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Costs of Sovereignty

K. A.D. Camara

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COSTS OF SOVEREIGNTY

K.A.D. Camara

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I. INTRODUCTION

Multiple states are often interested in regulating the same conduct. A state’s private international law limits the reach of its regulatory efforts in the face of this Fact of Overlap. Private international law traditionally includes jurisdiction, choice of law, and the enforcement of judgments. The law of enforcement of judgments is one part of the law governing a state’s response to foreign exercises of sovereignty. One response is to refuse enforcement of foreign judgments. But other responses include sanctioning parties who obtain such judgments, making enforcement of such judgments domestically action-

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able; and imposing diplomatic, economic, or military sanctions on states rendering such judgments.

This Article offers a normative theory of private international law. Such theories are sufficiently many that a preliminary attempt at classification is worthwhile. Part II identifies three categories into which the extant theories fall, and demonstrates the usefulness of this categorization by applying it to theories of conflicts of law. Briefly, naturalist theories bound state law according to an evident or higher-law notion of sovereignty; nationalist theories bound state law only so much as state interest demands; and internationalist theories bound state law out of respect for the moral-philosophical claims to legitimacy of foreign states. Naturalism has the ring of nineteenth-century, doctrinal private law; nationalism, the ring of private law post law-and-economics; and internationalism, the ring of constitutional law or political philosophy. In conflicts of law, early twentieth-century territorialism, American interest analysis, academic state-


4 Including responses to foreign regulatory efforts best considered executive or legislative rather than judicial blurs the boundary between private and public international law. Nevertheless, their inclusion is natural if one accepts that private international law’s role is to deal with the Fact of Overlap. Calling nationalism a theory of private international law creates a risk of bias in its favor, however, because nationalism and naturalism views have more intuitive appeal in private law, whereas internationalism has more intuitive appeal in public law.

5 See 1 Joseph H. Beale, A TREATISE ON THE CONFLICT OF LAWS § 1.1 (1935); see also RESTATEMENT OF CONFLICT OF LAWS (1934); Raleigh C. Minor, Conflict of Laws 1-7 (1901); A. V. Dicey, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS (2d ed. 1908).

subject connection theories, and the modern doctrine of deference to foreign judicial processes within the European Union all are subject to this classification. Conflicts theory in the United States has progressed over the past century from naturalism to internationalism and, in the past decade, toward nationalism. Nevertheless, nationalism remains unpopular, is as yet without a sustained defense, and, consequently, provokes little response from defenders of alternative theories.

Part III states and defends nationalism. The exercise of power pursuant to law is justified by the political processes from which law emerges. The particular rules that constitute justified law are those that furthest advance the ends that emerge from these political processes—the ends justifying a state’s law. Nationalism holds that private international law, like the rest of a state’s law, should maximize the attainment of these ends. Because the authority of legal decision-makers stems from their status as officials of a state, their institutional warrant to exercise state power allows them to give effect only to ends that emerge from that state’s political processes. A legal decision-maker who gives effect to other ends undermines the justification for his exercise of power—the justification for law—that the political processes in place provide. He exhibits, in short, infidelity to law.

Nationalist legal decision-makers nevertheless legitimately limit the reach of domestic law because, in the presence of the Fact of Overlap, some applications of domestic law interfere with other states’ regulatory interests and would cause them to sanction the regulating state. Part III.B describes three ways in which applications of a state’s law can interfere with other states’ regulatory interests, imposing externalities of sovereignty. Part III.C describes three

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9 Similar terminology has been used by others. See, e.g., William Blumenthal, The Challenge of Sovereignty and the Mechanisms of Convergence, 72 Antitrust L. J. 267, 267 (2004) (“As international markets confront the jurisdictional reach of national competition authorities, the exercise of sovereign powers spills across national borders . . . . Unless national authorities are
ways in which states can influence other states' regulatory behavior. States can deter (encourage) regulation that creates externalities of sovereignty by imposing positive (negative) costs of sovereignty. An important consequence of nationalism is that a private international law uniform across states that differ in their ability to absorb and inflict costs of sovereignty requires legal decision-makers of at least some of these states to exhibit infidelity to law—at least, to their law.10

Part IV applies nationalism. A state's private international law determines whether it will regulate conduct that other states are simultaneously interested in regulating. States should do so when the benefits of regulation outweigh the costs other states can impose to deter such regulation discounted by the probability of their imposition. Both costs and benefits should be measured in terms of attainment of the ends justifying a state's law. Part III takes two of the traditional dimensions of private international law—jurisdiction and choice of law—and identifies four paradigm positions that a nationalist state might take. For each such position, it identifies considerations that would rightly move states to take that position and offers examples of similar positions actually taken by states in specific subject areas.

