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**SKEPTICISM ABOUT UNIVERSALISM :  
INTERNATIONAL BANKRUPTCY AND INTERNATIONAL RELATIONS**

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## ABSTRACT

There is no international bankruptcy law, but only the national bankruptcy laws of various states. The failure of a multinational firm therefore raises difficult questions of conflict and cooperation among national bankruptcy regimes. Theorists have proposed various reforms to the uncoordinated territorial approach that most states pursue when a multinational firm suffers financial distress. Among these reform proposals, universalism has long been the dominant idea. Under universalism, the bankruptcy regime of the debtor firm's home country would govern, and that regime would have extraterritorial reach to treat all of the debtor's assets and claimants worldwide.

Despite its conceptual dominance, universalism has yet to find vindication in any concrete policy enactments. No universalist arrangements exist. While recent challenges to universalism have emerged, the current lively debate over universalism and rival proposals focuses almost exclusively on their comparative efficiencies. This article provides an entirely new perspective. Applying insights from elementary game theory and international relations theory, I show that universalism is politically implausible. Even for states interested in establishing universalist arrangements, they will be unable to do so. They will find themselves caught in a prisoners' dilemma with no ready solution. I conclude therefore that universalism holds only dubious promise as a prescription for international bankruptcy cooperation.

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SKEPTICISM ABOUT UNIVERSALISM:  
INTERNATIONAL BANKRUPTCY AND INTERNATIONAL RELATIONS

INTRODUCTION

There is no international bankruptcy law, but only the national bankruptcy laws of various states. The failure of a multinational firm therefore raises difficult questions of conflict and cooperation among national bankruptcy regimes. This Article addresses those questions. In particular, I argue that universalism, an idea that has dominated the theoretical discussion of international bankruptcy, is politically implausible, and therefore holds only dubious promise as a prescription for international bankruptcy cooperation.

When a firm fails, two fundamental issues arise—how to maximize the value of the firm’s assets, and how to distribute that value among its creditors. When a *multinational* firm suffers financial distress, it typically leaves assets and unpaid creditors in several jurisdictions. Several nations’ insolvency laws might plausibly apply to the asset disposition and value distribution questions.

States have traditionally pursued a territorial approach. Each state applies its own laws with respect to the debtor’s assets and creditors within its own borders. This territorial approach naturally leads to piecemeal disposition of the firm’s assets and uncoordinated, territory-based distribution of value to creditors, in which each territory typically favors local interests. Piecemeal asset disposition may destroy value that could have improved creditor recoveries. Uncoordinated territorial treatment of creditors’ claims raises fairness and efficiency concerns.

Over time, various proposals for international bankruptcy cooperation have emerged. Historically, analysts have almost invariably advocated a universalist approach.<sup>1</sup> The fundamental tenet of universalism is “one law, one court,” and in its most commonly described implementation,

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<sup>1</sup> See, e.g., John Lowell, *Conflict of Laws as Applied to Assignments of Creditors*, 1 HARV. L. REV. 259, 264 (1888) (“[I]t would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place.”); Donald T. Trautman, *Foreign Creditors in American Bankruptcy Proceedings*, 29 HARV. INT’L L. J. 49, 58 (1988); Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT’L L. 499, 515 (1991) [hereinafter Westbrook, *Choice of Avoidance Law*]; Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276 (2000) [hereinafter Westbrook, *Global Solution*].

the bankruptcy regime of the debtor firm's home country should govern.<sup>2</sup> That regime should have extraterritorial reach to treat all of the debtor's assets and claimants, displacing the local bankruptcy laws of other countries to the extent necessary to accomplish a unified administration. The dominance and longevity of the universalist idea is evidenced by its appearance in 1888 in the very *first* volume of the Harvard Law Review, in which Professor John Lowell of the Harvard Law School made the case for "a single proceeding . . . at a single place."<sup>3</sup> Subsequent scholarship to the present has regularly made the case for universalism.<sup>4</sup>

The basic premise to universalism is that national borders should not interfere with business restructuring. Maximizing asset value and distributing that value among claimants are *economic* activities. Their proper conduct should not be affected by the location of particular assets or the territorial attributes of claimants. A unified administration under the home country insolvency regime offers predictability, efficiency, and fairness,<sup>5</sup> avoiding the problems that a state-by-state piecemeal approach would present. As a practical matter, however, universalist cooperation has not been forthcoming. Only a handful of regional treaties exist that have realized only modest progress in the direction of universalism.<sup>6</sup>

The focus on reform efforts in international bankruptcy has intensified in recent years. A steady rise in crossborder acquisitions and other direct investment has created more multinational enterprises and—as night follows day—has resulted in more frequent multinational failures. In this process, bankruptcy law has moved into the limelight from its traditional

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<sup>2</sup> See, e.g., Donald T. Trautman, et al., *Four Models for International Bankruptcy*, 41 AM. J. COMP. L. 573 (1993); Jay Lawrence Westbrook & Donald T. Trautman, *Conflict of Laws Issues in International Insolvencies* in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 655, 667 (Jacob S. Ziegel ed., 1994) [hereinafter, CURRENT DEVELOPMENTS] ("[T]he goal in developing choice of law rules in insolvency should be to apply the home-country law as pervasively as possible."); Westbrook, *Choice of Avoidance Law*, *supra* note 1, at 515.

<sup>3</sup> See Lowell, *supra* note 1.

<sup>4</sup> See *supra* note 1; *infra* Part I.A.

<sup>5</sup> See *id.*

<sup>6</sup> "Despite the near-unanimous support of the academic community, policymakers have chosen not to adopt universalism." Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2184 (2000). See also *infra* note 51 and accompanying text.

place in the musty caverns of the legal landscape.<sup>7</sup> Among national and international policymakers,<sup>8</sup> as well as academics, international bankruptcy theory has become a prominent topic of discussion. The subject has become mainstream. A recent edition of the *Michigan Law Review* is devoted to debating the merits of universalism and two recent competing proposals.<sup>9</sup>

One proposal is Professor Robert Rasmussen's. In 1997, he first proposed a "debtor's choice" approach, under which each debtor's corporate charter would specify a choice of national insolvency law that would apply in case of financial distress.<sup>10</sup> The impetus to this approach is that the universalist choice of home country law may not necessarily be the most efficient choice. Instead, private parties allowed to choose their own governing law are better able to pick the optimal set of rules.<sup>11</sup>

The other challenge to universalism comes from Professor Lynn LoPucki. Professor LoPucki contests the claimed efficiency advantages of universalism, arguing among other things that universalism cannot deliver on its promise of ex ante predictability. LoPucki instead calls for cooperation on a territorial basis. Rather than overthrowing the existing territory-based order, LoPucki would build on it. Each state would apply its

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<sup>7</sup> Insolvency law rarely attracts much more than a fleeting interest and ranks low on any government's reform agenda. The commercial community, though sometimes aroused, is also largely disinterested in the subject. Legal and other scholars rarely concern themselves with insolvency law issues. It is thus quite remarkable that, during the last decade of the last century, corporate insolvency laws and related practices should have assumed an unparalleled national, regional and global importance.

Ronald Winston Harmer, *Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General Counsel on TA 5795-REG: Insolvency Law Reforms*, in 1 *LAW AND POLICY REFORM AT THE ASIAN DEVELOPMENT BANK* 10 (April 2000).

<sup>8</sup> See, e.g., *id*; United Nations Commission on International Trade Law, Working Group on Insolvency Law, Possible Future Work on Insolvency Law: Note by the Secretariat, A/CN.9/WG.V/WP.50 (20 September 1999); *Board Receives Report on Russian Program; Structural Benchmarks Remain to Be Met*, IMF SURVEY Vol. 28, No. 23, p. 389 (Dec. 13, 1999); International Money Fund Issues Brief: Recovery from the Asian Crisis and the Role of the IMF, June, 2000.

<sup>9</sup> See *Colloquy: International Bankruptcy*, 98 MICH. L. REV. 2177 (2000).

<sup>10</sup> See Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1 (1997) [hereinafter Rasmussen, *A New Approach*]. See also Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252 (2000) [hereinafter Rasmussen, *Private Ordering*].

<sup>11</sup> See Rasmussen, *A New Approach*, *supra* note 10.

own laws to assets within its borders, and would negotiate cooperative asset disposition on a case-by-case basis. Particular inefficiencies from territoriality could be remedied through specific international arrangements, without attempting to impose an entirely new regime on recalcitrant sovereigns.<sup>12</sup>

These challenges to universalism have focused largely on its hypothetical efficiency: even if it were adopted in the form advocated by its proponents, it would be less efficient than rival proposals. I raise a different—and in some sense, prior—concern with universalism, its plausibility as a political matter. The economics of universalism becomes irrelevant unless some critical mass of states are willing to commit to it. Its promised benefits become academic, in the worst sense of that word. Universalists and territorialists agree that in an ideal world, universalism would be an acceptable system for resolving crossborder insolvency. They agree that if bankruptcy systems of the various nations of the world were very similar, then universalist cooperation would be forthcoming.<sup>13</sup> They disagree, however, as to whether the world will realistically ever be ready to cooperate at the level that a universalist system would require.<sup>14</sup> A critical question, then, is how likely is universalism?

An international political perspective is long overdue. The idea of universalism has been around for some time. The modern debate over universalism and rival proposals has gone a number of rounds and still lacks for any comment on universalism's political plausibility. Any notion that international politics may matter in the development of cooperative norms in international bankruptcy has been conspicuously absent from the literature. Much has therefore been ignored that is interesting and important for the debate. As Bob Rasmussen has noted, “[a]ny credible theory of how transnational insolvencies should be handled has to wrestle with the problem of comity between sovereign nations.”<sup>15</sup>

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<sup>12</sup> See Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 761 (1999) [hereinafter LoPucki, *Cooperation in International Bankruptcy*].

<sup>13</sup> See Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2251 (2000) [hereinafter LoPucki, *Cooperative Territoriality*]; Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 468 (1991) [hereinafter Westbrook, *Theory and Pragmatism*].

<sup>14</sup> See *infra* note 44 and accompanying text.

<sup>15</sup> Rasmussen, *Private Ordering*, *supra* note 10, at 2255.



In this Article, I tackle that issue. Initially, I offer an intuitive explanation for why states might be reluctant to commit to universalism. I then go further, showing that even for states interested in establishing universalist arrangements, it is highly doubtful that they will be able to do so. I apply insights from elementary game theory and international relations theory to provide a framework for analyzing impediments to universalist cooperation even among sympathetic states. The game-theoretic approach to international cooperation has been a staple of modern international relations theory, applied to many traditional international security and international economic issues.<sup>16</sup> Game theory applications to international law, however, are fairly recent.<sup>17</sup>

The prevailing interest in international bankruptcy theory is part and parcel of the new and broader scholarly inquiry concerning international regulatory competition and coordination. As commerce has gone global, governments have tried to tag along. States have attempted to extend the reach of domestic regulatory regimes to police economic activities offshore that may have domestic implications. In addition to bankruptcy, antitrust,<sup>18</sup> securities regulation,<sup>19</sup> banking law,<sup>20</sup> labor law,<sup>21</sup> and

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All the participants in the debate over transnational insolvencies claim that their approach is the most (economically) efficient. Indeed, to date, this is the primary claim of both the universalist and bankruptcy selection clause approaches, both of which have yet to even assert that they respect the noneconomic decisions reflected in domestic bankruptcy law.

*Id.* at 2256.

<sup>16</sup> See *infra* note 65 and accompanying text.

<sup>17</sup> See Ronald A. Cass, *Introduction: Economics and International Law*, in ECONOMIC DIMENSIONS IN INTERNATIONAL LAW 1, 27 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997) [hereinafter ECONOMIC DIMENSIONS] (“Until recently, there has been little game-theoretic analysis of international law issues, although game theory long has recognized nations as strategic actors.”).

<sup>18</sup> See Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AMER. J. INT’L L. 1 (1997); Douglas A. Melamed, *International Antitrust in an Age of International Deregulation*, 6 GEO. MASON L. REV. 437 (1998); Andrew Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998).

<sup>19</sup> See Amir N. Licht, *Games Commissions Play: 2x2 Games of International Securities Regulation*, 24 YALE J. INT’L L. 61 (1999); Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 936 (1998).

<sup>20</sup> See Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925 (1996) (discussing Basle Accord).

environmental regulation<sup>22</sup> are other salient examples of once domestic regulatory structures now being pressed into international service and experiencing growing pains as a result. In each area, political and legal actors have recognized the need for explicit international coordination. Progress of varying degrees has been achieved.

States have conflicting incentives. Each state competes with others to assert the primacy of its own regulatory structure with respect to certain crossborder economic activities. At the same time, a state may have to cooperate and coordinate with others in order to accomplish *any* effective international regulation. In this arena of regulatory conflict-cooperation, applications of game theory and international relations theory have begun to emerge.<sup>23</sup> I now apply this methodology to international bankruptcy. I show that states wishing to adopt universalist arrangements will find themselves in a prisoners' dilemma with no easy solution. This predicament will afflict even bilateral universalist ambitions, with multilateral universalism all the more unlikely. Because the claimed superior efficiency of universalism implicitly depends on its widespread adoption—if not ubiquity<sup>24</sup>—this implausibility of multilateral universalism is particularly damning to the universalist cause.

I begin this Article with a summary in Part I of the debate over universalism and its claimed efficiencies. In Part II, I introduce my skepticism about universalism, suggesting some intuitive reasons why states might be reluctant to adopt it. In Parts III and IV, the heart of the Article, I describe an even deeper skepticism about universalism. I show that even states interested in universalist cooperation will have difficulty achieving it. Part III sets out the universalist dilemma. In Part IV, I describe the

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<sup>21</sup> See Brian A. Langille, *Competing Conceptions of Regulatory Competition in Debates on Trade Liberalization and Labour Standards*, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION (William Bratton et al. eds., 1996); Terry Collingsworth, *American Labor Policy and the International Economy: Clarifying Policies and Interests*, 31 B.C.L. REV. 31 (1989).

<sup>22</sup> See Alan V. Deardorff, *International Conflict and Coordination in Environmental Policies*, in ECONOMIC DIMENSIONS, *supra* note 17, at 248; Sean D. Murphy, *Does the World Need a New International Environmental Court?*, 32 GEO. WASH. J. INT'L L. & ECON. 333 (2000); Jonathan Baert Wiener, *On the Political Economy of Global Environmental Regulation*, 87 GEO. L. J. 749 (1999).

<sup>23</sup> See, e.g., TODD SANDLER, *GLOBAL CHALLENGES: AN APPROACH TO ENVIRONMENTAL, POLITICAL, AND ECONOMIC PROBLEMS* (1997) (applying game theory to international environmental law); Licht, *supra* note 19.

<sup>24</sup> See *infra* Part IV.D.

conditions of play in the international bankruptcy game, showing their inhospitality to cooperation and the gloomy prospects for universalism. In Part V, I conclude, suggesting that given the political implausibility of universalism, international bankruptcy reform should best be pursued through territorially-based cooperative arrangements. Ultimately, I agree with Lynn LoPucki that cooperative territoriality holds the greatest promise for international bankruptcy cooperation. However, I do not attempt (very much) to defend that approach here. Instead, I simply detail my skepticism about universalism.<sup>25</sup>

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<sup>25</sup> As will become clear from my discussion, the political implausibility that curses universalism applies with equal or greater force to Bob Rasmussen's debtor's choice approach. I therefore focus my discussion on universalism.

## I. UNIVERSALISM V. COOPERATIVE TERRITORIALITY

Territoriality simply honors the age-old behavior of nations in exercising jurisdiction over assets and parties within their borders. Analysts agree that territoriality is and has always been the dominant practice.<sup>26</sup> Each nation in which a multinational debtor owns assets decides under its own laws how the assets within its territory should be treated in the face of creditor claims. Historically, however, analysts have also agreed that a universalist approach is preferable to one segmented by territorial boundaries. The financial distress of a multinational firm should come under one insolvency regime, even though several states may claim jurisdiction over various pieces of the firm or over claimants located in or having some other connection with those states. Under universalism, the insolvency law and courts of the firm's home country should govern, and other interested states should defer to the home country proceeding.

Challenging this convention wisdom, Lynn LoPucki has proposed a territorially-based approach to international bankruptcy cooperation, asserting its superiority over universalism and thereby engaging the debate.<sup>27</sup>

### A. *The Universalist Account*

The basic universalist principle is “one law, one court.”<sup>28</sup> As most commonly envisioned by universalists, the courts of the debtor's home

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<sup>26</sup> See LoPucki, *Cooperative Territoriality*, *supra* note 13, at 2220; Lucian Arye Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J. L. ECON. 775, 787 (1999) (surveying laws of various jurisdictions and concluding that “the dominant approach to transnational bankruptcies remains territorial.”); Westbrook, *Theory and Pragmatism*, *supra* note 13, at 460.

<sup>27</sup> See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 12.

<sup>28</sup> Universalism comes in several flavors, at varying levels of abstraction. See Westbrook, *Choice of Avoidance Law*, *supra* note 1, at 514-18. See also LoPucki, *Cooperation in International Bankruptcy*, *supra* note 12, at 704-32 (separately discussing “pure” and modified universalism).

At its most fanciful, universalism is imagined as a sort of one-world government system. International bankruptcies would be governed by one international bankruptcy law administered by a unified system of international bankruptcy courts, thereby avoiding the messiness of any local influence. See Westbrook, *Global Solution*, *supra* note 1, at 2292. In a related context, Professor Kal Raustiala has commented: “One central lesson to emerge from the history of public international law is that international adjudication barely exists and rarely works.” Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT'L L. 401, 408 (2000). Even universalists admit that the proposed one-world system is implausible. See Westbrook, *Global Solution*, *supra* note 1, at 2294.

country, applying home country bankruptcy law, would have worldwide jurisdiction over the debtor's bankruptcy. The home country courts would depend on local courts in other states to carry out home country decisions.<sup>29</sup>

Conceptually, universalism is attractive. A unified proceeding enables one court to administer the entirety of the debtor's assets. This maximizes the value that can be preserved for creditors by facilitating a coordinated disposition of the debtor's assets.<sup>30</sup> It assures creditors' equal treatment,<sup>31</sup> and it avoids the duplicative administrative costs that multiple proceedings would entail.<sup>32</sup> Standardizing home country law as the governing law promotes predictability, thereby lowering the costs of credit and facilitating economic activity.<sup>33</sup> Universalists generally agree that the home country should ordinarily be determined by the location of the debtor's principal place of business.<sup>34</sup> They claim that this approach should be straightforward in most cases, and that judges should be able to handle the rare controversy that might arise.

