states do not associate claims to sovereignty they find excessive with the state in question, then they will have no reason to impose costs of sovereignty on that state. Camouflage operates in at least three ways.

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<sup>113</sup> By ordinary, I simply mean not including any feature that is of strikingly high importance to one of the states involved, for example, homosexual marriages to Texas or Massachusetts.

First, states can make claims to sovereignty appear to be the inevitable consequences of the way the world works—they can *embed* sovereignty. A state embeds sovereignty when it disguises the limitation or facilitation of conduct desired as a feature of the factual architecture independent of its law. For example, consider a state that wants to ban holocaust denial everywhere. If it designs the Internet, or permits the design of the Internet, in such a way that regulation of speech somewhere means regulation of speech in many other places, for example because it is difficult or impossible to reliably condition access on the geographic location or nationality of the user,<sup>114</sup> the claim to sovereignty over holocaust denial outside its borders can seem inevitable, at least as long as it regulates within its borders. Part of the breadth of the state's speech regulation is embedded in the architecture of the Internet. Similarly, by designing the Internet to use or not to use personal identifications traceable to particular users, a state can camouflage its regulatory preference for or against anonymity. The trick of embedding is to hide claims to sovereignty within a factual architecture: to make the limitations of the factual architecture appear proximately defined by the world out there rather than by the state in question.

Second, states can tie claims to sovereignty to systems to which they are attached—states can *naturalize* sovereignty. A state naturalizes sovereignty when it attributes its insistence on a particular claim to sovereignty to a system of which the claim is a part, which system the state is more credibly committed to than it is to the particular claim in question.<sup>115</sup> In this way, minor rules acquire the weight of the state's attachment to the system as a whole. The decision on particular rules is elevated to the level of the decision on the system as a whole—think of an elevation from law to politics—so that the state can purport not to have the power to tamper with particular rules. Adherence to a formalist private international law, for example a territorial theory of choice of law, may be an example of camouflage by naturalization. The trick of naturalization is to disguise claims to sovereignty as proximately dictated not by a state, but by some outside normative source binding on and unalterable by the state.<sup>116</sup>

Third, a state can allow other states or private institutions to act in ways that have an effect similar to direct regulation—it can *privatize* sovereignty.

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<sup>114</sup> See, e.g., *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (2002) (declining to base personal jurisdiction on the operation of a web site accessible in Michigan because “[a]n Internet website *by its very nature* can be accessed internationally”) (emphasis added); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (“While there is no question that anyone, anywhere could access the home page ... we cannot see how from that fact alone it can be inferred that Cybersell FL deliberately directed its merchandising efforts toward Arizona residents.” This is, however, at most a case of Florida taking advantage of other authorities’ camouflaging behavior, since it is implausible to ascribe this aspect of the Internet architecture to Florida.). See generally Lessig, *supra* n. XXX

<sup>115</sup> Cf. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* (1992) (also with respect to the private-public distinction in the next text paragraph).

<sup>116</sup> This can be viewed as creating the illusion of a pre-commitment device.

For example, take a state with ends that would be advanced by having a standard computer operating system as the domestic norm. One way to do this would be to mandate use of a domestically controlled operating system. Another would be to allow a private company to succeed in the prevailing socioeconomic system in such a way as to dominate the market for operating systems. The end result of the two approaches is the same from the point of view of the attainment of the state's ends; but the second can plausibly be said not to involve claims to sovereignty by the state itself. In fact, the state reaches its desired regulatory outcome through the background rules of private law, which have a greater apolitical naturalness to them than do direct regulatory mandates. The ratio of private law to more obvious forms of regulation can decrease without wholly eliminating the camouflage value of using private law. A less dramatic way of privatizing, for example, is to delegate regulatory authority to a body with the appearance of neutrality or internationality, but which is surrounded with control mechanisms that check divergences from domestic law. Instead of regulating Internet domain names directly, a state can pass the task to a purportedly international agency while ensuring that the cultural, legal and personal influences on that agency's decision making are largely consistent with the state's own ends.<sup>117</sup> The supposedly internationalist institution is a means of legitimizing enhanced domestic claims to sovereignty. The trick of privatization is to cleanse a state of regulatory agency by funneling regulation through a plausibly independent decision maker—a firm or international agency—or through a plausibly independent decision making mechanism—the market or democracy.

Cataloguing the different forms of camouflage and getting a sense of the prevalence of each in practice would be a worthwhile enterprise. That inquiry would be complicated, however, because camouflaging behavior will be motivated only partly by a desire to camouflage claims to sovereignty. Microsoft might both camouflage certain regulatory claims and also lead to greater welfare generation for its contractual partners than a United States Department of Software Engineering would for its citizens. The idea of camouflage stresses the nationalist idea that concessions are most effective along dimensions of private international law about which other states care. Camouflage is both a tool for disguising a private international law position, and for making dimensions of private international law less salient.

#### *D. Private Sovereignty*

Nationalism as so far presented is a normative framework for states.

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<sup>117</sup> See, e.g., Helfer, *supra* n. XXX.