Part V answers objections. Part VI discusses extensions and connections to the work of others, including important connections to the agency-cost analysis of corporate law and the theory of the firm. It also discusses positive claims; the notions of sticky, camouflaged, and private sovereignty; and a nationalist theory for federal organizations resolving regulatory conflicts between subsidiary states. Part VII summarizes the foregoing, infers from it several prescriptions for legal decision-makers, and identifies consequences for further work in private international law.

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

Naturalist theories hold that states should set private international law so that their claims to regulatory authority do not exceed limits specified by a normative source other than the state itself. This higher normative source defines sovereignty—legitimate claims to regulatory authority are those consistent with

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its edicts. The vested-rights theory of Joseph Beale,\(^\text{11}\) dominant in the early twentieth century, embodied in the first Restatement,\(^\text{12}\) and still followed in a minority of states,\(^\text{13}\) is a naturalist theory. Naturalist theories offer a formalist or legal-metaphysical justification for assignments of regulatory authority. "It is in the nature of torts that they are subject to regulation by the law of the place of injury."\(^\text{14}\) Objecting to this "devout and orthodox commitment to a fundamentalist theology of territorialism and vested rights"\(^\text{15}\) and seeking a functional basis for private international law, the legal realists\(^\text{16}\) developed interest analysis.

Interest analysis assigns regulatory authority to the forum so long as the policies underlying its substantive laws would be advanced by their application to the conduct in question.\(^\text{17}\) Interest analysis eschews consideration of foreign responses to domestic exercises of regulatory authority.\(^\text{18}\) This makes interest

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\(^{11}\) See Beale, supra note 5; see also A. V. Dicey, A Digest of the Law of England with Reference to the Conflict of Laws (2d ed. 1908); Minor, supra note 5; Restatement of Conflict of Laws (1934). Beale's theory assigns regulatory authority to states based on the geographic location of a critical element determined by the type of the cause of action. For example, in tort cases, the theory assigns regulatory authority to the state in which the injury occurred.

\(^{12}\) Restatement of Conflict of Laws (1934).


\(^{14}\) "[T]he only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation." Cuba R. Co. v. Crosby, 222 U.S. 473, 479 (1912) (Holmes, J.).

\(^{15}\) Currie, Ehrenzweig and the Statute of Frauds, supra note 6, at 244.


\(^{17}\) See Currie, The Constitution and the Choice of Law, supra note 6; Currie, Methods and Objectives, supra note 6; Currie, The Verdict of Quiescent Years, supra note 6; Currie, The Disinterested Third State, supra note 6 (often cited as moderating Currie's view, although I think it merely clarifies what his view had always been); see also Currie, Married Women's Contracts, supra note 6; Currie, Survival of Actions, supra note 6; Currie, Displacement of the Law, supra note 6; Currie & Schreter, Privileges and Immunities, supra note 6 (discussing constitutional objections to interest analysis); Currie & Schreter, Equal Protection, supra note 6 (same); Currie, Romero Case, supra note 6; Currie & Lieberman, supra note 6; Currie, Justice Traynor, supra note 6; Currie, Conflict, Crisis and Confusion in New York, supra note 6 (discussing the constitutional challenges); Currie, Ehrenzweig and the Statute of Frauds, supra note 6.

\(^{18}\) In a 1963 article, Currie wrote:

[A]nalysis may at first indicate an apparent conflict of interests; specifically, it may be clear that if the forum were to assert an interest in the application of its
analysis nonnationalist and means that fewer internationalist concessions are made under it than under nationalism. Brainerd Currie, the inventor of interest analysis, argued that judges are well-equipped neither for the forecasting of foreign responses required by nationalism nor for the political-philosophic balancing and bounding of different states’ interests required by internationalism. Professor Currie defended interest analysis only given the judiciary as a state’s private-international-law-implementing mechanism.