Professor Jay Westbrook has been the leading advocate for universalism. Recent scholarship by Professors Lucian Bebchuk and Andrew Guzman has also identified other plausible efficiencies from universalism. Bebchuk and Guzman argue that to the extent territoriality is synonymous with discrimination against foreign creditors, it creates inefficient investment incentives for debtors that would not plague a universalist system.<sup>35</sup> In a later piece, Guzman asserts that greater predictability and lower information costs under universalism would lower the costs of credit. Territoriality

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<sup>29</sup> “[U]niversality has been commonly defined in terms of a primary proceeding in a debtor’s ‘home’ or domiciliary country, with ‘ancillary’ proceedings in other jurisdictions where the presence of assets or other matters require local assistance to the primary court.” Westbrook, *Choice of Avoidance Law*, *supra* note 1, at 515. *See also supra* note 2 and accompanying text.

<sup>30</sup> *See* Westbrook, *Theory and Pragmatism*, *supra* note 13, at 465.

<sup>31</sup> Some creditors are typically more equal than others, however. *See* Westbrook, *Choice of Avoidance Law*, *supra* note 1, at 508 (explaining role of priority rules in favoring some classes of creditors over others).

<sup>32</sup> *See* Westbrook, *Choice of Avoidance Law*, *supra* note 1, at 515; J.H. DALHUISEN, 1 DALHUISEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY 3-186 (1986).

<sup>33</sup> *See* Westbrook, *Theory and Pragmatism*, *supra* note 13, at 469.

<sup>34</sup> *See* Westbrook, *Global Solution*, *supra* note 1, at 2316; Guzman, *supra* note 6, at 2207.

<sup>35</sup> *See* Bebchuk & Guzman, *supra* note 26.

forces creditors continually to monitor the location of the debtor's assets and to ascertain the laws of the various jurisdictions to which assets might possibly be moved. Universalism, by contrast, makes asset location irrelevant, relieving creditors of such burdens.<sup>36</sup>

### B. *Cooperative Territoriality*

In two recent articles, Lynn LoPucki has questioned the promised efficiencies of universalism.<sup>37</sup> LoPucki has instead proposed a system of cooperative territoriality, in which each state exercises jurisdiction over and applies its own laws to the debtor's assets within its territory, as states have done since time immemorial. Parallel bankruptcy proceedings could occur in each state with debtor assets, and cooperation would occur through the interaction of agents appointed by each state to represent the bankruptcy estate located there.<sup>38</sup>

Comparing the benefits of this system to universalism, LoPucki argues that universalism does not enhance predictability or lower borrowing costs because the "home country" concept is indeterminate<sup>39</sup> and may be manipulated by debtors.<sup>40</sup> Furthermore, the interface between local nonbankruptcy law and universalist—foreign—bankruptcy law would cause difficulties. The scope of bankruptcy jurisdiction ceded to a universalist court would always be open to question, and the dramatic shift from local nonbankruptcy entitlements to universalist bankruptcy entitlements would

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<sup>36</sup> See Guzman, *supra* note 6, at 2199. Guzman also identifies various distortions in certain lending markets that result from universalism and territoriality. See *id.* at 2190, 2202.

<sup>37</sup> See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 12; LoPucki, *Cooperative Territoriality*, *supra* note 13.

<sup>38</sup> See LoPucki, *Cooperative Territoriality*, *supra* note 13, at 2219-20. These estate representatives could agree or not, presumably negotiating the fate of the debtor's assets in the shadow of the separate territorial outcomes that would occur absent cooperation. See *id.*

<sup>39</sup> See *id.* at 9. Problems with corporate groups may be especially intractable. See *id.* at 15.

<sup>40</sup> See *id.* at 21. Universalists assert that determination of the home country will not be difficult in most cases. See *infra* note 127. However, various standards—principal place of business, state of incorporation, headquarters, center of main interests—have been used, with no single standard having emerged. See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 12, at 713-16 (discussing various tests).

invite wasteful gamesmanship by debtors and creditors.<sup>41</sup> These interface issues are much more manageable under a territorial system.<sup>42</sup>

LoPucki seems to agree with universalists that they offer a *conceptually* acceptable approach, and that as states' various insolvency regimes converge as a result of the globalization of business, universalism might emerge. However, he and Westbrook disagree about how realistic is the hope for universalism. Westbrook seems to believe that even piecemeal and sporadic deference to foreign insolvency proceedings is appropriate—despite the unpredictability and injustices generated—as it moves us in the right direction toward universalism.<sup>43</sup> By contrast, LoPucki notes that harmonization sufficient to make universalism widely acceptable might take decades or centuries. The crucial question is “what to do while we are waiting for the ‘new world society’—essentially, a world government—to arrive?”<sup>44</sup>

I argue that the wait will be a long one. While I agree with LoPucki's conclusion that a new and improved territoriality is the right approach to reform, I leave that point to take up his premise—that universalism is premature. Without directly addressing the efficiency debate between the two competing models, I am content to take universalists at their word, ignore universalist critics, and assume the strongest case for universalism.<sup>45</sup> My skepticism focuses instead on a prior question. Is universalism even plausible as a political matter? Only regularized universalist cooperation can deliver the predictability and promised efficiencies of universalism. I argue that such a system is highly improbable.

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<sup>41</sup> See *id.* at 26-27. See also discussion *infra* Part IV.A.

<sup>42</sup> See LoPucki, *Cooperative Territoriality*, *supra* note 13, at 2237.

<sup>43</sup> See Westbrook, *Theory and Pragmatism*, *supra* note 13, at 471 (approving instances of judicial deference to foreign proceedings).

<sup>44</sup> LoPucki, *Cooperative Territoriality*, *supra* note 13, at 2217 (borrowing Jay Westbrook's phrase).

<sup>45</sup> See *infra* Part III.B. The improbability of universalism will ultimately affect the validity of efficiency claims by its proponents, however. See *infra* Part IV.D.

## II. THE INTUITIVE IMPLAUSIBILITY OF UNIVERSALISM

States are generally reluctant to commit to universalist bankruptcy cooperation. In this Part, I provide some intuitive reasons why. The next Part provides a more formal game-theoretic framework to describe this fear of commitment and my skepticism that universalism may provide a general solution to international bankruptcy cooperation issues.

Below, I compare universalism with international recognition of civil judgments, in order to illustrate the radical deference to foreign law and foreign courts that universalism requires. I rely on existing international arrangements in civil judgment recognition as a rough barometer to show the limits of states' cooperative inclinations with respect to conflicts of laws. Bankruptcy is a particularly difficult area for international harmonization or cooperation, and the deference to foreign law and courts demanded by universalism is far greater than any commitment states have been willing to make to date. The observed limits of nations' willingness to commit to relatively narrow cooperation suggests even greater reluctance to accede to the broader cooperative arrangement demanded under universalism.

A conflict of laws arises when a legal dispute involves parties, property, or events that implicate more than one legal system. When a multinational enterprise fails, various states may assert jurisdiction over all or part of the failing firm or certain of its legal relationships. States will seek to apply their own laws to those issues over which they claim jurisdiction. Universalism simply provides a rule to resolve the conflicts of laws that arise in this context.

In the typical bankruptcy context, the debtor will enter formal bankruptcy proceedings in its home country, whose courts will apply home country bankruptcy laws. The home country court will attempt to include the debtor's foreign assets in the proceeding, claiming extraterritorial jurisdiction over those assets and extending the effect of its bankruptcy law to those assets. However, local courts in these other states will also claim jurisdiction over assets within their respective territories. They will seek to apply their own bankruptcy or other debt collection laws to those assets, typically to the benefit of local creditors or other domestic interest groups.<sup>46</sup>

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<sup>46</sup> "[M]any countries remain focused on the risk of injury to local creditors, almost to the preclusion of other considerations." Jay L. Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 571 (1996) [hereinafter Westbrook, *Creating International Insolvency Law*] (reflecting on countries' behavior in UNCITRAL Working Group on Transnational Insolvency, for which Professor Westbrook serves as co-leader of the U.S. delegation). The benefits might not always be easy to limit to local creditors:



Conflicts arise because states generally favor their own bankruptcy regimes—especially as to firms and assets within their territorial jurisdictions—and may attempt to extend extraterritorial effects to include foreign assets of their domestic debtors. At the same time, states will scrutinize and limit the municipal effects of foreign proceedings. They will be leery of granting recognition and giving local effect to determinations of foreign bankruptcy courts.<sup>47</sup>

Universalism resolves this conflict by requiring the local court to defer to the home country court and its bankruptcy law. Universalism demands that other states recognize and enforce home country court orders applying home country bankruptcy law.<sup>48</sup> However, states have shown great reluctance to concede their sovereignty in favor of home country law and courts.

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In the modern world, sophisticated multinational creditors are increasingly able to claim in local proceedings all over the world. Thus it is fair to say that the primary effect of the Grab Rule [territoriality] is to protect the primacy of local procedures and local law, with local creditors and sophisticated multinationals sharing significant practical advantages as a result.

Westbrook, *Choice of Avoidance Law*, *supra* note 1, at 514.

<sup>47</sup> “[O]ne may note the dual approach in many countries: own bankruptcies are generally favored and their effect extended abroad as far as possible, while the effects of foreign bankruptcies are subjected to scrutiny and curtailment.” DALHUISEN, *supra* note 32, at 3-162.

A bankruptcy contractarian might argue that states should be indifferent as to whose bankruptcy law applies, as long as the rule is clear so that debtors and creditors may properly price credit and otherwise plan their affairs. It is clear, though, that states are not indifferent. Each prefers that its regime of ex post loss distribution prevail. One plausible explanation may be that ex post losses from international financial distress are vivid to domestic interest groups, that in turn demand government intervention in their behalf. Or perhaps parochialism is driven by bankruptcy professionals whose economic interest lies in maximizing the size of the market for their local expertise. *See infra* note 74 and accompanying text. The ex ante efficiency benefits from predictable rules, on the other hand, are both more diffuse and less visible than the distribution of ex post losses.

<sup>48</sup> *See* DALHUISEN, *supra* note 32, at 3-181. Recognition of judgments becomes an issue when one state has rendered a binding decision between private parties, but the winning party must seek enforcement—e.g., collect against assets—outside the territory of the rendering state. Both the winning party and the rendering state will be interested in seeing the judgment accorded respect in a state where the defendant’s assets may be found. For a thoughtful discussion of international bankruptcy theory within a conflicts framework, see Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory*, 36 STAN. J. INT’L L. 23 (2000).

Although international recognition of civil judgments is common and becoming more so,<sup>49</sup> universalist bankruptcy recognition is basically nonexistent. Bankruptcy law is among the areas of law least amenable to international harmonization or cooperation,<sup>50</sup> and to date, the history of multilateral insolvency cooperation has been marked by frustration.<sup>51</sup>

#### A. *Bankruptcy and Social Policy*

Bankruptcy by its nature is a much more drastic type of legal proceeding than a simple civil suit between private parties. A garden variety civil suit settles rights with respect to a particular transaction between the parties, and a civil judgment is simply an order requiring the transfer of money between private parties. Bankruptcy, by contrast, has wholesale effects. It provides for the comprehensive restructuring of a firm and all its legal relationships with its creditors and other interested parties. Moreover, bankruptcy law is “meta-law.”<sup>52</sup> In remaking of the firm, bankruptcy law overrides contract-, property-, and other legal rights that exist outside of bankruptcy. While reordering prebankruptcy rights, bankruptcy typically effects a blanket prejudgment attachment of the debtor’s assets and a

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<sup>49</sup> See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 707 (4<sup>th</sup> ed. 2001). Foreign tax judgments are a significant exception to this trend. See *id.* at 706. While the details of states’ practices vary widely, many a state readily recognizes and enforces locally the civil judgments rendered by courts of other states. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, ch. 8 introductory note (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS]. Numerous treaties on the subject exist. See *id.*; EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 1005 (2d ed. 1992). See also *infra* note 61. Some states unilaterally grant recognition without insisting on any explicit reciprocity arrangement with the rendering state.

<sup>50</sup> “[I]t would if anything be a gross understatement to claim that the age-old problems of international bankruptcy are among the most intractable to have presented themselves to scholars and practitioners searching for workable and just solutions to the legal complexities of our increasingly interdependent global community.” Ian F. Fletcher, *Commentary on Boshkoff, Some Gloomy Thoughts Concerning Cross-border Insolvencies*, 72 WASH. U. L. Q. 943 (1994). See also Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 WASH. U. L. Q. 931 (1994).

<sup>51</sup> See Westbrook, *Creating International Insolvency Law*, *supra* note 46, at 570 (noting limited success of international bankruptcy conventions); Harold S. Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, 64 FORDHAM L. REV. 2543 (1996) (discussing failed efforts at international insolvency reform).

<sup>52</sup> The phrase is Manfred Balz’s. See Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 AM. BANKR. L. J. 485, 486 (1996).

comprehensive stay of creditor collection attempts. Bankruptcy scales down and prioritizes creditor claims, effectively distributing the losses from the firm's financial distress over the entire body of creditors and other interested parties. In this process, bankruptcy effectively renders judgment with respect to all claims. It then executes these judgments through the bankruptcy distribution. The firm's operations will typically be modified as well, or even liquidated piecemeal. The proceeding will affect not only creditors, equity holders, and employees, but also customers, suppliers, and taxing authorities, among others.

With these wholesale effects, each state's bankruptcy regime embodies its own myriad social policies. Each state has its favored creditors, whose recoveries take priority over the general body of creditors.<sup>53</sup> More generally, states take differing approaches to resolving corporate financial distress and may have divergent views concerning the appropriate goals and methods for a bankruptcy system.<sup>54</sup> Each state naturally prefers its own set of policy choices to those of other states. Especially with the bankruptcy of a multinational firm, which is likely to involve assets and liabilities of significant value, states may feel a significant stake in having their own laws apply, especially within their borders. A multinational bankruptcy is likely to have widespread effects in the states in which the firm does business or owns property. Because of these drastic effects and significant social policy implications, states may understandably be reluctant to defer to foreign bankruptcy regimes. Each state will be disinclined to recognize and give local effect to edicts of foreign courts applying foreign bankruptcy law.<sup>55</sup>

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<sup>53</sup> In the United States, grain producers and United States fishermen enjoy special priority over general creditors in certain cases. *See* 11 U.S.C. § 507(a)(5) (1994)). In South Korea, Mexico, and France, employee priority claims are senior to secured claims. *See* Soogeun Oh, *Creditor Rights in Insolvency Procedure*, *Insolvency Systems in Asia: An Efficiency Perspective* (OECD, Nov. 29-30, 1999) (visited August 26, 2000) <<http://www.oecd.org/daf/corporate-affairs/insolvency/in-asia/oh.pdf>> (South Korea); American Law Institute, *TRANSNATIONAL INSOLVENCY PROJECT: INTERNATIONAL STATEMENT OF MEXICAN BANKRUPTCY LAW 71* (Tentative Draft Apr. 15, 1998) (Mexico); PHILIP R. WOOD, *PRINCIPLES OF INTERNATIONAL INSOLVENCY* 24 (1995) (France). By contrast, in most countries, employee claims—almost invariably unsecured—are not excepted from the general rule that secured claims have priority over unsecured claims with respect to the secured creditors' collateral. *See* WOOD, *supra*, at 25.

<sup>54</sup> *See* WOOD, *supra* note 53, at 7 (ranking various jurisdictions as debtor- or creditor-friendly based on various factors).

<sup>55</sup> *See* DALHUISEN, *supra* note 32, at 3-181.

B. *Bankruptcy Recognition and Extraterritorial Jurisdiction*

Related to the broad social policy implications of recognizing foreign bankruptcy proceedings is the more technical problem of jurisdiction. While states vary in their requirements for recognition of civil judgments, each invariably requires that the rendering court have jurisdiction over the defendant-judgment debtor.<sup>56</sup> The defendant-judgment debtor must have some sufficient connection with the forum state to justify the court's exercise of judicial power over her. In light of this basic jurisdictional requirement, universalism represents a fairly bold demand for foreign recognition. It asserts an aggressive jurisdictional reach that has no parallel outside the bankruptcy context.

Assertion of expanded jurisdiction enables a state's courts to export social policy to other states.<sup>57</sup> The jurisdictional test for recognition of foreign judgments can be understood as a mechanism to deter such ambitions.<sup>58</sup> Given the meta-law nature of bankruptcy, the potential for export of social policy is great when a state asserts extraterritorial bankruptcy jurisdiction. Potential importing states, understandably vigilant about such large scale imports, may reject universalism on that basis.