But a parallel theory can be similarly justified for institutions in general. For example, consider a technology industry standards-setting board or a team organizing an intercollegiate ballroom dancing competition. An officer of either institution has a duty to advance the interests of the institution as manifested in its official statements and past practice.<sup>118</sup> Intrusions by the institution on matters in which other institutions are interested ought then to be determined by comparing the benefits of each intrusion in terms of advancement of institutional interests with the costs of that intrusion in the same terms. For the standards-setting board, relevant considerations include backward compatibility (roughly, consumers preferring more and industry preferring less), interoperability (with the standards of other groups, and fees or other value extraction (cross licensing agreements). For the ballroom dancing team, relevant considerations include the events offered (because training programs elsewhere are structure around events offered at competitions), step syllabi and level restrictions used (increasing the field versus equalizing it) and scheduling (on top of or away from other teams' events). There is a translation of nationalism from the case of states to that of private institutions.

The interest of this observation lies in the light it sheds on resistance to nationalism in the context of states. Private institutions generally operate against the backdrop of a state with a mixture of facilitative and regulatory laws in place.<sup>119</sup> Contract allows for credible commitment and makes reputation less important; property allows a relaxation of institutional security; and so forth. Generally, regulatory regimes alter the payoffs attached to the potential strategies of institutions operating within those regimes. A literal hostile takeover--with guns blazing--of a competitor's manufacturing plant receives not only what retaliatory sanctions the competitor can muster, but also the surer and stiffer intervention of the state. Commentators' attachment to non-strategic limits on sovereignty may be in part a carrying over of what are strategic considerations for the institutional decision maker because of the superior state in the background. At the international level, this condition is equivalent to the existence of a beneficent superpower enforcing a mix of facilitative and regulatory practices on all other states--the superpower as global policeman. That superpower might exist because, on balance, its ends are best achieved through global law; because its ends are themselves the maintenance of global law; or because its legal decision makers act inconsistently with

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<sup>118</sup> Corporate officers, for example, have an obligation to maximize shareholder wealth, unless something else is specified in the charter. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (1919); see generally K.A.D. Camara, *The Bundling Problem in Corporate Law*, 2004 WISC. L. REV. XXX. But see Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest* (working paper 2004). Charter specifications of a non-profit maximizing goal do exist, for example in the case of many incorporated newspaper companies.

<sup>119</sup> See, e.g., Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1979).

nationalism. The actions of an agency on high possessed of ineluctable force translate nicely into natural or higher order law when the agency is oddly absent. Such background conditions affect not only participants, but commentators as well.

### *E. The Federal Perspective*

Private international law can be set by a state deciding on the scope of its laws in the face of the Fact of Overlap--that is the perspective from which I have so far presented nationalism. But nationalism is equally applicable to the case of a federal entity regulating regulatory conflicts between subsidiary states. From the federal perspective, the institutional duty is to advance the ends justifying federal law. The normal law determining process yields for federal law, just as it does for the law of an independent state, a set of ends; and federal legal decision makers are obliged to pursue those ends, just as state legal decision makers are obliged to pursue state ends. What private international law between subsidiary states best advances federal ends depends on the relationship between state ends and federal ends. Consider, for simplicity, nationalist subsidiary states--states that pursue their own ends.<sup>120</sup> If these ends lead to results consistent with federal ends, then there will be no need for private international law. Indeed, there will be substantive agreement on the entire law and so the Fact of Overlap, with which it is the province of private international law to deal, will not obtain. Similarly, if federal ends do not include anything substantive, but rather consist in maintaining a certain allocation of authority among subsidiary states--for example, self determination--, what appears as a formalist private international law, for example a territorial theory, may be consistent with nationalist prescriptions.

The interesting cases arise when federal and state ends fall between these two extremes. For example, suppose that the federal entity and each subsidiary state aims to maximize the wealth of its citizens. Each state objective function depends positively and exclusively on the welfare of its citizens, and the federal objective function is the same, but for the citizens of the nation as a whole. To the extent the citizens of each state differ in

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<sup>120</sup> Criticizing Professor Currie, Professor Brilmayer notes that interest analysts sometimes rely on their own determination of the ends justifying the law of a foreign state, rather than on the judicial (or other official) pronouncements of that state. Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO STATE L. J. 459, 469 (1985). Nationalist legal decision makers are concerned with the potential reaction of foreign states. Thus, if foreign states view their interests through a non-nationalist lens, for example if they claim regulatory authority on a territorial or vested rights theory, it is intrusions on those non-nationalist claims that the nationalist state should be concerned with. It will sometimes be proper to discount the pronouncements of a foreign state's judiciary or other authorized law applying body when the response to domestic claims to sovereignty is likely to come from a different organ of the foreign state, for example its executive or legislature.

their interest, occupations and other characteristics, the outputs of state legal processes will differ as well. Suppose that a state containing the full base of producers and consumers in a particular market would have reason to enact the best antitrust laws for regulation of that market. If the demographics of the federal organization are such that producers are concentrated in one subsidiary state and consumers in another,<sup>121</sup> the antitrust law of the state with producers will be biased toward producers, while the law of the state with consumers will be biased toward consumers.<sup>122</sup> The federal legal decision maker should keep this in mind when setting rules to govern antitrust cases in which both subsidiary states are interested: the welfare maximizing rule will be somewhere in between the rules of the producer state and the consumer state.