Modern critiques of interest analysis hold that it defers insufficiently to the claims to regulatory authority or, equivalently, independence from regulation of foreign states and their citizens. State-subject theories require a connection between the party disadvantaged by regulatory action and the regulating state that justifies the disadvantage. A citizen’s obligation to obey law is conditional on the justifying characteristics of his relationship to the state. But, state-subject theories claim the same is true for aliens—a state’s authority to regulate is generally conditional on the justifying characteristics of the relationship between it and those it regulates. Law-and-economics scholars suggest that due respect for all people demands a private international law that maximizes global welfare. On this view, private international law is a way of har-

policy, it would be constitutionally justified in doing so. But no principle dictates that a state exploit every possible conflict, or exert to the outermost limits its constitutional power. On the contrary, to assert a conflict between the interests of the forum and the foreign state is a serious matter; the mere fact that a suggested broad conception of a local interest will create conflict with that of a foreing state is a sound reason why the conception should be re-examined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum’s legitimate purpose.

Brainerd Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROBS. 754, 757 (1963). Some scholars have interpreted this article as a withdrawal by Currie from his earlier hard-line position.


20 Currie thought “[w]e would be better off if Congress were to give some attention to problems of private law, and were to legislate concerning the choice between conflicting state interests in some of the specific areas in which the need for solution is serious.” Id. at 177.

21 See, e.g., BRILMAYER, supra note 7, at ch. 5; Brilmayer, Jurisdictional Due Process and Political Theory, supra note 7; Brilmayer, Jurisdictional Due Process and Political Theory, supra note 7; Brilmayer, Interstate Federalism, supra note 7; Brilmayer, Rights, Fairness and Choice of Law, supra note 7; Brilmayer, Liberalism, Community and State Borders, supra note 7, at 1-3; cf. Dane, supra note 7 (discussing an alternative internationalist theory).

22 Public international law has long been burdened by analogies between the society of states and the society of individuals within a state. See generally Edwin D. Dickinson, The Analogy Between Natural Persons and International Persons in the Law of Nations, 26 YALE L. J. 564 (1917).

nessing state behavior in service of the common good. Drawing on the literature on the definition of property rights, some scholars want private international law to define and allocate rights to regulatory authority such that exchange mechanisms move them to their highest-valuing users. Finally, scaffolding theories justify international cooperation as a bet on the benefits that would arise from a closer international community. Since the nature and value of those benefits is uncertain, scaffolding theories rest on an internationalist faith—a faith that is easier to muster the closer one thinks is the alignment and the swifter one thinks is the convergence of the interests of the states in question. Each of these theories, because they all condition the legitimacy of regulatory authority on a due accommodation of foreign ends, is an internationalist theory of private international law.

Law-and-economics scholars have also fielded the theory closest to nationalism. Jack Goldsmith and Eric Posner argue that states should maximize domestic welfare when they set private international law, just as they should

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28 "One [argument] focuses on U.S. national interest, and maintains that the welfare of U.S. citizens would be enhanced in the fairer, safer, and more prosperous world that would result from increasing assistance to others. I have no quibble with this form of argument, which in my view properly focuses on what is best for U.S. citizens ...." Jack L. Goldsmith, Liberal Democracy and Cosmopolitan Duty, 55 Stan. L. Rev. 1667, 1668 (2003) (emphasis added). Professor Goldsmith goes on to compare this argument with one that favors internationalist concessions for their own sake, or out of "cosmopolitan duty." Id.

Most of this literature is advanced as descriptive, although its authors appear to endorse welfare-maximizing nationalism as a normative matter. See, e.g., Jack L. Goldsmith & Eric A. Posner, A Theory of Customary International Law, 66 U. Chi. L. Rev. 1113, 1113 (1999) (arguing that customary international law results merely from the coincidence of interests of the states involved and lacks any further binding authority, for example, moral); Jack L. Goldsmith & Eric A. Posner, Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective, 31 J. Leg. Stud. 115, 115 (2002) (replying to arguments that states' use of moral and legal rhetoric is evidence to the contrary); Eric A. Posner, Do States Have a Moral Obligation to Obey International Law?, 55 Stan. L. Rev. 1901, 1918 (2003) ("The more plausible view is that the law is
when setting other aspects of their law. This welfare-maximization theory is the only instance of nationalism in the literature. It is a weak form of nationalism because it combines the claim that private international law should maximize the attainment of state objectives with the claim that state objectives should be some function of the welfare of citizens or other relevant persons. The strong-form nationalism here defended instead holds that states should set private international law to best advance the ends that justify their domestic law whatever those ends happen to be. Unlike the welfare-maximization theory, nationalism, and internationalism, strong-form nationalism says nothing about what ends a state’s political process should endorse.