To the extent local creditors' rights are adversely affected by a foreign bankruptcy proceeding, their position is analogous to that of a defendant-judgment debtor in ordinary civil litigation. Local creditors would

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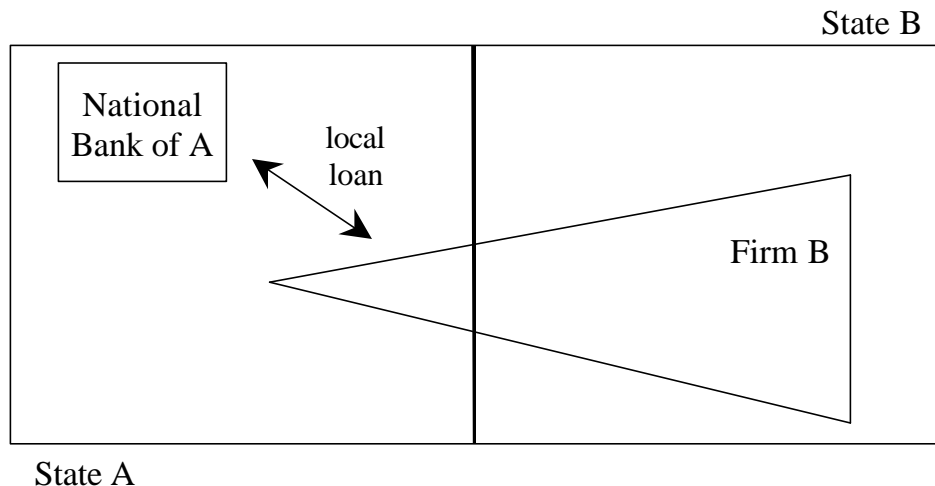
<sup>56</sup> See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 49. See also ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 836 (1965) ("In Anglo-American law . . . recognition of foreign judgments turns basically on the question whether in the view of the recognizing court the rendering court had adjudicatory jurisdiction in the international sense."); SCOLES & HAY, *supra* note 49, at 1011; DALHUISEN, *supra* note 32, at 3-70.2.

<sup>57</sup> See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 12, at 759 (noting that an involuntary claim is "the direct product of some country's social policy" and that "[t]o require a second country to recognize that claim exports the social policy of the first."). *Id.*

<sup>58</sup> See Michael Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 MELBOURNE U. L. REV. 416, 425 (1999); DALHUISEN, *supra* note 32, at 3-9. Efforts to expand jurisdiction may also appeal to the local bar, which stands to gain in terms of increased representations as the scope of cases that may be heard locally increases. See Whincop, *supra* at 424. Judgment recognition conventions and municipal judgment recognition laws also typically allow for refusal of recognition if it would be incompatible with the state's public policy. See Hague Convention, *supra* note 59, Art. 28(f); Whincop, *supra* at 428; SCOLES & HAY, *supra* note 56, at 1014. This basis for refusal of recognition further limits states' social policy exporting ambitions.

have enjoyed collection rights against the debtor’s local assets under local law, absent a foreign party’s invocation of foreign legal process—in the form of the foreign bankruptcy proceeding—to alter local creditors’ rights. Given that the entirety of local creditor dealings with the debtor may have occurred locally, the adverse intervention of a foreign proceeding will trigger extraterritoriality concerns.

By way of comparison, consider the simple contract depicted in Figure 1.



*Figure 1*

Assume the world consists of two states, State A and State B, represented by the two contiguous squares above. The large triangle represents Firm B, a multinational firm whose home country is State B, but which also has operations in State A. Suppose the National Bank of A, a domestic bank in State A that lends only locally, has extended a loan to Firm B. All aspects of the transaction were conducted in State A. Under these conditions, absent the bank’s agreement otherwise, not only would disputes relating to the loan ordinarily be resolved in the courts and under the laws of State A, but any assertion of jurisdiction by courts of State B would be highly contested. That Firm B may be incorporated or headquartered or have its principal place of business or major operations in State B does not by itself confer on State B courts a jurisdictional reach that is internationally recognized.<sup>59</sup> The transaction at issue has no other connection with State B.

<sup>59</sup> For example, the preliminary draft of the Hague Convention on Jurisdiction and Foreign Judgments specifically forbids “the application of a rule of jurisdiction provided for under the national law of a Contracting State . . . if there is no substantial connection between that State and the dispute,” and more particularly forbids exercise of jurisdiction based

While State B might claim such exorbitant jurisdiction for its courts, such an approach is typically condemned by other states.<sup>60</sup> Existing international conventions on jurisdiction and recognition of judgments forbid this exercise of jurisdiction and forbid recognition of any judgment based on such jurisdiction.<sup>61</sup> Yet, this is exactly the deference that universalism demands, not just with respect to specific transactions, but with respect to all the debtor's affairs in State A.<sup>62</sup>

Consider next the financial distress of Firm B. With the debtor's bankruptcy filing in State B, a universalist system would displace State A bankruptcy law with State B bankruptcy law. It would disempower State A courts, requiring their deference to those of State B. With its bankruptcy filing, the debtor would effectively drag not one but *all* State A claimants into State B, even those with no connection to State B whatsoever except having engaged with the debtor in a transaction wholly within State A. The State B court would assert jurisdiction over assets, parties, and legal relationships wholly within State A. Finally, universalism would require State A to recognize and enforce decisions rendered in the State B proceeding.

In effect, the rights of State A claimants, which would ordinarily include collection rights against debtor assets in State A adjudicated by State A courts under State A law, would instead under

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solely on "the domicile, habitual or temporary residence, or presence of the plaintiff" in a particular State. *See* Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission of the Hague Conference, 30 October 1999, Art. 18 [hereinafter, Hague Convention]. The concept of "habitual residence" under this convention is approximately the same as the home country concept under universalism. *See id.* Art. 3(2). *See also* Catherine Kessedjian, *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Preliminary Document No. 7, Hague Conference on Private International Law, Revised Translation October 1997)*, 39-40 (noting as an exorbitant basis for jurisdiction "the domicile/habitual residence of the plaintiff").

<sup>60</sup> *See* Kurt H. Nadelmann, *Jurisdictionally Improper Fora*, in CONFLICT OF LAWS: INTERNATIONAL AND INTERSTATE 222 (1972) (describing controversy surrounding the "notorious article 14 of the French Civil Code," which bases jurisdiction on the *plaintiff's* French nationality).

<sup>61</sup> *See* Hague Convention, *supra* note 59, Art. 26; European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, July 28, 1990 (as amended 29 I.L.M. 1413), Art. 28 [hereinafter Brussels & Lugano Conventions].

<sup>62</sup> This is not to question that unified administration of an insolvency proceeding might make economic sense, *see supra* Part I.A, but instead to point out the drastic assertion of crossborder jurisdiction that this sort of approach requires.

universalism be disaggregated from those local assets and subjected to foreign rules applied by a foreign court in light of foreign claims. Again, this jurisdictional reach is uniquely a bankruptcy aspiration. A similar assertion of jurisdiction made in the nonbankruptcy context—typically involving a proceeding of more limited scope, concerning only one or a few distinct transactions among a handful of private actors—would have little hope of foreign recognition.<sup>63</sup> In the basic civil judgment context, the State B court would have no jurisdiction over the assets or creditors in State A that had no contact with State B. The State B judgments would therefore not merit recognition. The wholesale nature of bankruptcy makes wholesale recognition even less appealing.

Bankruptcy law’s wholesale purview means that recognition of a foreign proceeding effects the wholesale import of another state’s regime for deciding sensitive policy issues. Political judgments about local asset disposition and allocation of local losses from the foreign firm’s demise are left in the hands of a foreign court. Universalism effectively requires a state’s precommitment to wholesale deferral to other states’ various prescriptions for financial distress. This is no small request.<sup>64</sup>

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<sup>63</sup> Jurisdiction based on the nationality of the plaintiff—in the insolvency context, the party instigating the foreign proceeding would be the appropriate analogue—is considered “exorbitant.” RESTATEMENT OF FOREIGN RELATIONS, *supra* note 49, ch. 2 introductory note.

<sup>64</sup> Professor Westbrook suggests that these problems can be avoided by applying universalism only to “large” multinationals. See *Global Solution*, *supra* note 1, at 2298. However, if the size of the firm bears *any* relation to the level of its local activity, it would seem that a “large” firm would be at least as likely to engage in significant numbers of local transactions—employment and supply contracts, for example—as a smaller multinational firm. The failure of the large multinational may have significantly greater local effects than failure of a small one.

### III. THE GAME THEORY OF INTERNATIONAL BANKRUPTCY RECOGNITION

The preceding Part explained why states will generally be reluctant to adopt universalism. States will be reluctant to precommit to recognizing other states' assertions of extraterritorial bankruptcy jurisdiction. This earlier discussion portends bleak prospects for universalism.

In the remainder of this Article, I consider universalism from a different perspective. Assuming for discussion purposes that states do or may exist that prefer universalism to territoriality, I show that such states will have difficulty implementing universalism. I rely on simple game theory to show that even under the most optimistic circumstances (for a universalist), universalism is unlikely to emerge.<sup>65</sup> Whether universalist deference to home country bankruptcy proceedings could be regularized is doubtful. And given that predictability is one of the major promises of universalism,<sup>66</sup> regularity of cooperation is important to the universalist agenda. Universalism may be impossible, even among sympathetic states.

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<sup>65</sup> Game theory analysis is standard in international relations discourse. See Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, 38 *WORLD POL.* 1 (1985); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT'L L.* 335 (1989); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 *AM. J. INT'L L.* 367 (1998); Duncan Snidal, *Coordination versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 *AM. POL. SCI. REV.* 923 (1985) [hereinafter Snidal, *Coordination*]; Duncan Snidal, *The Game Theory of International Politics*, 38 *WORLD POL.* 25 (1985) [hereinafter Snidal, *Game Theory*]; Robert Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, in *COOPERATION UNDER ANARCHY* 235 (Kenneth A. Oye ed. 1986). It has been applied in the conflict of laws context. See, e.g., LEA BRILMAYER, *CONFLICT OF LAWS* 182 (2d ed. 1995) (proposing game models for choice of law analysis); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 *HARV. INT'L L. J.* 101, 161 (1998) (applying iterated prisoners' dilemma model to choice of law); Larry Kramer, *Return of the Renvoi*, 66 *N.Y.U.L. REV.* 979, 1023 (1991) (same); Larry Kramer, *Rethinking Choice of Law*, 90 *Colum. L. Rev.* 277, 340 (1990) [hereinafter Kramer, *Rethinking Choice of Law*] (same). This resort to game-theoretical analysis has not been without controversy. See Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 *U. PA. L. REV.* 949, 1000 (1994) (doubting that game theory prescriptions for achieving cooperative outcomes apply to judges' choice of law decisions); Louise Weinberg, *Against Comity*, 80 *GEO. L. J.* 53, 55 (1991) (questioning applicability of prisoners' dilemma model to choice of law, and describing game theory and choice of law as "Godzilla Meets the Swamp Thing").

<sup>66</sup> See, e.g., Westbrook, *Choice of Avoidance Law*, *supra* note 1, at 529 (noting that benefits of universalism depend on "high predictability of results and reciprocity").



In this Part, I frame universalism as a prisoners' dilemma. I first explain my focus on states as the primary actors in the international bankruptcy game. Next, I describe the universalist dilemma. Finally, I discuss prospects for solving the universalist dilemma under repeat play conditions, which are typical of international commercial interaction. In the next Part, I show that given the conditions of play in international bankruptcy, the universalist dilemma will not be susceptible of easy resolution.

#### A. *States' Interests and Preferences*

Throughout my discussion, I implicitly engage certain simplifying assumptions concerning states' interests and preferences. I treat each state as a unitary actor with well-defined interests and preferences. This approach is familiar to international law and international relations discourse,<sup>67</sup> and has been implicitly followed as well in the international bankruptcy debate.<sup>68</sup> In particular, I have argued that each state prefers its own bankruptcy laws and policy choices to those of other states,<sup>69</sup> without delving into the internal political dynamics that generate these preferences.

This parochialism of states may seem unremarkable and without need of further internal investigation. However, public choice and international relations theorists have cautioned us to be wary of treating states as black boxes or billiard balls.<sup>70</sup> Domestic politics matters for

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<sup>67</sup> See ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 29 (1984); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1168 (1999) (defending simplifying assumption that national leaders identify and pursue national self-interest); Abbott, *supra* note 65, at 351 (explaining simplifying assumptions to rational actor approach).

<sup>68</sup> See *supra* Part I. The focus on state interests dominates choice-of-law scholarship. "Most scholars now advocate, and courts now apply, some version of government interest analysis, which looks to the states' legislative interests in determining the applicable law." Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1169 (2000).

<sup>69</sup> See *supra* Part II.A. The general assumption that states' favor their own laws is fairly standard in the conflicts of law literature. See *infra* notes 89-90 and accompanying text (discussing states' interests as embodied in their laws).

<sup>70</sup> See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988); DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans et al. eds., 1993); Jonathan R. Macey, *Chicken Wars as a Prisoners' Dilemma: What's in a Game?*, 64 NOTRE DAME L. REV. 447 (1989) (reviewing JOHN C. CONYBEARE, *TRADE WARS: THE THEORY AND PRACTICE OF INTERNATIONAL COMMERCIAL RIVALRY* (1987)) (noting importance of public

international policy, and unitary actor models of state behavior run the risk of missing important domestic causal variables that affect international policy.<sup>71</sup> Therefore, while I focus primarily on state actors—an approach I justify below—I first comment briefly on influences of domestic actors and interest groups.<sup>72</sup>

In general, a state's preference for its own bankruptcy law and reluctance to recognize foreign bankruptcy proceedings may arise from the desire of domestic political actors to defend the policies implicit in their domestic laws. This may include the preservation of any perquisites that redound to particular groups under those laws. The complexities of a state's bankruptcy regime reflect myriad policy decisions and political trade offs.<sup>73</sup> These trade offs might enhance the public interest or merely the interests of the victors in domestic rent seeking contests. Regardless of which, political actors will wish to preserve the balance struck in their domestic bankruptcy rules.<sup>74</sup> They will generally resist recognition of foreign bankruptcy

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choice analysis in understanding trade policy formation); Colombatto & Macey, *supra* note 20 (denying that states have preferences or interests, and arguing instead that only individuals have interests). *See also* O'Hara & Ribstein, *supra* note 68, at 1169 (criticizing traditional emphasis on government interests, as opposed to individual interests, in U.S. conflicts scholarship and court opinions) (2000).

<sup>71</sup> *See* Snidal, *Coordination*, *supra* note 65, at 926 (acknowledging drawbacks to realist assumption of states as goal-seeking actors with well-defined preferences); Andrew Moravcsik, *Introduction: Integrating International and Domestic Theories of International Bargaining*, in *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS 3* (Peter B. Evans et al. eds., 1993); Keisuke Iida, *When and How Do Domestic Constraints Matter?: Two-Level Games with Uncertainty*, 37 *J. CONFLICT RESOL.* 403, 403-04 (1993) (criticizing realist tradition of "treat [ing] nation-states as unitary actors" and noting that "[i]n reality, foreign policy decisions are the result of political processes within nation-states."). Moreover, speaking of states' interests and states' preferences may be anthropomorphic: "Institutions in general, and governments in particular, do not have preferences, people do. Governmental policy reflects the preferences of powerful constituents, not some mystically determined set of preferences that might be described as the 'national interest.'" Colombatto & Macey, *supra* note 20, at 931.

<sup>72</sup> States' internal political processes are heterogeneous, of course, so any account necessarily involves some generality and some speculation.

<sup>73</sup> *See supra* Part II.A.

<sup>74</sup> In general, interest groups with political influence sufficient to affect policy or capture rents from the domestic legislative process will typically also have sufficient influence to preserve these policies or protect these same rents from potential dilution from the incursion of foreign or international laws. Some evidence exists to suggest that bankruptcy professionals exercise significant political influence in shaping a state's bankruptcy law. *See* Bruce G. Carruthers & Terence C. Halliday, 74 *AM. BANKR. L. J.* 35, 38 (2000) ("Bankruptcy law historically has appeared to be a marginal or complex field of

proceedings that would upset this careful balance.<sup>75</sup> This home town bias sets the stage for the conflict of bankruptcy laws that arises with the financial demise of a multinational firm.

For the remainder of this Article, I continue with the traditional focus on state actors, assuming that their political leaders pursue national interests, without much further attention to domestic politics. This approach emphasizes external incentives and influences on states, highlighting the systemic constraints and opportunities of the international system.<sup>76</sup> It makes the ensuing game analysis tractable; “it simplifies our premises, making deductions clearer.”<sup>77</sup>

Given that my task is to prove a negative, these simplifying assumptions only strengthen my argument. If, as I claim, states considered as unitary actors will be unable to achieve cooperation, consideration of domestic influences would only show universalism to be even more dubious.<sup>78</sup> Opening the black box of the state only reveals more actors and influences that might frustrate cooperative endeavors. In general, as the number of relevant actors rises, cooperation becomes less likely.<sup>79</sup> Identifying the domestic actors within each state only multiplies the number of constituencies that must ratify—and may veto—any cooperative arrangement. “International agreement is less likely when domestic politics is involved. . . . It is not just anarchy but also domestic politics that makes

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law where most citizens or companies have had little interest and where professional experience should count a great deal.”); Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 57 (1997) (describing lawyers’ roles and interests in shaping U.S. bankruptcy law reform); Paul Stephan, *The Futility of Unification and Harmonization of International Commercial Law*, 39 VA. J. INT’L L. 743 (1999) (describing influence of technical experts on formulation of international bankruptcy and commercial law). Reluctance to recognize foreign bankruptcy proceedings might therefore arise from professionals’ desire to preserve their local franchise in professional services from the foreign incursion that would result from recognition.

<sup>75</sup> I discuss the possibility of jurisdiction trading below. *See infra* Part III.B.

<sup>76</sup> *See* KEOHANE, *supra* note 67, at 29; Abbott, *supra* note 65, at 351-52.

<sup>77</sup> KEOHANE, *supra* note 67, at 29. While two-level game analysis has been used to capture the interaction of international relations with domestic political constraints, the efforts have been largely descriptive in nature. *See, e.g.*, DOUBLE-EDGED DIPLOMACY, *supra* note 70.

<sup>78</sup> *See* HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS 80 (1997).

<sup>79</sup> *See infra* Part IV.D.

cooperation difficult.”<sup>80</sup> For the most part, I make fairly optimistic assumptions—from a universalist’s perspective—concerning states’ preferences for universalism, in order to show its futility.<sup>81</sup> Treating states as unitary actors is consistent with this “best case” approach. Consideration of internal domestic influences would only make universalism *less* likely, not more.