The purpose of this hypothetical is to illustrate not a thorough analysis of a particular problem, but rather the gist of the concerns that would face a federal legal decision maker. In circumstances like that of the hypothetical, the problem can be characterized as one of resolving imperfect signals. Each subsidiary state has ends such that its output is an imperfect signal of the optimal law from the perspective of the federal entity—the job of private international law, on the nationalist view, is to resolve these signals into the law that best attains the ends justifying federal law. In our antitrust hypothetical, a substantive federal law of antitrust is not adopted because a multiplicity of state processes plus a good private international law better achieves federal ends than would a federal substantive law; or because federal ends include the independent good of lawmaking by states—European subsidiarity. A further development of federal nationalism would be useful in understanding and critiquing the constitutional and statutory restraints imposed by the United States on the several states under the heads of Due Process, Equal Protection and Full Faith and Credit.

## VI. SUMMARY, IMPLICATIONS AND CONCLUSION

Nationalism claims private international law ought merely to be the application of the ordinary legal process to a particular unusual fact: the Fact of Overlap. Anything else substitutes an alternative normative source for that justified by the political processes in place. Other states' interest in regulating conduct and their ability to act on that interest give states a reason to limit their claims to sovereignty. One way to analyze this statement is to note the effects of regulation on the regulatory interests of other states—externalities of sovereignty—and the ways in which states can

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<sup>121</sup> This example is drawn from Andrew Guzman, *The Case for International Antitrust* (working paper 2003).

<sup>122</sup> See, e.g., PHILLIP E. AREEDA & HERBERT HOVENKAMP, 1 ANTITRUST LAW ¶ 276 (2d ed. 2000)

deter (or encourage) regulation with these effects—the ways of imposing costs of sovereignty. Equilibrating the costs and benefits of sovereignty results in a state's taking positions along the many dimensions of private international law. These positions define an object in abstract sovereignty space. In illustrating four paradigm positions within sovereignty space, I drew on examples from gay marriage to American federalism.

Skepticism of the idea of ends justifying domestic law does not undermine nationalism because of the weak claims nationalism makes on the content of those ends. Nationalism uses the idea only to distinguish domestic ends from other normative sources, such as foreign law. Skepticism about specific legal decision makers' ability or willingness to take internationalist benefits into account results at best in second order internationalism, but fails to undermine nationalism itself. Skepticism about the moral basis for nationalism depends on acceptance of the imperfect political freedom of persons prior to their association one with another. Nationalism holds that the creation of a state creates no political duties to non-citizens, so that no special justificatory apparatus is necessary to the furtherance of domestic ends where foreign interests are involved. A consequence of this claim is that difficult moral philosophical questions, such as those presented by many internationalist theories, are avoided by legal decision makers who accept nationalism.

My purpose here has been to explore nationalism, not to exhaust it. Consequently, the immediate implications of this work for legal decision makers are limited. Although nationalism forbids the giving of weight to foreign interests in the setting of private international law, it is possible that *judges'* doing so is consistent with nationalism. That would be true if judges who fail to do so have a nationalist bias. Nationalism alone cannot be used to critique judicial opinions on their face adopting naturalist or internationalist theories. To provide such a critique, nationalism must be combined with empirical assertions about the biases of the relevant legal decision makers. Nationalism alone, however, does serve as a guide to the conscientious legal decision maker—in many cases he will know that his decision is not a product of a nationalist calculus, however rough, and so he must either abandon that decision or confront the defenses of nationalism here presented. Commentators, too, must accept nationalism or justify their elevation of alternative normative sources as competitors of domestic law.

Much room remains for further work. On the descriptive side, we do not yet know how close state behavior is to nationalist prescriptions; nor do we have an adequate theory of how to shape that behavior, by the application of market, political and social forces and insulation, to conform to nationalist prescriptions. The questions here carry a close resemblance to those animating the modern corporate law literature. The two fields have

much to learn from each other: private international law can absorb the relatively advanced agency cost analysis that has developed in corporate law, while corporate law can absorb the respect for non-market forces that is difficult to avoid in private international law. The strong resemblance nationalism bears to Professor Coase's theory of the firm is one example of the likely interconnections.

The nationalist analysis itself can profitably be extended to a theory of the optimal technology of private international law—under what circumstances fine grained claims to sovereignty are useful; to a theory of the ways and incidence of camouflaging sovereignty—of reducing imposed costs of sovereignty without cutting back on sovereignty; and to a theory of the regulatory scope decisions made by officers of non-state institutions, and the possible origin of tastes for internationalist constraints in familiarity with the situation of such officers. Finally, the nationalist analysis can be applied from the perspective of a federal entity regulating internal regulatory conflicts. In the United States, for example, the constitutional and statutory law surrounding the Commerce, Due Process, Equal Protection and Full Faith and Credit clauses as they apply to choice of law, jurisdiction, enforcement of judgments and other responses to interstate claims to sovereignty, is subject to nationalist critique.