A first-order view requires commitment to the characteristic claim of its type. First-order nationalism requires commitment to the claim that states should set private international law to maximize the attainment of the ends justifying their law as a whole. A second-order view requires only that a particular set of legal decision-makers act as though they held a first-order view. Second-order nationalism might require only that federal judges act as though they were first-order nationalists. Such a theory would be consistent with first-order internationalism if federal judges would otherwise make more internationalist concessions than appropriate even under first-order internationalism. Interest

built up out of rational self-interest”). A theory of why private-international-law decision-makers would maximize domestic welfare is notably absent. See, e.g., Posner, Do States Have a Moral Obligation to Obey International Law, supra, at 1918 (noting the arguments that legal decision-makers may be “under the spell of a legalistic ideology; they may make unrealistic assumptions about the enforceability of international law; or they may simply make some other error in moral reasoning” but finding that “none of these seems plausible.”). Compare Goldsmith, Liberal Democracy and Cosmopolitan Duty, supra, at 1669-70 (arguing that the design of liberal democracies makes it difficult to sacrifice national welfare), with Casey B. Mulligan et al., Do Democracies Have Different Public Policies than Nondemocracies?, 18 J. ECON. PERSP. 51, 52 (2004) (“[D]emocratic institutions have important effects on the degree of competition for public office, but otherwise have effects on public policies that are insignificant.”).

And even if states did not in fact maximize welfare one suspects that Goldsmith and Posner would nevertheless want them—or their legal decision-makers—to use private international law to come closer to a welfare-maximizing law generally.

Professor Kersch illustrates this:

[The U.S. Supreme Court's Brown v. Board of Education (1954) decision and the judge-led ‘rights revolution’ it inaugurated . . . proved highly influential around the world, inspiring many countries to accept the radical empowerment of their judiciaries at the expense of democratically elected legislatures. Brown, the proliferation of litigation advocacy groups it inspired, and the rise of public law litigation, reversed the traditional progressive suspicion of judges . . . and helped create the modern identification of judicial power with progress, civil liberties, and civil rights. The rise of Kantian legal theory, in turn, which envisaged the judge as the heroic tribune of universal morality, reinforced the moral authority—and, hence, political power—of the judge, and inflated his governing pretensions worldwide.

Kersch, supra note 27, at 5.
analysis is a second-order naturalist theory because it commands judges to behave as though a naturalist theory (in which the bounds of sovereignty are immediate interest) were true but can be consistent with either nationalism (if, because of other internationalist-biasing factors, having judges act this way best advances domestic interests) or internationalism (if, because of other nationalist-biasing factors, having judges act this way best respects the political-philosophic claims of other states and their citizens).31

For those involved in pushing this . . . judicial empowerment with the aim of advancing stipulated public policies in the face of democratic resistance or indifference, preserving ‘the mask’ of law is essential. The most effective way of proceeding . . . is by working incrementally off-shore, quietly creating new ‘norms’ and ‘law’ through small insertions of language into international declarations and other documents, and then appealing to them in arguments made before judges . . . .


I am reminded of the old story that Austin Wakeman Scott, wanting to establish a new principle in the law of trust, wrote it into an edition of his treatise, waited for a court to cite it as authority, and then cited that decision in subsequent editions. Compare Bradley & Goldsmith, supra, at 836 (describing similar bootstrapping process for federalization of customary international law).