To that analysis we now turn.

*B. Conflicting Bankruptcy Laws and the Prisoners’ Dilemma*

Even between states that might prefer universalism to territoriality, the states will find themselves in a prisoners’ dilemma.<sup>82</sup> Below, I suggest a plausible account of states’ preference for universalism. Though states generally prefer their own bankruptcy laws, I will assume that states exist that identify a potential for mutual gains from universalist cooperation—no small assumption, and one that is counterfactual for many states.<sup>83</sup> For clarity of exposition, I assume away any problems relating to corporate groups, so that multinational enterprises are assumed to have no subsidiaries, but own their foreign assets directly.<sup>84</sup>

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<sup>80</sup> MILNER, *supra* note 78, at 80.

<sup>81</sup> *See infra* Part III.B.

<sup>82</sup> For a description of this most famous of games, *see* ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 7 (1984).

<sup>83</sup> *See supra* Part II. Jay Westbrook has also noted the difficulties of achieving universalism, enumerating certain preconditions to its realization. My assumption of mutual cooperative gain parallels his assertion for the necessity for “critical-mass reciprocity,” basically that enough states exist that share the perception of mutual gains from universalist cooperation that they will participate in reciprocal arrangements. *See Westbrook, Theory and Pragmatism, supra* note 13, at 467. He further asserts that roughly similar bankruptcy laws are required. *See id.* at 468. However, this condition may neither be necessary nor sufficient. Even “identical” bankruptcy laws would not necessarily cause states to be indifferent as to whose law and courts control particular assets. Given that (a) most states refuse to recognize the tax claims of other states while giving priority to their own tax claims, and (b) professional fees—possibly of sizable amounts—are always at stake, each state would still have some incentive to refuse deference and instead assert its territorial privilege. On the other hand, Westbrook is correct that the more similar are states’ bankruptcy laws, the smaller is the immediate cost of cooperation in a particular case.

<sup>84</sup> *See supra* note 39 and accompanying text. If cooperation cannot be achieved in the simple case, it will be even more unlikely given added complexity.

1. *Conflicting Preferences and Cooperative Possibilities*

Assume the world consists of our two states, A and B. Each state must choose an international bankruptcy policy. Its two choices are universalism (“cooperation” in the game parlance) or territoriality (“defection”). As previously discussed, State A will prefer that its bankruptcy jurisdiction extend to all situations in which State A may have some plausible interest.<sup>85</sup> In particular, State A will prefer that jurisdictional competence for its bankruptcy regime include the following:

- (x) bankruptcies involving State A firms,<sup>86</sup> including the assets of State A firms, whether located
  - (i) within State A
  - or
  - (ii) outside the territory of State A;<sup>87</sup> and
- (y) all other assets located in State A that become involved in bankruptcy proceedings,<sup>88</sup> regardless of their ownership—i.e., including assets owned by State B firms.

State B will have similar preferences.

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<sup>85</sup> See *supra* Part II.A. This coincidence of choice of law and forum is consistent with the universalist approach, which also selects the home country court as the appropriate forum. Once home country law is chosen, this forum selection generally makes sense, since home country courts will be the most able at applying that law. See Rasmussen, *A New Approach*, *supra* note 10, at 33-34 (“Bankruptcy rules are notoriously complex. It is fanciful to expect a court to apply the bankruptcy law of a foreign country with anything approaching an acceptable degree of accuracy. Thus, for pragmatic reasons, a forum should generally apply its own bankruptcy law.”).

<sup>86</sup> That is, firms with home country A.

<sup>87</sup> See *supra* note 47 and accompanying text; WOOD, *supra* note 53, at 240 (describing extraterritorial reach of various bankruptcy regimes). Under U.S. law, for example, the bankruptcy estate created upon the commencement of the proceeding includes property of the debtor “wherever located.” 11 U.S.C. § 541(a) (1994).

<sup>88</sup> I borrow Lynn LoPucki’s definition of “located” to include not only physical location of tangible assets, but to encompass intangible assets as to which a state is able unilaterally to enforce its determinations. See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 12, at 743 and n.228. Under this definition, of course, an intangible asset could theoretically be located simultaneously in both State A and State B. I ignore that wrinkle for present purposes.

Of course, it is not possible for all of both states' preferences to be fulfilled all the time. Figure 2 illustrates the conflicting preferences.

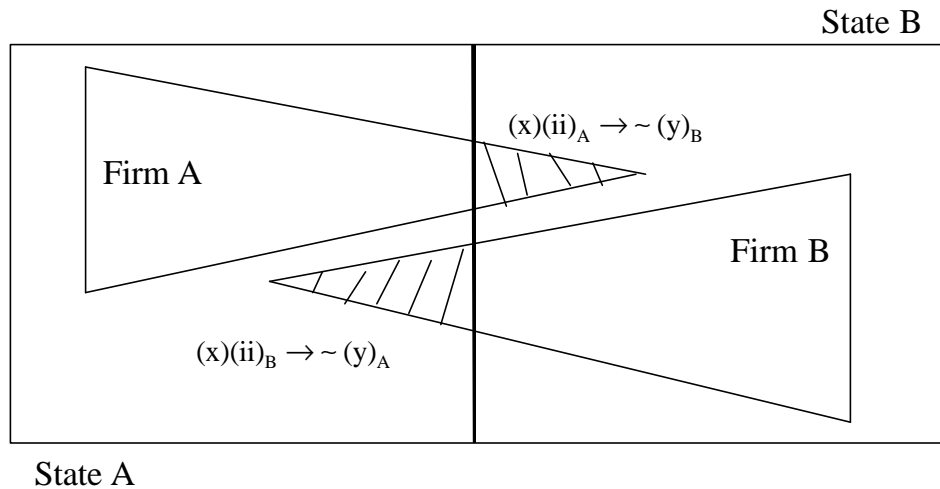


Figure 2

Firm A is a State A firm; Firm B is a State B firm. The shaded areas of Firm A and Firm B identify the international operations of each firm. It is these offshore assets that trigger international bankruptcy issues when a firm suffers financial distress. Competing assertions of bankruptcy jurisdiction will focus on these offshore assets.

State A's desire to apply its bankruptcy law to assets owned by State A firms but located in State B will clash with State B's desire to have its bankruptcy law apply to all assets located in State B. In general, fulfillment of preference (x)(ii) of either state will require the other state's relinquishment of its preference (y) and recognition of the first state's assertion of extraterritorial bankruptcy jurisdiction. This of course is universalism. With territoriality, on the other hand, a state will insist on its preference (y) in the face of the other state's assertion of extraterritorial jurisdiction and its preference (x)(ii).

This sort of competition among states to advance their own laws and policies is not necessarily a zero-sum game. One state's gain in having its laws applied to a given dispute does not necessarily diminish a competing state by the same amount.<sup>89</sup> In many disputes, one state will have

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<sup>89</sup> For our purposes, we may assume a state "gains" when its policies are furthered by the application of its laws. See Brilmayer, *supra* note 65, at 193; Joel P. Trachtman, *Externalities and Extraterritoriality: The Law and Economics of Prescriptive Jurisdiction*, in *ECONOMIC DIMENSIONS*, *supra* note 17, at 642 (analogizing prescriptive jurisdiction to property rights and discussing jurisdictional trade). In addition, we may assume that a

a greater stake in application of its own law than will other states. One state will more highly “value” application of its law than others. If states could cooperate by deferring to each other’s laws on this welfare maximizing basis, then as a group they could make themselves better off than if each state blindly applied its own law whenever it could.<sup>90</sup>

The presumptive welfare maximizing choice of law implicit in the universalist approach, of course, is the law of the debtor’s home country. Universalists have not explicitly defended home country law on this basis,<sup>91</sup> but for purposes of my discussion, I assume this choice is plausible. The home country in many cases will have the greatest interest in having its law govern its debtor’s bankruptcy proceeding.<sup>92</sup>

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state’s gains inure to the benefit of domestic interest groups that supported the original domestic legislative bargain, and therefore that such groups will support such jurisdictional trades.

<sup>90</sup> See Kramer, *Rethinking Choice of Law*, *supra* note 65, at 340; Brilmayer, *supra* note 65, at 197; Trachtman, *supra* note 89.

<sup>91</sup> Neither predictability nor the desire for one main forum necessarily requires application of home country law. Predictability only depends on a *clear* choice of law rule, not that the choice be home country law. For instance, a rule that U.S. bankruptcy law (or the bankruptcy law of any other specified jurisdiction) should apply to all crossborder bankruptcies in the world offers better predictability than a home country rule. On the other hand, a desire for one main forum may suggest that whatever forum is selected ought to apply the law it applies best—its own domestic law. See *supra* note 85.

<sup>92</sup> Moreover, one can imagine domestic interest group alignments that might coalesce around a universalist policy. Given the absence of any universalist arrangements in the world, scant evidence exists on this question. However, it appears that bankruptcy professionals typically play important roles in promoting bankruptcy reform, both domestically and internationally. See *supra* note 74. Recent international bankruptcy reform efforts have been driven largely by reform-minded lawyers and legal academics acting primarily through “private” legislatures—that is, technical expert groups affiliated with professional organizations or selected by international organizations. See Stephan, *supra* note 74 (discussing private legislatures and role of technical experts in drafting UNCITRAL Model Law on Cross-Border Insolvencies); Westbrook, *supra* note 46 (discussing various reform initiatives). Consistent with this evidence, bankruptcy professionals would likely play a leading role in a given state’s adoption of universalism. A state’s lawyers and other bankruptcy professionals would presumably prefer universalism if they believed that they would realize a net gain in retentions and fees as compared to territoriality.

Assuming bankruptcy professionals’ expertise remains territorially bound, local professionals would favor universalism if they anticipated that they would be exporting their bankruptcy expertise more often than they would be witnessing foreign professional imports. That is, a state’s bankruptcy professionals would support universalism if they believed their home jurisdiction would be the home country more often than not. They would lose some revenues, of course, in those cases in which a foreign bankruptcy regime

## 2. *The Universalist Dilemma*

Assuming that each state values mutual cooperation more than mutual defection, these conditions produce a prisoners' dilemma. Returning to our two-state example, with two policy choices available to each state, there are four possible combinations of their decisions. For each state, we can rank these four possible outcomes in relative order of desirability, with 4 being a state's most favored outcome and 1 being the least favored.

In State A's best scenario—its most highly ranked outcome of 4—all its preferences are met. It chooses territoriality, while State B chooses universalism. Under this outcome, State B will defer to State A's assertions of extraterritorial jurisdiction when a State A insolvency proceeding involves Firm A operations or assets in State B (State A's preference (x)(ii) above), and State A will not defer to State B when the roles are reversed, but will apply its own law (State A's preference (y) above). State A will enjoy the fruits of State B's deference without having to reciprocate. In game theory parlance, State A will wish to defect, while having State B cooperate.

Next best from State A's perspective is mutual cooperation. By hypothesis, mutual cooperation is superior to mutual defection for State A, so State A is willing to defer when State B is the home country, provided State B reciprocates—i.e., State B defers when State A is the home country.

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controlled. Issues affecting local assets and legal relationships, which would have been litigated, negotiated, and decided locally under a territorial regime, would instead be subject to the foreign court's home country jurisdiction, where foreign professionals would reap the lion's share of fees. On the other hand, local professionals would stand to gain from the cases in which their state was the home country. Those cases would offer local professionals the chance to export their local expertise as home country bankruptcy specialists, advising foreign as well as local parties as to how the state's bankruptcy regime would operate. Consistent with this proposition, Lynn LoPucki has observed that "American bankruptcy professionals are nearly all universalists, because they assume the reorganizations will all come to the US so [the debtors] can be debtors in possession. Canadian bankruptcy professionals are (mostly closet) territorialists because they make the same assumption." *See* Electronic correspondence from Prof. Lynn LoPucki, Security Pacific Bank Professor of Law, UCLA Law School, to author (Feb. 24, 2001) (on file with author).

Of course, a given state's bankruptcy professionals may not hold uniform preferences on the subject of universalism. Those on the losing end of universalism may not be the same as those on the winning end. For example, professionals accustomed to representing unsophisticated local creditors with no offshore lending activities would only stand to lose business under universalism. Professionals representing unsophisticated clients may also not enjoy the same political influence as professionals with sophisticated international firms or lenders for clients. Therefore, the politics of universalism may turn disproportionately on the interests of the elite bankruptcy professionals in each state.



While this outcome does not satisfy all of State A's preferences, it does garner State A the benefits of mutual cooperation. We give this outcome a ranking of 3.

After mutual cooperation comes mutual defection, which we can rank at 2. And finally, State A's worst outcome occurs when it cooperates but State B fails to reciprocate. In this scenario, State A defers to State B's assertions of extraterritorial jurisdiction when State B is the home country, but State B does not accord the same deference to State A's assertions of home country extraterritorial jurisdiction in State B. So neither State A's preference (x)(ii) nor its preference (y) is satisfied. This outcome ranks the lowest at 1.

State A's rank ordering of preferred outcomes, then, is as follows:

- 4 State A defects (chooses territoriality);  
State B cooperates (chooses universalism).
- 3 State A cooperates; State B also cooperates.
- 2 State A defects; State B also defects.
- 1 State A cooperates; State B defects.<sup>93</sup>

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<sup>93</sup> I do not claim that these preferences and payoffs hold for all states. If anything, many states' preferences are likely to be *more* rivalrous than those found in the prisoners' dilemma. Symmetric or asymmetric deadlock may apply, making universalist cooperation even more hopeless. See Oye, *supra* note 65, at 7 ("When you hear hoof beats, think horse before you think zebra. . . . When you observe conflict, think Deadlock—the absence of mutual interest—before puzzling over why a mutual interest was not realized." (internal quotations omitted)); Abbott, *supra* note 65, at 357 (describing deadlock games).

For example, besides states' general concerns regarding recognition described *supra* Part II, particular asymmetries among states may make universalism especially unappealing to some states. Less developed countries, which typically import far more direct investment than they export, would see little benefit from universalism. LDCs would find themselves far more often deferring to industrial country bankruptcy regimes, rather than seeing their own domestic regimes applied extraterritorially. Since far more multinational firms are headquartered in industrial countries, those countries—and not LDCs—would more often be the home country for multinational bankruptcies. Some states may also find themselves consistently "asset-heavy." Multinational debtors' assets will be disproportionately distributed across jurisdictions relative to the amounts of local creditors' claims in each jurisdiction. Some states may find themselves consistently in relative surplus. Such states may therefore prefer territoriality since that maximizes the amount of assets subject to distribution under the local regime. Transfer payments or issue linkage might be helpful in persuading these territorialist regimes to adopt universalism,

Assuming State B has similar preferences, their respective preference orderings and strategic incentives are reflected in the 2x2 matrix in Figure 3.<sup>94</sup>

		<b>State B</b>	
		Cooperate (universalism)	Defect (territoriality)
<b>State A</b>	Cooperate (universalism)	3, 3	1, 4
	Defect (territoriality)	4, 1	2, 2

*Figure 3*

Several features of their interaction are noteworthy. State A's best outcome also represent State B's worst outcome, since State B has garnered the costs but not the benefits of interacting with State A. This explains the (4, 1) rankings in the southwest box of Figure 3. Because the two states' preferences are symmetrical, when their roles are reversed, their respective rankings of that outcome are reversed as well, giving us the (1, 4) outcome in the northeast box.<sup>95</sup> In addition, as discussed above, both states are better off if they both cooperate—garnering the (3, 3) result in the

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but there appears to be no political impetus to pursuing such approaches, and universalists have not advocated them. *See infra* Part IV.E.

In any event, the prisoners' dilemma model seems appropriate among countries with significant commercial relations and for whom mutual advantage from universalist cooperation would seem to exist. Moreover, universalist advocates implicitly assume these preferences in their advocacy. *See infra* note 108 and accompanying text.

<sup>94</sup> State A's ranking of each outcome is the first number of the pair, while State B's ranking is the second number.

<sup>95</sup> If we represent the combination of the players' two strategies as an ordered pair, with a player's strategy as the first element and her counterpart's as the second, then each player's best outcome is DC—she defects while the other player cooperates. Conversely, each player's worst outcome is CD.

northwest box—than if neither do. Mutual defection leaves them the (2, 2) result in the southeast box.<sup>96</sup>

Each state prefers mutual universalist cooperation to mutual territoriality, but they have a problem. They will not achieve mutual cooperation. Instead, they will each choose to defect, even though they both know this to be a suboptimal outcome. This is the prisoners' dilemma. Consider the possible scenarios from State A's perspective. With no ability to assure State B's cooperation—an issue I discuss below—State A is always better off defecting. If State B cooperates, then State A obtains its best payoff by defecting. If State B instead defects, State A is also better off defecting. Otherwise, State A ends up with the “sucker's payoff,” its worst result in the game. State B is in a similar predicament and must also defect. For both states, defection is the dominant strategy—each state's best strategy no matter what choice the other state makes.<sup>97</sup> The dilemma is that individually rational strategy choices of the two states result in mutual defection, which for *both* states is an inferior outcome compared to mutual cooperation.<sup>98</sup>

In the international context, the dilemma arises because states' promises may not be credible. Among sovereign states, no ultimate international authority exists to enforce states' promises. No supranational sovereign exists to force states to abide by their commitments. Without such a central authority, states cannot guaranty future performance of their promises. “Nations dwell in perpetual anarchy, for no central authority imposes limits on the pursuit of sovereign interests.”<sup>99</sup> Even if mutual cooperation is preferable to mutual defection, states will have difficulty making credible their promises to cooperate.

One might suppose that a treaty provides a straightforward solution to this problem of credible commitments. However, a treaty does

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<sup>96</sup> For each player,  $CC > DD$ . Combining this preference with those described above gives the overall ordering of player preferences:  $DC > CC > DD > CD$ . This is the general definition of the single-play prisoners' dilemma. A further condition that  $CC > (DC + CD)/2$  is required in order to assure the possibility of mutual cooperative benefits from iteration, which is discussed *infra* in Part III.C. This separate condition assures that consistent mutual cooperation returns higher payoffs than if the players merely took turns defecting.

<sup>97</sup> See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 11 (1994) (explaining dominant strategy).

<sup>98</sup> That is, DD is not Pareto-efficient.

<sup>99</sup> Oye, *supra* note 65, at 1.

not create its own coercive enforcement authority. It has no independent binding effect. That states often comply with treaty obligations does not necessarily suggest any binding effect. Instead, a state's behavior consistent with its treaty obligations may show only that any benefit from breaching is outweighed by the possible retaliation of its treaty partners.<sup>100</sup> As the costs and benefits associated with compliance and cheating vary, so does the likelihood of compliance.<sup>101</sup>

Perhaps states could back up their universalist treaty commitments with domestic legislation instructing their courts as to application of the appropriate universalist conflicts of law rules. Domestic legislation mandating judicial implementation of universalism might provide some assurance to treaty partners about a state's future cooperation. Presumably, such enabling legislation could only be changed with some difficulty. Its passage might therefore add credibility to a state's universalist commitment.

However, demonstrating precommitment to universalism in this way will be problematic. As more fully discussed below,<sup>102</sup> specifying the universalist commitment with particularity will be difficult, whether in a treaty or in any enabling domestic legislation. Choice of law rules are notoriously imprecise and indeterminate,<sup>103</sup> as universalists admit.<sup>104</sup> The universalist commitment will inevitably be expressed in terms of imprecise

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<sup>100</sup> See Goldsmith & Posner, *supra* note 67, at 1171.

<sup>101</sup> This is not to assume away any reputational consequences that may attach to treaty violations. But these are simply additional costs in each state's decisional calculus. Moreover, reputational effects are ambiguous. A reputation for honoring international commitments must compete with other reputational interests states might have. A reputation for helping one's allies or punishing one's enemies, or a reputation for toughness, for example, might be as or more useful to a state in achieving its international objectives. These various reputational interests may conflict in any given case. Reputation may also not be as critical for powerful states, which may be "the only game in town" with respect to particular issues or transactions. See Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L. J. 487, 497-98 (1997). Even assuming a reputation for honoring international commitments were paramount, negative reputational consequences depend on third-parties being able to distinguish cooperation from defection, which will not be easy in the context of universalism. See *infra* Part IV.B.

<sup>102</sup> See *infra* Part IV.A-B.

<sup>103</sup> See Whincop, *supra* note 58, at 427-28 (identifying indeterminacy of choice of law rules as reason for absence of choice of law requirement for judgment recognition).

<sup>104</sup> See *infra* note 131 and accompanying text.

standards, relying on the exercise of ex post judicial discretion for their application. But standards and ex post discretion—as opposed to hard-and-fast rules—do not deliver a credible commitment. Instead, they offer only ambiguity concerning the content of any ostensible commitment, and they invite both cheating and good faith disagreement over their proper implementation.<sup>105</sup> Universalist commitments will be fuzzy. But fuzzy commitments implemented through judicial discretion will not be credible commitments, so states will be reluctant to make such commitments in the first place.<sup>106</sup>

In our bankruptcy cooperation game, despite promises of universalist cooperation, neither state can be assured that the other will cooperate. So they must both defect.

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Consistent with this account, universalist advocates, bemoaning the failure of international efforts at cooperation, promise mutual benefits if only states could forswear pursuit of short-term parochial interests in particular cases. Universalists seem to recognize that not all states are ready for cooperation.<sup>107</sup> However, for those that stand to benefit from mutual cooperation, a prisoners' dilemma exists that can hopefully be overcome.<sup>108</sup>

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<sup>105</sup> [W]here jurisdiction is defined by standards rather than rules, no credible commitment is made because the content of the standard is only ascertained at the time that the standard is applied to the case. That is inherent in the definition of a standard. Since no commitment has been made other than to apply a standard, courts will have an opportunity to cheat when cases arise, especially when the matters on which a court purports to base its judgment . . . are difficult for other states to observe or verify.

Whincop, *supra* note 58, at 433. See generally Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 279-80 (1992) (discussing difficulties of contracting conditioned on information that is unobservable or unverifiable).

<sup>106</sup> “[P]arties will not contract on the basis of unverifiable terms. This should apply equally to conventions.” MICHAEL J. WHINCOP AND MARY KEYES, *POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS* 159 (2000). This may in part explain why universalism has nowhere been implemented, despite its attraction to commentators.

<sup>107</sup> See *supra* note 83 and accompanying text.

<sup>108</sup> See Westbrook, *Theory and Pragmatism*, *supra* note 13, at 466; Westbrook, *Choice of Avoidance Law*, *supra* note 1, at 518 (describing cooperative benefits); Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 L. & POL’Y INT’L BUS. 1037, 1046

### C. *Repeat Play and Conditions for Cooperation*

Happily, states considering crossborder bankruptcy cooperation may anticipate repeat interaction with one another. In this repeat play context, states may have more sophisticated policy options than the once-and-for-all decision either to cooperate or defect. Each state may adopt a conditional strategy, which takes account of the other state's past behavior in deciding its own moves. In this context, the prospects for reaching cooperative outcomes under the prisoners' dilemma improve considerably.<sup>109</sup> Each player has the ability to reward or punish the other—augment or reduce the other's payoff—by cooperating or defecting in any given round of play.<sup>110</sup> Each player also understands that it may be punished in later rounds for defection in the current round. Given the prospect of reward for mutual cooperation and future punishment for current defection, a stable pattern of

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(1997). *See also* Stephan, *supra* note 74, at 785 (viewing international insolvency as “a classic collective action problem”).

<sup>109</sup> *See* Oye, *supra* note 65; Axelrod & Keohane, *supra* note 65, at 235. *See generally* AXELROD, *supra* note 82 (describing experiments confirming evolution of cooperation with repeat-play prisoners' dilemma games).

One could also imagine particular rounds of the international bankruptcy game in which the payoffs might not correspond to the prisoners' dilemma, but might be more conducive to cooperation. For instance, suppose that State B is the home country for Firm B's bankruptcy, but that significant Firm B assets are located in State A. Suppose further that in the particular case, (a) claims of State A creditors are predominantly local employee claims, which do not enjoy priority under State A bankruptcy law, but would enjoy high priority under the bankruptcy laws of State B; (b) State B creditors are primarily banks, which enjoy no priority under the laws of either state; (c) there are no other significant creditor groups; and (d) neither state's bankruptcy laws discriminate against foreign creditors. If State A acted territorially, rejecting the jurisdiction of the State B universalist court and applying its own bankruptcy laws to Firm B's local assets, it would have to distribute the value of those assets pro rata as among State B bank creditors and State A employee creditors. On the other hand, because State A's employee creditors would enjoy priority in the universalist proceeding, relinquishing local assets to the universalist proceeding would enable State A's creditors to recover against those assets before State B's bank creditors. In that situation, the clear benefit to State A creditors from State A's universalist cooperation would likely outweigh any countervailing policy considerations that might argue for territoriality by State A.

While particular cases might arise in which states' preferences are less rivalrous than in the prisoners' dilemma, they are not likely to arise regularly, as my stylized facts above suggest. I exclude this consideration from my model.

<sup>110</sup> In fact, each player's payoff is affected more by the other player's move than its own. Each player's move affects its own payoff by only one ordinal ranking, but the other player's move affects the first player's payoff by *two* ordinal rankings. *See* Snidal, *Coordination*, *supra* note 65, at 927.

reciprocal cooperation can emerge.<sup>111</sup> If the game is infinitely repeated, or players do not know when the last round of play will occur, as is typically the case with international commercial relations, the prospects for stable cooperation are strong.<sup>112</sup>

Whether cooperation in fact emerges depends on the “shadow of the future,” the particular contours of the anticipated future interaction between the players. In any given round, cooperation requires each player to forego its single-play dominant strategy move—defection—in the hope of garnering the future benefits of the other player’s cooperation. Therefore, the rational player will weigh the immediate benefits of current defection against anticipated future payoffs from current cooperation. In the context of universalism, a non-home country asked to defer to home country insolvency proceedings must decide whether immediate gains from defection—exercising territorial jurisdiction and applying its own laws to particular issues—outweigh the prospect of future cooperative payoffs—enjoying extraterritorial jurisdiction and application of its own bankruptcy laws beyond its borders when it later finds itself as the home country.

Several factors are critical to this strategy choice and the shadow of the future generally. First, perceived durability of a relationship and anticipated frequency of interaction will improve a state’s willingness to

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<sup>111</sup> In Robert Axelrod’s cooperation experiments, he found that a Tit for Tat strategy was the overall best performing strategy in computer simulations of round-robin repeat prisoners’ dilemma tournaments. With that strategy, a player starts out cooperating, and then in every subsequent round simply plays the strategy that the other player played in the prior round. So every instance of cooperation from Player B is rewarded with cooperation from Player A, and every defection is punished by a retaliatory defection in the next round. See AXELROD, *supra* note 82, at 31. Tit for Tat, however, performs less well in “noisy” environments, where imperfect monitoring or other errors may undercut simple reciprocal strategies for cooperation. See *infra* notes 158-162 and accompanying text.

<sup>112</sup> See Oye, *supra* note 65, at 13 and n.25. While backwards induction predicts that for finitely repeated prisoners’ dilemma games, cooperation will not evolve, see AXELROD, *supra* note 82, at 10, finite repetition is typically not an issue in international relations. See Oye, *supra* note 65, at 13 n.25. In addition, experimental evidence shows that even in the finite game, players cooperate up until the last few rounds. This divergence between predicted and observed results may be reconciled by relaxing the assumption of common knowledge of rationality. See Barry Nalebuff, *Prisoners’ Dilemma*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 92 (1998). Common knowledge of rationality means that all the players know that all the players are rational, all the players knows that all the players know that all the players are rational, and so on. See ROGER B. MYERSON, GAME THEORY: ANALYSIS OF CONFLICT 64 (1991). Common knowledge is a very strong informational assumption. For a discussion of its subtleties, see Peter H. Huang, *Still Preying on Strategic Reputation Models of Predation*, 3 GREEN BAG 437, 439 (2000) (reviewing JOHN R. LOTT, JR., ARE PREDATORY COMMITMENTS CREDIBLE? WHO SHOULD THE COURTS BELIEVE? (1999)).

cooperate.<sup>113</sup> With commercial relations, states can typically anticipate that their relationships with other states will continue indefinitely.<sup>114</sup> This perception of a long time horizon means a long future from which cooperative rewards may potentially emerge. Anticipated frequent interaction also assures each player of regular opportunities to garner cooperative future payoffs or if necessary, to punish defection with swift retaliation. If significant crossborder direct investment exists or is anticipated between States A and B, and investment flows are not too lopsided in one direction, then the two states may anticipate that the game of crossborder bankruptcy cooperation will have many future iterations. Each state anticipates that it will find itself in the position of both home country and non-home country in the future. As the latter, it will understand that in any given round, its decision whether to play universalism or territoriality will affect its future payoffs.<sup>115</sup> On the other hand, if States A and B do not anticipate significant future interaction, then the international bankruptcy cooperation game looks very much like a one-shot game, for which defection is the dominant strategy.

Related to a state's time horizon is its discount factor—how it values future payoffs as compared to immediate payoffs. Players are typically impatient. All other things being equal, they prefer an immediate payoff to an identical payoff in the future. The discount factor captures just how much a state discounts a future payoff as compared to an immediate one.<sup>116</sup> The lower the discount factor, the less a state values the future

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<sup>113</sup> See AXELROD, *supra* note 82, at 129.

<sup>114</sup> By contrast, in security affairs, a particular act of defection may be decisive in crippling or destroying another player, thereby eliminating the possibility of retaliation. See Axelrod & Keohane, *supra* note 65, at 232-33.

<sup>115</sup> In the repeat play of international bankruptcy cooperation, we can think of each state's separate decisions on cooperation or defection as "moves" in the prisoners' dilemma game. In this context, the moves will ordinarily be sequential, rather than simultaneous: when State A is put to the choice of cooperation or defection, it will already have observed State B's earlier strategy choices when State A was the home country requesting State B's cooperation. Whether players move sequentially or simultaneously does not affect the equilibrium of the prisoners' dilemma game.

<sup>116</sup> The discount factor  $d$  falls between 0 and 1. With money payoffs, if  $r$  is the prevailing interest rate, then  $d = 1/(1+r)$ . The present value of a payoff of  $p$  dollars is equal to  $dp$  if paid in the next period. See ROBERT GIBBONS, *GAME THEORY FOR APPLIED ECONOMISTS* 68 & n.7 (1992). Other payoffs can be similarly discounted. See JAMES D. MORROW, *GAME THEORY FOR POLITICAL SCIENTISTS* 38 (1994). The discount factor may also incorporate the possibility that a game will end. The end of the game means no further prospect for future cooperative payoffs. So a higher probability of the game's end generally means that a state will value immediate payoffs more highly, making defection more attractive. See GIBBONS, *supra*, at 90.



payoff as compared to the immediate payoff. In the context of the prisoners' dilemma, a low discount factor spells more ready defection than cooperation. Cooperation demands delayed gratification, but the lower the discount factor, the more attractive is the immediate payoff from defection. Therefore, in order for cooperation to emerge, states must have sufficiently high discount factors so that they value future cooperative payoffs more than the immediate defection payoff.

Finally, with repeat play and the weighing of immediate versus future gains, payoff structure matters. In particular, interval levels of the various payoffs, and not just their rank ordering, are important to consider. For example, the difference between the unilateral defection payoff and the mutual cooperative payoff matters.<sup>117</sup> The smaller this is, the lower is the temptation to defect, since the relative gain from defection is small.<sup>118</sup> In general, relatively higher cooperative payoffs<sup>119</sup> and relatively lower defection payoffs<sup>120</sup> make cooperation more likely.<sup>121</sup>

In general, then, States A and B are more likely to succeed with universalist cooperation (a) the longer they expect their relationship to last and the more iterations they expect, (b) the higher their respective discount factors, and (c) the greater are cooperative payoffs relative to defection payoffs. In the best case, each state anticipates numerous iterations of the universalist game, and whatever short-term loss it suffers from deferring to the other state's bankruptcy regime now will be more than offset by reciprocal deference extended by the other state in the future.

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<sup>117</sup> That is, DC – CC. See *supra* notes 95-96.

<sup>118</sup> See Abbott, *supra* note 65, at 364 (describing devices by which player reduces its own defection payoff in order to facilitate cooperation).

<sup>119</sup> Namely, CC and CD.

<sup>120</sup> That is, DC and DD.

<sup>121</sup> See AXELROD, *supra* note 82, at 134 n.3; Robert Jervis, *Cooperation Under the Security Dilemma*, 30 WORLD POL. 167, 171 (1978). The discount factor  $d$  can be expressed in terms of these payoffs to specify the conditions under which reciprocal strategies will form cooperative equilibria. For instance, two players playing Tit for Tat strategies will reach a cooperative equilibrium when

$$d > \max \left( \frac{DC - CC}{CC - CD}, \frac{DC - CC}{DC - DD} \right).$$

See MORROW, *supra* note 116, at 266; AXELROD, *supra* note 82, at 59 n.4.

IV. FITTING THEORY TO FACTS:  
CONDITIONS OF PLAY IN INTERNATIONAL BANKRUPTCY

Given these conditions for cooperation, how likely is universalism?<sup>122</sup> The particular conditions of play in international bankruptcy will not be conducive to universalist cooperation. Universalist commitments will be fuzzy, relying on standards and judicial discretion instead of clear-cut rules. This fuzziness, as well as the role of judges in implementing universalism, will frustrate the development of reciprocity necessary to solve the universalist dilemma. Fuzzy commitments mean that states will disagree on what counts as cooperation. In addition, the judicial role may not be conducive to implementing reciprocal strategies. Finally, once we move beyond our bilateral example to consider multilateral universalism, the obstacles become well-nigh insurmountable.

A. *Fuzzy Commitments*

Specifying the universalist commitment with precision will be difficult. In this section, I explain the tendency toward fuzzy universalist commitments, before exploring its significance in subsequent sections.

Largely for technical reasons, defining the basic jurisdiction of the universalist court will necessarily involve some vagueness, leaving discretion to judges.<sup>123</sup> Two significant areas are particularly problematic.

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<sup>122</sup> As a preliminary matter, it should be noted that even if State A and State B have long time horizons and expect frequent interaction in terms of opportunities for crossborder bankruptcy cooperation; even if their respective discounting of future payoffs is not too severe; and even if the payoff structure of their universalist dilemma is hospitable to cooperation, these conditions do not assure cooperation. Though these conditions vastly improve its prospects, cooperation is never guaranteed. Even under ideal conditions, mutual defection is still always a subgame-perfect equilibrium in iterated prisoners' dilemma games. See MORROW, *supra* note 116, at 267. Two states attempting to cooperate through reciprocity strategies still need to coordinate on which equilibrium strategies they are playing and what punishment will be used to enforce cooperation. Otherwise, they may settle in to a pattern of repeated mutual defection. See *id.* at 266. In addition, as a practical matter, conditional strategies are often politically difficult to sell to domestic constituents. See Oye, *supra* note 65, at 16.

<sup>123</sup> Paul Stephan offers a public choice explanation for standards in international commercial law. He argues that within the international groups producing unified international commercial laws, such as UNCITRAL, the interaction of technical experts—who essentially produce the initial versions of reform proposals—with wider approving bodies—that must contend with interest group pressure in the process of adopting any proposal—results in the adoption of instruments with few rules that would impose costs on any organized group. Instead, these instruments delay hard choices by leaving actual outcomes to the discretion of future decision makers. See Stephan, *supra* note 74, at 759. With respect to the UNCITRAL Model Law on Cross-Border Insolvency, Stephan further

The first is the specification of rules for identifying the home country. The second is the problem of defining the scope of the home country court's bankruptcy jurisdiction—that is, identifying the local laws or specific issue areas that are displaced by home country bankruptcy law.