31 Another way of putting this is that Currie’s interest analysis is directed at judges applying law silent on its face as to conflicts of law; interest analysis has nothing to say to legislators, except perhaps that it constitutes a good default if little legislative time is to be put into the conflicts question anyway.
Because first- and second-order views of different types are compatible, disagreement over first-order views need not preclude agreement on outcomes. A first-order nationalist who must convince truth-motivated others to put his ideas into effect can convince them either of the truth of nationalism or of the internationalist bias of the relevant legal decision-makers. The second approach skirts philosophical matters in favor of an empirical question—whether such a bias exists—although with the flavor of a sneak attack. Such an approach is useful when it is costly simply to walk past those who disagree.\textsuperscript{32}

III. NATIONALISM

This Part states the nationalist theory and offers a framework for its application by legal decision-makers. Subpart A presents nationalism as the normal law-application process applied to cases made difficult by the Fact of Overlap. Subparts B and C identify externalities of sovereignty and costs of sovereignty, respectively, that a nationalist legal decision-maker must weigh in setting private international law.

A. Fidelity to Law: The Institutional Argument

When hard cases test the scope of legal rules, judges check to see if applying the rule in question to the type of case at bar would advance the ends that justify the rule.\textsuperscript{33} Analogical reasoning in law depends on identifying similari-

\textsuperscript{32} Table 1 classifies the leading theories of private international law using the offered taxonomy, and roughly dates each to give a sense of the historical development in American private-international-law theory.

<table>
<thead>
<tr>
<th>First-Order</th>
<th>Naturalist</th>
<th>Nationalist</th>
<th>Internationalist</th>
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<tr>
<td>Territorialism and Vested Rights Theories (Beale 1935)</td>
<td>Attainment of State Objectives (strong form) (Camara 2004)</td>
<td>State-Subject Connection (Brilmayer 1987)</td>
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<td>Domestic Welfare Maximization (weak form) (Goldsmith &amp; Posner 1999)</td>
<td>Global Welfare Maximization (Guzman 2002)</td>
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<td>Consistency / Predictability</td>
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\textsuperscript{33} "[W]hen [judges] are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 67 (1921); see also William F. Baxter, Choice of Law and the Federal System, 16 STAN. L. REV. 1, 5-6 (1963). Before the relation of the facts of the case to the purposes of a rule is checked to test the rule's applicability, there is a pre-
ties and differences between the facts of the case at bar and sets of facts to which the rule in question is admittedly applicable or inapplicable. Only relevant factual distinctions matter—distinctions that alter the degree to which application of the rule would advance its justifying end.34

The ends of law emerge from and are justified by a state’s political processes.35 Judges’ failure to decide cases with reference to these ends is what

liminary question of the rule’s validity: its normative claim to be applied if applicable. A legal system’s test for validity is its rule of recognition, see H.L.A. HART, THE CONCEPT OF LAW 100-110 (2d. 1994), or, for concreteness, its constitution. Cf. United Mizrachi Bank Ltd. v. Migdal Village, 49(4) P.D. 221 (Israel 1995) (Barak, C.J.) (“when the constitution is silent [the rule] depends upon the culture and tradition of the legal system”).

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

On analogical reasoning in philosophy, see, for example, AMARTYA SEN, RATIONALITY AND FREEDOM 39 (2002) (explaining that the concept of rationality must specify appropriate ends to exclude the person who intelligently and systematically cuts off his toes) and ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 86 (1981) (“Classification . . . takes place within an assumed or already given abstract space wherein points differ in closeness . . . . If the dimensions were changed by which closeness was judged, if different dimensions were salient, a different classification [] . . . would result.”). On analogical reasoning in law, see, for example, Cass R. Sunstein, On Analogical Reasoning, 106 HARV. L. REV. 741, 745, 753-54, 756-57, 773-74 (1993) (although Sunstein emphasizes that analogical reasoning on the ground operates at a low level of generality, id. at 747, 753, he agrees with me that the end of analogical reasoning must be ultimate principles, id. at 753-54, 778, 785-86; and, consequently, that analogical reasoning fails in the face of ultimate disagreement, id. at 769-70); James R. Murray, The Role of Analogy in Legal Reasoning, 29 UCLA L. REV. 833, 850, 852, 853, 870 (1982) (importance of relevance); Wilson Huhn, The Stages of Legal Reasoning: Formalism, Analogy and Realism, 48 VILL. L. REV. 305, 317, 356-58 (2003) (labeling what I call analogy as realism). On analogical reasoning in practice, see, for example, Dan Hunter, Reason is Too Large: Analogy and Precedent in Law, 50 EMORY L. J. 1197, 1214-29 (2001) (citing Alan L. Tyree, Fact Content Analysis of Case Law: Methods and Limitations, 22 JURIMETRICS J. 1 (1981); ALAN L. TYREE, EXPERT SYSTEMS IN LAW (1989); JAMES POPPLE, A PRAGMATIC LEGAL EXPERT SYSTEM (1996). See generally Sunstein, supra at 741 n.3 (collecting sources); Hunter, supra at 1203 n.25 (collecting sources).