Lynn LoPucki's seminal challenge to universalism first raised questions concerning the determinacy of the home country rule.<sup>124</sup> He argued that the "home country" concept is not only indeterminate, but that any determinate rule would be susceptible to eve-of-bankruptcy manipulation—forum shopping—by debtors. He cites egregious cases of debtors moving their headquarters or divesting assets just prior to filing in order to facilitate access to favorable fora.<sup>125</sup> No workable definition of "home country" is possible because greater determinacy begets greater manipulability.<sup>126</sup> According to LoPucki, indeterminacy on this basic issue belies the claimed predictability and related efficiency advantages of universalism.

Universalists reply that no hard-and-fast rule is necessary, since the controversial cases will be few. In most cases, the home country

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notes that the broad discretion left to bankruptcy tribunals in that instrument enhances the power and prestige of insolvency professionals. They therefore had incentive to support the Model Law despite its creation of greater uncertainty in international insolvency situations. *See id.* at 787.

<sup>124</sup> *See* LoPucki, *Cooperation in International Bankruptcy*, *supra* note 12, at 713-25.

<sup>125</sup> Debtors could accomplish [forum] shops by a variety of means. The most obvious means would be to move the company's headquarters to the preferred country before filing the case. Contrary to the assertions of some universalists, moving the headquarters of a large company is neither difficult nor unusual. Such moves were made on the eves of several major domestic bankruptcies. While an international move theoretically might be more difficult, they are hardly unknown. For example, BCCI moved its headquarters from London to Abu Dhabi shortly before filing its bankruptcy case in Luxembourg. Dreco Energy moved its headquarters and its center of gravity from Canada to the United States on the eve of its bankruptcy and then moved it back afterwards. To do this, Dreco divested itself of its Canadian properties and Canadian employees before filing its bankruptcy case in Houston, Texas, and then it did the opposite after concluding its case.

*Id.* at 722 (citations omitted). Fruit of the Loom's parent company apparently shopped itself into a Cayman Islands bankruptcy proceeding through an eve-of-bankruptcy corporate reorganization. *See Cooperative Territoriality*, *supra* note 13, at 2231 & n.71 (describing various eve-of-bankruptcy strategies available to corporate groups that wish to forum shop).

<sup>126</sup> *See* LoPucki, *Cooperation in International Bankruptcy*, *supra* note 12, at 722; LoPucki, *Cooperative Territoriality*, *supra* note 13, at 2235.

will be readily identifiable.<sup>127</sup> Moreover, a “principal place of business” or “center of main interests” standard has worked passably in other contexts.<sup>128</sup> A “raw, unsophisticated choice” among rules is unnecessary; instead, the choice may be “multidimensional.”<sup>129</sup> According to universalists, then, such a standard works well for most cases, and judges will presumably apply discretion to the few cases involving indeterminacy or possible debtor manipulation. Without resolving this debate as to its efficiency consequences, I discuss the effect of indeterminacy on states’ reciprocity strategies below.<sup>130</sup>

A second area of fuzziness involves the interface between home country bankruptcy law and local nonbankruptcy law. Once the home country is determined, there is the further issue of determining the exact contours of the home country court’s extraterritorial reach—that is, the scope of local laws and local court jurisdiction that are overridden by the home country bankruptcy regime. Universalism selects home country law applied by home country courts, but only as to bankruptcy issues. Deciding where

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<sup>127</sup> See Westbrook, *Global Solution*, *supra* note 1, at 2317 (“[T]he marginal cases will be few.”); Guzman, *supra* note 6, at 2207 (“[T]here is widespread agreement . . . that, in the vast majority of cases, the home country will be easy to identify—making the issue a minor question.”); Jay L. Westbrook, *The Lessons of Maxwell Communications*, 64 *FORDHAM L. REV.* 2531, 2541 (1996) [hereinafter Westbrook, *Lessons of Maxwell*] (noting unusual case of *Maxwell*, in which identification of home country was debatable). See also Rasmussen, *A New Approach*, *supra* note 10, at 12 (“In most situations, it will be clear which country is the home of the debtor.”).

<sup>128</sup> See Westbrook, *Global Solution*, *supra* note 1, at 2316. Place of incorporation might be used as a proxy, but that would be subject to adjustment as the facts required. See *id.* at 2317.

Westbrook cites the Brussels Convention as an example of a successful articulation of rules for adjudicatory jurisdiction. See *id.* However, the reference is inapt. The Brussels Convention concerns states’ obligation to recognize foreign civil judgments. It delineates acceptable and unacceptable bases for the rendering court’s jurisdiction over the defendant-judgment debtor in civil cases. In that context, the possibility of multiple bases for jurisdiction works no great harm. It creates no opportunities for endgame manipulation, since multiple bases of jurisdiction merely broaden a *plaintiff’s* litigation options based on the *defendant’s* activities. By contrast, indeterminacy of the home country standard under universalism *does* create opportunities for strategic behavior by debtors, since it enables debtors to manipulate applicable bankruptcy law and the appropriate bankruptcy forum through *their own* endgame maneuvers, to the detriment of creditors. Only if the Brussels Convention conditioned jurisdiction over defendants based on *plaintiff’s* activities would the comparison hold. Such an approach to jurisdiction would, of course, be absurd. See *supra* Part II.B.

<sup>129</sup> See *Global Solution*, *supra* note 1, at 2317.

<sup>130</sup> See *infra* Part IV.B.

bankruptcy law ends and nonbankruptcy law begins, however, is not always an easy issue—and hardly exact science. Put differently, the scope of the universalist choice of law and forum selection rules is not self-defining.<sup>131</sup>

Two especially problematic areas involve creditor entitlements and regulatory issues. As to the former, creditors' rights in bankruptcy generally depend on their entitlements outside of bankruptcy. Bankruptcy law does not create the contract or property rights that creditors assert against the debtor in bankruptcy. Those rights exist independent of bankruptcy law. But deciding whether a given issue is a bankruptcy issue or one involving nonbankruptcy entitlements is not always simple. For example, when a German debtor has fraudulently conveyed land in Belgium to an innocent third party, it pits the debtor's creditors against the innocent purchaser. Should German bankruptcy law applied by the German court determine who is entitled to the land? Or should the Belgian court apply its own property laws to decide the question?<sup>132</sup> In general, ownership rights in land are determined by the law and in the courts of the jurisdiction in which the land is located,<sup>133</sup> which in our example would indicate Belgian law and courts. However, determining entitlements to the land would also have clear distributional consequences for creditors, which is a fundamental bankruptcy issue. From this perspective, the German bankruptcy regime should govern. How this issue is ultimately resolved is not as important for our purposes as is the simple illustrative value of the example. It highlights the inevitable murkiness in the content of the universalist commitment.<sup>134</sup>

Regulatory issues may also be particularly nettlesome. To what extent may bankruptcy law modify local regulatory obligations to which a debtor would otherwise be subject? For example, may local

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<sup>131</sup> Universalists recognize these problems as well. See Westbrook & Trautman, *supra* note 2, at 662 (describing difficulty of deciding where municipal property law ends and universalist bankruptcy rules should take over); Westbrook, *Theory and Pragmatism*, *supra* note 13, at 462 (distinguishing choice of law from forum choice, and illustrating when intersection of local and home country laws may create difficult questions).

<sup>132</sup> See Westbrook & Trautman, *supra* note 41, at 661-62.

<sup>133</sup> See *id.* (regarding choice of law); Brussels & Lugano Conventions, *supra* note 61, Art. 16(1) (regarding exclusive jurisdiction of courts where immovable property is situated).

<sup>134</sup> Security interests present similar issues. A creditor's secured status in bankruptcy generally depends on its secured status outside of bankruptcy. Analysts generally agree that this question of secured status should be determined based on nonbankruptcy law, while the *effect* of that status in bankruptcy is a question of bankruptcy law. See Westbrook & Trautman, *supra* note 41, at 661; Ulrich Drobniq, *Secured Credit in International Insolvency Proceedings*, 33 TEX. INT'L L. J. 53, 65 (1998). This distinction may prove elusive in particular cases.

environmental clean-up obligations be superseded by home country rescue rules? May the universalist bankruptcy court relieve the debtor from such regulatory obligations in a non-home country? Resolution of these issues within a single national jurisdiction may not be straightforward.<sup>135</sup> Resolution *across* jurisdictions is likely to be quite messy and unpredictable.<sup>136</sup> Take another example. Under U.S. law, certain bankruptcy-related offerings of securities by a debtor enjoy exemption from otherwise applicable U.S. securities laws.<sup>137</sup> Should all or part of the local securities regulation as applied to debtor firms be considered a part of the local “bankruptcy law” overridden by a universalist assertion of extraterritorial bankruptcy jurisdiction?

The answer to these questions are not straightforward and may depend on the specific contexts in which they are raised. “Analytically, one must determine the character of the issue before determining the governing law.”<sup>138</sup> Given the complexity of large multinational firms and the unique issues that may arise in particular cases, characterization of legal issues will often have to be improvised. Universalism transplants one state’s bankruptcy regime into another’s legal system, raising unavoidable issues concerning the scope and boundaries of the foreign regime. The resolution of issues that may be critical to specific cases will often have to be tailored on an ad hoc basis.<sup>139</sup> As with the determination of the debtor’s home

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<sup>135</sup> See, e.g., *Ohio v. Kovacs*, 469 U.S. 274 (1985) (holding that prepetition environmental clean-up obligation was liability on a claim and therefore subject to bankruptcy discharge); *Midlantic Nat’l Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 (1986) (holding that Chapter 7 trustee may not abandon contaminated estate property in contravention of local health and safety laws); *New York v. Exxon Corp.*, 932 F.2d 1020 (2d Cir. 1991) (finding that city’s nonbankruptcy action for prepetition clean-up reimbursement costs fell within police and regulatory exception to automatic stay). See generally LoPucki, *Cooperative Territoriality*, *supra* note 13, at 2237 (discussing indeterminacy of scope of universalist bankruptcy jurisdiction).

<sup>136</sup> These issues are not likely to be clarified over time. Even if some issues recur, different courts from different legal regimes may take different approaches, with none binding on any other. See Stephan, *supra* note 74, at 792 (discussing lack of density and stability of international commercial law).

<sup>137</sup> See 11 U.S.C. § 1125 (1994). See generally Richard E. Mendales, *We Can Work It Out: The Interaction of Bankruptcy and Securities Regulation in the Workout Context*, 46 RUTGERS L. REV. 1211 (1994). For discussion of the opposite problem—opting out of U.S. securities regulation and effects on the domestic bankruptcy regime—see Choi & Guzman, *supra* note 19, at 936.

<sup>138</sup> Westbrook & Trautman, *supra* note 41, at 663.

<sup>139</sup> The complexity of the choice of law rules of the European Union Insolvency Regulation shows the difficulty of elaborating bankruptcy choice of law rules with particularity. See Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency

country, these interface issues will often have to be decided by judges relying on standards and exercising discretion *ex post*.

### B. *Consequences for Reciprocity*

Universalists do not contest the existence of these various muddy areas that may require some exercise of judicial discretion.<sup>140</sup> Instead, universalists contest their significance. Universalists admit that reliance on standards and judicial discretion may sacrifice a bit of

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Proceedings, OJ 2000 L160/1 [hereinafter EU Insolvency Regulation]. The EU Insolvency Regulation institutes a compromise system that incorporates aspects of both universalism and territoriality. It provides for a universalist main proceeding, which is conducted in the state where the “centre of a debtor’s main interests is situated,” *see id.* Art. 3(1), and which has extraterritorial effect throughout the EU. *See id.* Art. 17. It is also apparently intended to “encompass the debtor’s assets on a worldwide basis and to affect all creditors, wherever located.” IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW: NATIONAL AND INTERNATIONAL APPROACHES* 260 (1999). On the other hand, however, separate territorial proceedings are also authorized in states where the debtor has an establishment, *see* EU Insolvency Regulation, *supra*, Art. 3(2), preserving the ability of non-home countries to distribute value pursuant to their own local laws. These secondary proceedings must be winding-up proceedings, and they only affect the debtor’s assets within the particular state. *See id.* Art. 3(2), (3).

Article Four of the EU Insolvency Regulation defines the basic scope of the home country choice of law rule: “the law applicable to insolvency proceedings and their effects shall be that of the Contracting State within the territory of which such proceeding are opened.” *See* EU Insolvency Regulation, *supra*, Art. 4. Article Four relies on thirteen subsections for detail. *See id.* Art. 4(2). Articles Five through Fifteen then elaborate specific exceptions. *See id.* Arts. 5-15. For example, the local law applicable to an employment contract trumps home country bankruptcy law with respect to the effect of insolvency proceedings on the contract. *See id.* Art. 10. The most dramatic exception, from a universalist perspective, is contained in Article Five, which provides that as to debtor assets outside the territory of the home country, the local law governing secured creditors’ rights in rem—including the right to seize and dispose of collateral—trumps home country bankruptcy law. *See id.* Art. 5.

The EU Insolvency Regulation effectively legislates the provisions of the European Union Convention on Insolvency Proceedings, which was duly negotiated among EU members but never entered into force because the United Kingdom’s subsequent refusal to ratify. *See* European Union Convention on Insolvency Proceedings, opened for signature, Nov. 23, 1995, 35 I.L.M. 1223 (1996) [hereinafter EU Insolvency Convention]. The UK refusal apparently had nothing to do with the convention itself but with some concurrent friction over Continental reluctance to allow imports of UK beef following the scare over mad cow disease. Following expiration of the ratification period for the treaty, the EU Council promulgated the same rules in the form of a regulation.

<sup>140</sup> “The key point is that the line-drawing problem cannot be avoided; it can only be placed at different points on the commercial spectrum. . . .” Westbrook & Trautman, *supra* note 41, at 662.

predictability for creditors, but such indeterminacy at the margins is tolerable. In any event, universalism with standards is still an improvement over territoriality.<sup>141</sup>

To date, this debate over determinacy has focused on efficiency—i.e., whether indeterminacy does or does not undercut universalist claims of improved ex ante predictability. However, the effect of indeterminacy on the comparative efficiency of universalism only matters if we assume that an otherwise idealized universalist system is already in place. But that may never happen. A prior question exists concerning the political consequences of indeterminacy—in particular, its effect on reciprocity strategies among states. Even if fuzzy commitments would not undermine the comparative efficiency of an otherwise idealized universalist system, fuzzy commitments *will* make the realization of that idealized system less likely.

Reliance on standards implemented through ex post judicial discretion creates ambiguity concerning states' commitment to universalism and makes reciprocal cooperation difficult to achieve. Any professed commitment may not be credible.<sup>142</sup> As important, the fuzzy quality of the commitment will make it difficult for one state to interpret whether another has cooperated or defected. A state's refusal to defer to the edicts of foreign bankruptcy proceedings is certainly transparent, but whether that refusal breaches the state's universalist commitment may be unclear in a given case. With fuzzy commitments, good faith disagreement over compliance issues will not be uncommon.

With respect to identification of the home country, for example, certainty in most cases may not be good enough. Acting entirely in good faith, states will disagree as to which is the home country. If fuzzy commitments allow ostensibly cooperative states to assert plausible competing claims to home country status, then the reciprocity strategy at the heart of the development of universalist cooperation may be frustrated. Ambiguity enables State A to insist on its territorial prerogative, refusing to recognize any claimed extraterritorial effect of State B's insolvency proceeding while also claiming no violation of its universalist

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<sup>141</sup> See Guzman, *supra* note 6, at 2208.

<sup>142</sup> See *supra* note 105 and accompanying text.



commitment.<sup>143</sup> Ultimately, the best the two states may be able to do is a rough ad hoc territorial compromise.<sup>144</sup>

The famous *Maxwell* case<sup>145</sup> provides one nice example. This multinational publishing empire was headquartered in England, from where it was managed and whence its financial affairs were conducted. While its major debts were incurred in England, however, its principal assets were in the United States. Two U.S. publishing companies wholly owned by Maxwell—Macmillan, Inc. and Official Airline Guide, Inc.—accounted for about 80% of Maxwell’s assets.<sup>146</sup>

Maxwell initially petitioned for an administration in England,<sup>147</sup> but when the judge appointed administrators not to the liking of the company, the company filed a Chapter 11 petition with the U.S.

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<sup>143</sup> State A may even attempt its own universalist proceeding, claiming extraterritorial effect in State B. This would be necessary from State A’s perspective only if significant debtor assets were located in or otherwise subject to the de facto control of State B.

<sup>144</sup> International bankruptcy cooperation has already evolved in this direction. In the absence of any international framework for cooperation, judges and lawyers have fashioned ad hoc “protocols” in particular cases.

In the absence of a formal treaty, practitioners and courts have created what are essentially case-specific, private international insolvency treaties. . . . The Protocols that have been implemented to date have been influenced both by considerations of universality and certain constraints of territoriality. They strive, in the first instance, to promote an efficient, worldwide coordination and resolution of multiple insolvency proceedings. At the same time, they serve to protect fundamental, local rights material to each of the legal fora involved. . . . Although the relief provided by Protocols necessarily varies to suit circumstances and legal environments, the essence of the Protocols is to provide a mechanism that controls how the parties will communicate, take actions, and apply both procedural and substantive elements of law.

Evan D. Flaschen & Ronald J. Silverman, *Cross-Border Insolvency Protocols*, 33 TEX. INT’L L. J. 587, 589 (1998) (citations omitted).

<sup>145</sup> *Maxwell Communications Corp. v. Barclays Bank (In re Maxwell Communications Corp.)*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff’d*, 186 B.R. 807 (S.D.N.Y. 1995), *aff’d*, 93 F.3d 1036 (2d Cir. 1996).

<sup>146</sup> *See Maxwell*, 170 B.R. at 802. In 1988, Maxwell had acquired Macmillan for \$2.6 billion and Official Airline Guide for \$750 million. *See id.* These two subsidiaries in turn owned assets all over the world. *See Westbrook, Global Solution, supra* note 1, at 2321 n.184.

<sup>147</sup> Administration is a rescue proceeding under English law. *See infra* note 155.

bankruptcy court in New York.<sup>148</sup> Most universalists would probably agree that the U.K. was the home country.<sup>149</sup> However, the U.S. court retained primary jurisdiction over the case, along with the U.K. court. This retention of jurisdiction was no surprise, given the sheer size of the estate, the value of assets in the U.S., and perhaps the professional fees at stake.<sup>150</sup>

[M]ost of the debtor's assets were in the United States. This fact was no doubt an important part of Judge Brozman's [the U.S. bankruptcy judge's] insistence on retaining United States jurisdiction and requiring the concurrence of a United States examiner in major decisions in the case. Yet the court had recognized from the start that the center of gravity of the company was in the United Kingdom, the location of its principal executive offices. For that very reason, the court had ceded primary authority for corporate governance to the British administrators, *while protecting against potential injury to U.S. interests through maintenance of the Chapter 11 case and appointment of the examiner.*<sup>151</sup>

Maxwell's bankruptcy proceeded simultaneously in both courts. The U.K. administrators and the U.S. examiner, appointed by the U.S. judge to work with the administrators, worked out a "Protocol" to govern the conduct of the joint proceedings.<sup>152</sup> Ultimately, a "Plan and Scheme" was formulated, which complied with the laws of both jurisdictions,<sup>153</sup> pursuant to which Maxwell's businesses were sold as going concerns and creditors were paid.<sup>154</sup>

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<sup>148</sup> See Leonard Hoffman, *Cross-Border Insolvency: A British Perspective*, 64 FORDHAM L. REV. 2507, 2514 (1996).

<sup>149</sup> See Westbrook, *Lessons of Maxwell*, *supra* note 127, at 2537, 2541 n.44 (noting that Maxwell's "center of gravity" was in U.K., and that company was "essentially English"). Universalists identify principal place of business and center of main interests as appropriate standards for determining the home country, while rejecting location of assets as ordinarily indeterminate and subject to manipulation. See *supra* note 128; Guzman, *supra* note 6, at 2207.

<sup>150</sup> See LoPucki, *Cooperation in International Bankruptcy*, *supra* note 12, at 721 (noting significance of professional fees in courts' competition for cases).

<sup>151</sup> Westbrook, *Lessons of Maxwell*, *supra* note 127, at 2537 (emphasis supplied).

<sup>152</sup> See Maxwell, 170 B.R. at 802.

<sup>153</sup> See *id.* The single scheme represented both a plan of reorganization under U.S. law and a scheme of arrangement under U.K. law. See *id.*

<sup>154</sup> See *id.*

*Maxwell* no doubt represents a remarkable achievement in terms of cooperation and coordination in an enormously complex international bankruptcy. However, it also offers a stark illustration of a type of case for which the universalist home country standard and judicial discretion would yield indeterminacy, requiring ad hoc territorial compromise.

Jay Westbrook portrays *Maxwell* as the unusual case “where the debtor’s home country might be subject to some plausible debate.”<sup>155</sup>

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<sup>155</sup> See Westbrook, *Lessons of Maxwell*, *supra* note 127, at 2541. Westbrook has also attempted a universalist rehabilitation of *Maxwell*, portraying it recently as a “classic application of modified universalism.” He claims that the case was “centralized” in the U.K., and that the U.S. examiner merely stood by to guard U.S. interests. See Westbrook, *Global Solution*, *supra* note 1, at 2321. However, the fact that the Plan and Scheme was required to comply with U.S. as well as British law belies Westbrook’s characterization of only incidental U.S. court involvement.

Moreover, comments by the British judge in *Maxwell* paint an entirely different picture. The interjection of the U.S. bankruptcy system was no trivial matter from the British perspective. English administration is a very different creature from Chapter 11 in the U.S, which is an arrangement negotiated among debtor management and creditors. See Frederick Tung, *Confirmation and Claims Trading*, 90 NW. U. L. REV. 1684, 1689 (1996) (describing plan confirmation process). The English administrator, by contrast, does not need to negotiate with creditors or the debtor’s management, but instead takes complete control of the debtor company in a matter of hours after his appointment. “He has full power to do what he likes. . . . He can employ the old management if he likes, but if he decides not to, he simply collects the keys of their automobiles and leaves them to go home on the subway.” See Hoffman, *supra* note 148, at 2515. For the administrators of *Maxwell*, Chapter 11 was something of a culture shock.

[T]he English administrators found that they had to deal with an Examiner who was responsible to a judge who in turn had to have regard to the various interest groups who jockey for position in any Chapter 11 proceedings. Even the old management, who would simply have been shown the door in England, had their leverage which enabled them to keep a place at the negotiating table. The administrators therefore found that to get anything done—for example, to raise interim finance to keep the subsidiary companies going—required a great deal of expensive and time-consuming negotiation.

*Id.* at 2515. At the end of the day, the English administrators opted for the Protocol simply because it was less expensive than trying to have the U.S. Chapter 11 proceeding terminated. See *id.* at 2516. It is quite clear from the British perspective that administration was held hostage to the structure and process of Chapter 11.

[T]he administrators told me that they were having trouble in New York. Naturally they would have preferred simply to take charge of everything as they were used to doing in England. That would have been quicker and cheaper. But they had been advised that an attempt to terminate the Chapter 11 proceedings in New York would be expensive and delay matters without necessarily being successful. So they felt that the interests of creditors were best served by agreeing to the Protocol.

But even if the number of these cases is small, the cases are likely to be significant. States will be most likely to vie for home country status—or at least contest other states’ claims to such status—in cases involving significant local interests on each side, cases involving large firms with significant assets and huge liabilities at issue, cases for which the immediate costs of deferring are quite high. Given the stakes in a case like *Maxwell*, any plausible claim to home country status will likely be pressed by each state.<sup>156</sup> Likewise, even where the identity of the home country is not in dispute, non-home countries can be expected to press for a narrow jurisdiction for the home country court. They will define broadly the scope of what count as local nonbankruptcy issues, to be determined by local courts according to local law.<sup>157</sup>

Fuzzy commitments allow each state to assert plausible good faith claims to compliance. This lack of clarity weakens the credibility of any universalist commitment and creates problems of misperception and misinterpretation: states will have trouble distinguishing cooperation from defection.

The ambiguity inherent in standards, and haziness with respect to whether particular application of a standard was “correct” given the underlying circumstances, impair states’ ability to differentiate between cooperation and defection. Therefore, the administering of appropriate rewards and punishments becomes more difficult.<sup>158</sup> Even with perfect

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*Id.*

<sup>156</sup> Of course, the U.S. court in *Maxwell* was under no legal obligation to defer to the U.K. court, having undertaken no clear universalist commitment. But it would be difficult to imagine that the U.S. would have relinquished home country jurisdiction to the U.K. in any event. Some universalists claim that Section 304 of the U.S. Bankruptcy Code, 11 U.S.C. § 304, expresses a U.S. commitment to universalism. See Westbrook, *Global Solution*, supra note 1, at 2323. Others find Section 304 indeterminate. See Bebchuk & Guzman, supra note 26, at 783.

<sup>157</sup> Issues concerning the interface between home country bankruptcy jurisdiction and local nonbankruptcy jurisdiction will be difficult to anticipate or resolve ex ante through clear rules. Instead, as with identification of the home country, resolution of jurisdictional interface issues will depend on judges’ discretionary application of imprecise standards ex post. See supra notes 135-139 and accompanying text.

<sup>158</sup> Ambiguity and uncertainty about defection . . . wreak havoc with [the reciprocity] mechanism of sustaining cooperation. Under many circumstances, determining whether a state’s actions constitute defection may be difficult or impossible. For example, in the presence of an unforeseen contingency, reasonable people may disagree about how a given agreement should be applied. When they disagree,

monitoring and ability to identify defection, cooperation is not easy to sustain. But when “noise” is introduced, sustained cooperation becomes even less likely. For example, even if—in the absence of uncertainty—two states could coordinate on playing Tit for Tat strategies to yield a cooperative equilibrium,<sup>159</sup> introducing uncertainty reduces both states’ long-run average payoffs to no better than random plays.<sup>160</sup> Moreover, this result obtains even if only a very low probability of misperception exists. A low probability simply means that it will take longer for a misperception to arise, but once it does, it will also take longer to clear up.<sup>161</sup> In other words, *any* noise renders Tit for Tat no better than random plays.<sup>162</sup>

In a noisy environment, more generous strategies than Tit for Tat may enable improved cooperation. For example, a modified Tit for Tat strategy that forbears from retaliating for some percentage of the other player’s perceived defections has been shown to be effective in noisy environments.<sup>163</sup> Such a forgiving strategy enables error correction and dampens the effects of mistaken vendettas between players. The more forgiving the strategy, the more quickly an error can be corrected and cooperation restored. However, adopting a generous or forgiving strategy comes with a cost: generosity exposes a player to greater risk of

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they cannot coordinate their responses, implying that full cooperation cannot be sustained.

Barry R. Weingast, *A Rational Choice Perspective on the Role of Ideas: Shared Belief Systems and State Sovereignty in International Cooperation*, 23 POL. & SOC. 449, 450 (1995). See also Oye, *supra* note 65, at 15 (discussing conditions of play that may limit effectiveness of reciprocity strategies).

<sup>159</sup> See *supra* note 121.

<sup>160</sup> See Per Molander, *The Optimal Level of Generosity in a Selfish, Uncertain Environment*, 29 J. CONFL. RES. 611 (1985); Nalebuff, *supra* note 112, at 93. Once a mistake occurs, Tit for Tat causes the mistake to echo back and forth, as each state retaliates for the other state’s prior defection. In this process of punishing perceived defections, a mistake is as likely to get compounded as it is to be fixed.

<sup>161</sup> See Nalebuff, *supra* note 112, at 93.

<sup>162</sup> See Molander, *supra* note 160, at 612. If the probability of misperception reaches fifty percent, then cooperation becomes hopeless. Given the slim prospects for cooperation, each state might as well defect in every round. See Nalebuff, *supra* note 112, at 93.

<sup>163</sup> See Jianzhong Wu & Robert Axelrod, *How to Cope with Noise in the Iterated Prisoner’s Dilemma*, 39 J. CONFL. RES. 183 (1995). See also Jonathan Bendor, Roderick M. Kramer, & Suzanne Stout, *When in Doubt . . . Cooperation in a Noisy Prisoner’s Dilemma*, 35 J. CONFL. RES. 691 (1991) (discussing generous variations of Tit for Tat).

exploitation.<sup>164</sup> The immediate costs of generosity and forbearance may be quite high. A generous strategy may therefore be unattractive for many states.

Without accurate matching of rewards and punishments to cooperation and defection, any message among players becomes garbled. Reciprocity is frustrated; cooperation is undermined.

### C. *The Role of Courts and Judges*

Compounding the problem of fuzzy commitments, the involvement of courts and judges in deciding questions of universalist recognition creates problems for cooperation. In most industrial countries, a corporate insolvency proceeding is a legal proceeding. It is filed with a court and monitored by a judge, who is the logical candidate to decide questions of crossborder recognition. Establishing conditional policies is politically difficult in any event.<sup>165</sup> Implementing conditional strategies through courts and judges may be futile.

By hypothesis, states enjoy long-run payoffs from universalist cooperation—i.e., extraterritorial application of their bankruptcy laws in appropriate cases—and suffer long-run punishments from defection—i.e., nonrecognition of their extraterritorial assertions of bankruptcy jurisdiction. However, judges are not states; though states may be repeat players in the universalist cooperation game, judges typically are not.<sup>166</sup> For each judge, the decision whether to defer to a foreign insolvency proceeding looks more like a one-shot game. The judge will understand the immediate prejudice to local interests from deferring to a foreign proceeding, but may not perceive

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<sup>164</sup> See Bendor et al., *supra* note 163, at 712. Prisoners' dilemma tournament experiments in noisy environments show a sharp trade off between generosity and exploitability. See Jonathan Bendor, *Uncertainty and the Evolution of Cooperation*, 37 J. CONFL. RES. 709 (1993).

<sup>165</sup> See *supra* note 122.

<sup>166</sup> Some states might have only one or a few judges or other officials charged with overseeing corporate bankruptcies. The U.S. is arguably moving in that direction, as the district of Delaware now fields over sixty percent of all large public company bankruptcy filings in the U.S. See Lynn M. LoPucki, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a Race to the Bottom*, \_\_ VAND. L. REV. \_\_, at \_\_ (2001). Even in that case, however, courts and judicial officers will still likely suffer from the institutional deficiencies described in the text that preclude their effective implementation of reciprocity strategies.

or care about the long-term consequences of defection. The judge's dominant single-play strategy is therefore defection.<sup>167</sup>

Judges and courts are not institutionally equipped to play iterated games. Each judge applies laws to a specific case. Individual judges will ordinarily have neither the mandate nor the resources to follow the various rounds of play across cases. Each judge will therefore have difficulty matching a “tit” to the appropriate “tat.”<sup>168</sup> Judges will be unable to dispense rewards and punishments appropriately.<sup>169</sup> In addition, judges do not individually enjoy payoffs from cooperation or suffer punishments from defection. They are not charged with the representation of state interests over time as are the political branches of government—legislatures and executive officials—and therefore are unlikely to internalize and effect the long-run maximization goals of their respective states.<sup>170</sup> Officers of the political branches may be appropriate agents to dole out rewards and punishments, but judges are not. The judicial function does not lend itself well to conducting foreign relations while deciding specific cases.<sup>171</sup>

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<sup>167</sup> See Dodge, *supra* note 65:

While it may be true that states will continue to decide choice-of-law cases indefinitely, for the judge who makes the choice-of-law decision each case looks more like a single play game. Thus there is little reason to think that cooperation will evolve in conflicts or extraterritoriality based on the individual decisions of judges.

*Id.* at 162; Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND J. TRANSNAT'L L. 975, 1022 (1994) (same).

<sup>168</sup> See *supra* note 111 (describing Tit for Tat strategy in repeat prisoners' dilemma).

<sup>169</sup> Cf. Sterk, *supra* note 65, at 1009 (noting similar problems for game theory predictions of cooperation in choice of law context).

<sup>170</sup> Public choice scholars remind us as well of the political agency costs. Judges may have private interests that differ from the national interest. O'Hara & Ribstein, *supra* note 70, at 1226.

<sup>171</sup> [T]he political branches are better equipped to weigh the long-term benefits of compromise against the short-term detriments of deferring to another jurisdiction in a particular case. “The stimuli in the diplomatic forum that encourage effective balancing of short term against long term interests are not operative in the municipal judicial forum except in very general terms.”

Dodge, *supra* note 65, at 159 (quoting Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 594 (1983)). See generally Oye, *supra* note 65, at 16 (discussing control issues in effecting reciprocity).

Regardless of other obstacles to universalist cooperation, because of the role that judges and courts play in deciding on universalist recognition in specific cases, the repeat play that characterizes many international commercial interactions will not likely cause the emergence of universalist cooperation.

#### *D. The Numbers Problem*

Thus far, we have limited our analysis to a two-state world and considered only the two-player prisoners' dilemma. When we move to a world with many states, the "numbers problem" arises. Even if bilateral universalism were not difficult enough to realize, multilateral universalist cooperation is even less tractable. As the number of players rises, cooperation issues become far more complex. Both establishing and maintaining cooperation become more difficult.

The existence of commonly shared interests becomes less likely as the number of potential adherents to a universalist arrangement increases. Recall that in our two-state model, we assumed that in both states' preference orderings, the mutual cooperation outcome—reciprocal universalism—was preferred to mutual defection.<sup>172</sup> We were willing to grant this assumption in order to present an optimistic case for universalism. We also noted, however, reasons why many states would not prefer mutual universalism, but would instead prefer territoriality, regardless of another state's willingness to cooperate.<sup>173</sup> As the number of states rises, the assumption that each state prefers mutual cooperation to mutual defection

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These judge-related issues will vary from state to state. One could imagine a state with relatively few insolvency judges and other professionals, who as a group take a strong international and universalist outlook. If the norms of this group developed in a way that paralleled the state's preference for universalist cooperation, then this professional elite might possibly evolve into an effective enforcer of universalist reciprocity. On the other hand, in a state with a large and diffuse group of insolvency judges and professionals, the emergence of group norms favoring a unified universalist approach may be less likely. *See* ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 177 (1991) (discussing significance of close-knit settings for emergence of welfare-maximizing norms). States might respond to this problem by removing cooperation decisions from judges and centralizing them in the hands of international policymakers. However, that approach may cause other problems. Jay Westbrook has offered a less drastic proposal that might reduce somewhat the information problems among judges. *See infra* note 183.

<sup>172</sup> That is,  $CC > DD$ . *See supra* Part III.B.

<sup>173</sup> That is, a state may prefer deadlock:  $DC > CC$  and  $DD > CC$ . *See supra* Part II and note 93.



becomes a very strong one. Relaxing the assumption, of course, means that multilateral universalism is doomed.

Even retaining this strong assumption about preference orderings, states' heterogeneity of circumstances makes it less and less likely that the necessary conditions for sustained cooperation will hold for all of them. One state may discount the future severely. Another may have special domestic political difficulty implementing a reciprocity strategy.<sup>174</sup> Another may anticipate only infrequent iterations of the international bankruptcy game, insufficient to make long-term cooperation worthwhile.

In particular, recall that in our two-state discussion, we noted that roughly symmetric investment flows between our two states would be an important condition related to "iterativeness"—each state's expectation concerning the frequency of iterations of the international bankruptcy game.<sup>175</sup> With multiple states, a rough multilateral symmetry with respect to investment flows would also be required, so that each state might expect future benefits as the home country. However, as the number of states increases, fulfillment of this condition becomes more and more unlikely.<sup>176</sup>

Even if conditions for cooperation are promising among multiple states, transaction and information costs increase with the number of states. Identifying shared interests and negotiating workable arrangements to the satisfaction of all the players becomes more expensive. In addition, as the number of states increases, each state will have more difficulty anticipating the future behavior of other states and assessing the prospective value of future cooperative payoffs.<sup>177</sup>

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<sup>174</sup> See *supra* note 122.