35 Legal rules are applicable when their purposes are furthered by their application. When two or more legal rules with origins of equal normative weight come into conflict, we refer to the process of resolution as balancing. Balancing requires that the purpose that unifies the conflicting legal rules, either a weighing of each against the others or a true resolution that avoids the apparent conflict, be identified, and the rule applied that best advances that purpose. Although I rely on legal decision-makers being able to do something of this sort, I do not elaborate the process of decision with reference to legal purpose further. Instead, I adopt by reference RONALD DWORKIN, LAW’S EMPIRE 225-75 (1986) (“[P]ropositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive inter-

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unifies formalism, or decision abstracted from purpose; naturalism, or decision for purposes floating free of the law; and skeptical legal realism, or decision for the judge's purposes. Each of these involves infidelity to law because each replaces the political processes ordinarily responsible for the ends of law with some other normative source—a formal system, the judge's breakfast, or, in private international law, the political processes of states of which the judge is not an official. When the outcome of a case changes as a result, the judge has put state force behind law not legitimated by passage through its political processes: extra-constitutional law. Nationalism's central claim is that it is ordinarily wrong for legal decision-makers to apply extra-constitutional law for the same reason it is ordinarily wrong for them to apply unconstitutional law: their offices offer no warrant for such exercises of state power.

The legal decision-maker in question need not be a judge. Legal decision-makers—judges, executive officers, legislators, &c.—can be thought of as primary or subsidiary. Subsidiary decision-makers owe fidelity to externally specified bodies of law. The judge applying a statute is the paradigm, but administrative officers carrying out executive orders are similarly situated. Primary decision-makers, by contrast, themselves endow bodies of law with legal authority. The legislator framing a statute is the paradigm, but the judge deciding a novel question at common law is similarly situated.

36 Analogical reasoning with reference to the purposes animating valid rules of law results in "a particular conception of community morality [being] decisive of legal issues; ... the political morality presupposed by the laws and institutions of the community." Dworkin, Hard Cases, supra note 35, at 1105.


38 In this lies the distinction between courts as checks on democracy and courts as its guarantors. When courts trump present, democratically expressed wishes by enforcing prior law democratically enacted at a higher level, there is no conflict between judicial power and its democratic justification—the justification, also, for the duty of obedience operating even in the absence of judicial power. But when courts trump democratic wishes without reference to such prior, higher law itself justified by democratic credentials, their decisions must be justified, if at all, with reference to outside normative sources; and this holds even (especially?) when courts "enforce" current but not-yet-enacted democratic views. The process of enactment is a check on democratic excess that itself possesses prior, higher democratic credentials. See, e.g., U.S. CONST. art. V. Ratification of judicial circumvention of that process by silence or anything other than equally powerful enactment is a bootstrap, not a justification.


40 But see, e.g., DWORKIN, LAW'S EMPIRE, supra note 35 (judge constrained by dutiful inter-
Actual legal decision-makers fall between the paradigms. The Securities and Exchange Commission endows rules with legal authority but is constrained in so doing by the terms of its congressional mandate. A trade minister may be authorized to decide whether prosecution of agribusiness or Microsoft would best advance competitive markets but not whether to advance competitive markets or protect a favored industry.

Primary decision-makers create law for reasons. These reasons include crude self-interest, as where the moneyed interests purchase laws; command from a higher authority, e.g. Church or Party; and moral or political obligations realized after reasoned reflection, e.g. those encompassed by utilitarian or libertarian political-philosophic systems. Law enacted for such personal reasons is justified because of the institutional position of the primary decision-makers involved: they are the part of the political system that makes the law. The justifying characteristics of that political system—what creates a duty of obedience to its law—justify the law that primary decision-makers make for reasons rooted in the system even if it allows decision-makers to deviate from institutional ends. A system that allows for deviation may yet be justified because the deviations it permits are politically acceptable or not amenable to review at acceptable cost.