<sup>175</sup> See *supra* notes 114-115 and accompanying text.

<sup>176</sup> For states with strong commercial ties—the states of the European Community, for example, or NAFTA or ASEAN—this condition might obtain. But even then, all the other factors affecting cooperation would still have to align properly. Within most groups of states, the frequency of expected iterations will differ as among the various pairs or coalitions, making for uneven cooperative impulses. State A may anticipate frequent crossborder insolvency interaction with State B but not State C. Anticipating infrequent iterations with State C, State A may be more willing to defect as to State C than to State B, since any cooperation by State A with State C in the current round may be reciprocated only far into the future. Discounting that future payoff to present value, State A may decide that the short-term gain from current defection is worth more. Uneven cooperation will frustrate the emergence of cooperative norms within the group as a whole.

<sup>177</sup> See Oye, *supra* note 65, at 19.

Consider the added complexity of negotiating a multilateral universalist agreement. Imagine, for example, several states—otherwise favorably disposed to universalism absent these transaction and information costs—attempting to define the scope of the universalist choice of law rule and to clarify the interface between bankruptcy law and nonbankruptcy law.<sup>178</sup> They must in effect decide what counts as a bankruptcy issue—for which home country law applies—and distinguish that from nonbankruptcy issues—as to which local law would apply. Each state will have particular issue areas—for example, environmental or securities regulation<sup>179</sup>—that it will wish to insulate from possible displacement by the bankruptcy rules of each other state acting as home country. To accomplish this, each state will have to obtain information about every other state’s bankruptcy rules and sensitive issue areas, and may need to engage in a bilateral negotiation with each other state to resolve any potential conflict. With two states, of course, only one bilateral negotiation need occur. With three states, three separate bilateral negotiations may be required. With four states, the number of bilateral negotiations jumps to six, and so on.<sup>180</sup> These increased transaction and information costs erode the margin between the cooperative payoff and the short-term gain from defection, making defection all the more attractive and cooperative agreements all the more difficult to achieve.<sup>181</sup>

Recognizing and punishing defection also becomes more complicated as numbers increase.<sup>182</sup> We have already noted that reliance on standards and discretion will engender ambiguity and misperception. With multiple states, this problem is greatly exacerbated. For example, even if

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<sup>178</sup> See discussion *supra* Part IV.A.

<sup>179</sup> See *supra* note 135 and accompanying text.

<sup>180</sup> For  $n$  states, the number of bilateral negotiations will equal  $\frac{n*(n-1)}{2}$ .

A casual look at the choice of law provisions in the EU Insolvency Regulation illustrates the complexity of these bankruptcy-related choice of law issues for multiple states. See *supra* note 139. See also Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions*, 33 TEX. INT’L L. J. 119 (1998). The existence of the already well-developed and multifaceted EU regime no doubt facilitated negotiation of the EU Insolvency Convention, which was the precursor to the EU Insolvency Regulation. See *supra* note 139. See generally KEOHANE, *supra* note 67, at ch. 6 (explaining importance of international regimes for reducing transaction costs and disseminating information). Absent the EU regime, it is highly unlikely that such an agreement could have been reached.

<sup>181</sup> See Oye, *supra* note 65, at 19.

<sup>182</sup> See Axelrod & Keohane, *supra* note 65, at 235.

identification of the home country were not controversial, the number of unique interfaces between home country bankruptcy law and local nonbankruptcy law multiplies as more states are involved. The chances for previously unanticipated contingencies increase, thereby increasing the likelihood of ambiguity in application of the original universalist agreement. Without an institution to provide definitive resolution of ambiguities and to coordinate punishments for defection,<sup>183</sup> the potential for inconsistent cooperation among participants is high. This will inhibit the development of stable multilateral cooperative norms. The sure payoff from immediate defection becomes much more attractive, and the likelihood of defection increases.<sup>184</sup> For all these reasons, multilateral cooperative arrangements are unlikely to arise, and any that do will be quite fragile.

With the bankruptcy of an integrated multinational firm, all affected states must cooperate in order to achieve the optimal cooperative outcome,<sup>185</sup> but one player's defection will often trigger the defection of others. In the Felixstowe case,<sup>186</sup> these considerations played at least some part in an English court's refusal to defer to a U.S. proceeding. The English court refused to turn over local English assets of a U.S. debtor in Chapter 11

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<sup>183</sup> See Weingast, *supra* note 158, at 452 (describing coordination problem of interpreting agreement in light of unanticipated situation). Cf. Giovanni Maggi, *The Role of Multilateral Institutions in International Trade Cooperation*, 89 AM. ECON. REV. 190 (1999) (arguing that even without direct enforcement power, WTO through dispute settlement panels acts as multilateral enforcement mechanism by verifying and publicizing violations, thereby causing violator's loss of reputation in trading community).

Jay Westbrook has proposed "common unilateralism," a sort of unilateral universalism without treaties that would promote a culture of rough reciprocity among states. This reciprocity would be facilitated by domestic institutions that would certify to their respective judiciaries the various other states that qualify for deference based on rough similarity of their laws and their reciprocity behavior. See Westbrook, *Theory and Pragmatism*, *supra* note 13, at 488. This thoughtful approach might improve the incidence of insolvency cooperation generally, but it does not directly address the problems of cheating and detecting defection, issues whose resolution would be necessary in order to provide the predictability that universalism promises.

<sup>184</sup> See Oye, *supra* note 65, at 19.

<sup>185</sup> A situation involving multiple players may not always create an n-player prisoners' dilemma, but a series of bilateral prisoners' dilemmas between the different pairs of players. In that situation, resolution of one bilateral interaction would not directly affect the outcomes of others. See Snidal, *Game Theory*, *supra* note 65, at 52-53. With multilateral universalism, though, each defection may potentially reduce the cooperative payoffs for the remaining states, reducing the advantages of any universalist arrangement and encouraging further defections.

<sup>186</sup> See *Felixstowe Dock & Railway Co. v. U.S. Lines Inc.*, 2 Lloyd's Rep. 76 (1987).

proceedings.<sup>187</sup> Separate insolvency proceedings were apparently also underway or pending in France and several other European countries. Besides the fact that English creditors would have been prejudiced in the U.S. proceeding,<sup>188</sup> the English court noted that in the French insolvency proceeding, the French court likewise refused to defer to the U.S. If the French would not defer, why should the English?<sup>189</sup>

The French court was willing to turn over assets to the U.S. court only after all French creditors had been paid in full.<sup>190</sup> With little choice, the U.S. debtor had agreed to these French demands. This capitulation the English court read as “not only a serious breach of the [debtor’s] ‘single proceedings’ theory, but also a preference (in the interests no doubt of expediency) of one particular group of creditors.”<sup>191</sup> Therefore, the debtor’s arguments concerning a single insolvency administration and equal treatment of creditors were seriously undermined.

The numbers problem has particular bite for universalism because claims concerning its efficiency advantages over territoriality depend on its widespread—if not universal—adoption. According to its advocates, universalism offers superior efficiency because it makes the location of the debtor’s assets irrelevant to creditors’ rights. Universalism

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<sup>187</sup> English law did not require any such turnover, but it was within the judge’s discretion. *See id.*

<sup>188</sup> Not only would English creditors do far better in a territorial distribution, but the contemplated reorganization would have eliminated the debtor’s European operations and instead concentrated resources in North America. Assets repatriated from England would therefore have funded a reorganization benefiting North American trade creditors by preserving commercial relationships with the reorganized entity. English trade creditors, however, would see no such benefit. *See id.*

<sup>189</sup> The proposed scheme of reorganization was that the assets removed from England would be used to keep U.S. Lines going in the United States but that it would withdraw from the European market. This meant that the Felixstowe Dock company [an English creditor] would gain nothing from the reorganization. Furthermore, it was clear that the French, who have a highly developed sense of their own national interest, were for similar reasons not going to allow any of the assets in France to be sent to the United States.

Hoffman, *supra* note 148, at 2513.

<sup>190</sup> French creditors successfully procured the arrest of two of the debtors ships, and the French courts would allow sale of the ships and repatriation of proceeds to the U.S. only after all French creditors had been paid. *See id.*

<sup>191</sup> *See id.*

therefore provides ex ante predictability to creditors,<sup>192</sup> relieves them of the burdens of ex post monitoring of the debtor's assets,<sup>193</sup> and facilitates efficient administration of the debtor's assets.<sup>194</sup>

By contrast, the argument goes, territoriality suffers from the problem of fleeing assets. Creditors cannot possibly predict their bankruptcy recoveries ex ante because the governing laws will change depending on the various locations of the debtor's assets, which "may be spread among many jurisdictions and which may be moved at any time."<sup>195</sup> Creditors are therefore forced to monitor the locations of the debtor's assets at all times and "must consider the laws of all jurisdictions in which assets are located, or into which assets may move."<sup>196</sup> Under universalism, only the home country need be identified, and that determination must surely be simpler and more predictable than monitoring all the debtor's assets all the time.<sup>197</sup>

The trouble with this neat analysis, of course, is that it assumes the ubiquity of universalism. Universalism yields superior predictability, reduces monitoring costs, and renders asset location irrelevant only if *all* states adopt it. Otherwise, a debtor may always move its assets beyond the jurisdiction of the universalist court, just as under territoriality. Even if many states were to adopt universalism—a highly unlikely prospect, as we have already seen—plenty of amenable jurisdictions would still exist in which debtors might park assets comfortably out of the reach of creditors. Absent highly unrealistic assumptions about the world, then, universalism is no better than territoriality with respect to ex ante predictability and monitoring costs. Those arguments for universalism should therefore be put to rest.<sup>198</sup> As important, in a world of incomplete universalism, the problem of fleeing assets frustrates achievement of the unified international administration of assets that is at the heart of the universalist proposal.

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<sup>192</sup> See Westbrook, *Global Solution*, *supra* note 1, at 2309.

<sup>193</sup> See Guzman, *supra* note 6, at 2207-08.

<sup>194</sup> See Westbrook, *Global Solution*, *supra* note 1, at 2309.

<sup>195</sup> Guzman, *supra* note 6, at 2207.

<sup>196</sup> *Id.* at 2208.

<sup>197</sup> See Westbrook, *Global Solution*, *supra* note 1, at 2309; Guzman, *supra* note 6, at 2207.

<sup>198</sup> Recently, Jay Westbrook has justifiably retreated a bit from the predictability thesis. See Westbrook, *Global Solution*, *supra* note 1, at 2326.

The numbers problem suggests that even universalism among a relative handful of states—never mind ubiquity—is unlikely. However, large multinational firms operate in dozens of states, and such firms will continue to grow in size and international reach. Even ignoring problems of strategic asset transfer, any universalist arrangements would be inadequate to handle what will come to be routine international bankruptcies.

#### *E. Other Approaches*

The dim prospects for the standard iterated play solution to the prisoners' dilemma do not exhaust all possible universalist reform strategies. I briefly discuss two alternative approaches that would theoretically improve prospects for universalism. However, each approach has important drawbacks. Skepticism about universalism remains appropriate.

International institutions have been relied upon in other contexts to address fuzzy commitments and problems of ambiguity or misperception, which are not unique to international bankruptcy. The Dispute Settlement Procedure of the World Trade Organization acts as a device to distinguish true violations from misperceptions in the context of international trade obligations. The DSP process gathers and disseminates information concerning alleged violations. It resolves ambiguity and promulgates shared understandings about trade obligations. This process facilitates monitoring and reciprocity among interested states, thereby promoting cooperation.<sup>199</sup>

An international institution might be able to perform a similar function for a universalist system, again assuming that states preferred universalism. However, this institution-building would be no small undertaking. The political impetus for such an institution seems lacking. Moreover, the upfront costs of negotiating and implementing such a regime might easily outweigh the present value of the anticipated benefits. In addition, any institutional solution would have to accommodate the peculiar characteristics of bankruptcy proceedings. Their often time-sensitive nature may make impractical any attempt to review particular bankruptcy court decisions by an international body. Any international review would not likely be completed until long after the conclusion of the disputed proceeding. An institutional solution would also have to address the problem of attempting to implement reciprocity through judicial bodies.

One way to avoid the universalist prisoners' dilemma altogether would be to change states' payoffs through issue linkage.

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<sup>199</sup> See Maggi, *supra* note 183; Weingast, *supra* note 158, at 458.

Embedding negotiations over universalism within a larger set of issues could create a different set of more harmonious incentives among states.<sup>200</sup> For example, in our original prisoners' dilemma story, if each prisoner had the ability to harm the other's family in the event of squealing, then the prisoners' decisions on squealing become embedded within a larger set of relationships. The family linkage effectively changes each prisoner's payoffs. Promised punishments for squealing would reduce each prisoner's defection payoffs, so that it would not pay for either prisoner to squeal. Silence would become the dominant strategy.

Issue linkage, however, is not a simple process. If international bankruptcy cooperation were not complicated enough, linking it with bargaining over and enforcement of other issues would vastly complicate the overall project. Moreover, political interests associated with other potentially linked issues may object to any linkage for fear that such complications might doom the entire lot of issues. Jay Westbrook mentions the success of the TRIPs agreement, negotiated under the auspices of the World Trade Organization, which links the condition of states' domestic intellectual property regimes to trading privileges within the WTO.<sup>201</sup> TRIPs, however, is a very special case involving a very important issue backed by powerful domestic lobbies within industrial countries.<sup>202</sup> In addition, the WTO framework facilitated transfer payments from industrial countries to developing countries that would otherwise have opposed the TRIPs agreement. No such framework exists for international bankruptcy, and the issue is unlikely to command the same attention and vigor as

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<sup>200</sup> “[A] given bargain is placed within the context of a more important long-term relationship in such a way that the long-term relationship affects the outcome of the particular bargaining process.” Axelrod & Keohane, *supra* note 65, at 241. Moreover, the few modest treaty commitments that exist with respect to international insolvency are embedded in more comprehensive schemes of commercial cooperation. See FLETCHER, *supra* note 139, at 232 (discussing existing international bankruptcy treaties).

<sup>201</sup> See Westbrook, *Global Solution*, *supra* note 1, at 2295-96.

<sup>202</sup> Getting intellectual property onto the MTN agenda was itself no easy task. Believing that European support would be necessary and Japanese support helpful in making it happen, the U.S. Trade Representative recommended to the chairmen of Pfizer and IBM that they encourage their European and Japanese counterparts to pressure their governments and EC secretariat leadership to support the idea. Though competitors in global markets, these companies shared the common interest in improved intellectual property protection around the world, especially in developing-country markets, and various European and Japanese trade associations were talked into supporting the initiative.

Michael P. Ryan, *The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking*, 19 U. PA. J. INT'L ECON. L. 535, 562 (1998).

international intellectual property issues. Absent such attention and support, the impetus to link bankruptcy to some other prominent issue will be lacking. It will be difficult to peg the fate of universalism to other significant issues.<sup>203</sup> Finally, issue linkage does nothing to minimize problems associated with fuzzy commitments and misperception or problems of judicial implementation, which may all still disrupt cooperation within an embedded game.

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Universalism presents a prisoners' dilemma that is not easily resolved, either through the standard prescription of repeat play or more elaborate devices. Even among states with welfare maximizing reasons to prefer mutual universalist cooperation, the particular conditions of play in international bankruptcy render states unable to make credible commitments or enforce other states' proffered commitments to universalism. Even if discount factors and payoff structures were conducive to the emergence of cooperation, fuzzy commitments and misperception problems, the involvement of judges, and the problem of numbers would likely overwhelm any attempt at universalism. In the end, even a state that prefers universalism faces the single-play prisoners' dilemma, for which defection is its dominant strategy.

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<sup>203</sup> In addition, the European experience—a situation involving multiple overlapping commercial, political, and legal relationships among states—should give us great pause. Even within the web of Europe's multifaceted integrationist ambitions, and with a commercial framework available to facilitate whatever transfer payments might be necessary, universalist cooperation has not been forthcoming. *See supra* note 139 and accompanying text.



## V. CONCLUSION

Universalism is a sexy idea. Conceptually, it is neat and clean, simple and sweet.<sup>204</sup> In the face of inexorable globalization, the notion of a cooperative, internationalist, one-court, one-law bankruptcy system seems irresistible. The simple fact, however, is that states differ in their views of the appropriate goals and means for their bankruptcy regimes. Some states will refuse to cooperate. Others may be amenable, but conditions make sustained cooperation unlikely. Cooperation is hardly a given; it cannot be assumed. The universalist proposal seems deceptively simple, but only when much that is interesting, important, and difficult about international relations and international cooperation is assumed away. Scholars in other areas have embraced, rather than avoided, the thorny social and political questions raised by international legal and regulatory interaction.<sup>205</sup> We bankruptcy scholars should do the same.

Predicting the future is always a risky endeavor, and proving a negative is impossible. However, my analysis shows many reasons to be skeptical that universalism will soon emerge as a popular prescription for international bankruptcy cooperation. Most states will remain territorial in their approach to crossborder insolvency. Even those that prefer universalism will encounter tremendous difficulty attempting to establish and maintain universalist arrangements.

At the least, the burden rests with universalists to show that universalism is even possible. In the meantime, territoriality will remain the dominant approach in international bankruptcy for the foreseeable future. Therefore, reform efforts should proceed on that basis, with territorially-based cooperation as the primary focus.

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<sup>204</sup> “Universality is a very appealing approach. . . . It is intellectually elegant.” Westbrock, *Choice of Avoidance Law*, *supra* note 1, at 515.

<sup>205</sup> See, e.g., INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES (William Bratton, et al. eds., 1996); Licht, *supra* note 19; Colombatto & Macey, *supra* note 20; Wiener, *supra* note 22.