The justifying characteristics of the political system thus justify deviations by legal decision-makers from institutional ends to the extent these are necessary to benefits of the political system more valuable in terms of those ends than the deviations are costly. If political campaigns are necessary to the political system because of the legitimacy they confer on the operators of government, then deviations caused by them are part of that system and justified by its justifying characteristics. But these characteristics do not justify deviations made for extrasystemic reasons because, being unnecessary to the system, they are not part of it. Deviations caused by deference to other political systems are extrasystemic in this sense. The warrant for their imposition must lie elsewhere than in the justifying characteristics of the political processes in place.

41 But the motives of legal decision-makers in enacting law need not be the same as the ends underlying the law they enact for purposes of subsequent maximization. "It is what they did, not why they did it."

42 By which I mean "not terribly bad" so that the costs and risks of transitioning to a new system outweigh the potential benefits.

43 When deviations exceed this limit, there is a failure of justification for the system. Revolution looms. And this is not to say that institutional review mechanisms may not exist. Where they do exist, primary decision-making authority rests not with an individual but rather with an institution or complex of institutions including both the first-instance decision-maker and the reviewing forum.
When a primary decision-maker finds that his reason for enacting a body of law is \( X \), he should design that body of law so as to best advance \( X \). By failing to do so he authorizes a use of state force not justified by the political processes that empower him to issue such an authorization. He wields power without warrant, acts *ultra vires*, and puts in place extraconstitutional law.

For slightly more concreteness, consider a senator writing an antitrust statute. After reasoned reflection (and everything else the constitution calls on him to do) he concludes that he should write laws that maximize the welfare of the citizens of his state. He consults economists who advise him to design the antitrust statute to promote competitive markets. Acting on their advice, he concludes that the definition of anticompetitive behavior should be such-and-such. Having done this, he should set the other components of the antitrust statute—its rules for calculating damages, its applicability to nonprofits, its empowerment of prosecutors and rulemaking administrators, &c. —in the way that best promotes competitive markets. It would be inconsistent for the senator to pick one of these rules and set it to serve a different end; more, it would result in extraconstitutional law because of the senator's antecedent decision, resulting from the political processes in place, that he should write the law that best promotes competitive markets.\(^{44}\) Having identified the end to be advanced by a body of law, the primary decision-maker becomes subsidiary: judges and legislators alike—*all* legal decision-makers—in most of what they do, are bound to advance ends antecedently ordained.

Legal decision-makers should decide cases made difficult by the Fact of Overlap in the same way: by applying the rule that best advances the ends justifying domestic law given the facts, including the Fact of Overlap, of the case at bar. This rule need not be the domestic rule in any of the interested states; a compromise adopted by multiple states might lead to better results than would each state applying its own domestic rule to those cases within its de facto jurisdiction.\(^{45}\) The Fact of Overlap is often relevant in selecting the optimal rule (often affects the degree to which application of a rule advances its justifying ends) because other interested states' responses to the application of a legal rule

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\(^{44}\) Extraconstitutional law can be both unconstitutional and binding on other legal decision-makers, for example, judges. A constitutional preamble commanding laws "for the general welfare" might be violated by a statute enacted to benefit the Ballihuron Corporation, even though a judge would be bound to give the statute full effect.

may affect the advancement of the ends justifying domestic law. After a one-
paragraph detour to correct a doctrinal distortion in the literature, the balance of
this Part sets out the ways in which the Fact of Overlap can constitutionally change the applicable rule of law.

I have so far applied a general method of legal decision-making, familiar from other areas of the law, to private international law. It applies equally to all branches of that subject. The effect of private international law is to determine the scope of a state’s claims to sovereignty in the face of the Fact of Overlap. A branch of private international law is therefore important insofar as it affects the scope of these claims. If cases heard in France and Kentucky or London and Beijing are decided essentially identically when both courts agree that English law is applicable, then choice of law is more important than jurisdiction. But if variations in institutional quality or in other social, economic, political, or cultural factors, strongly affect outcomes in spite of choice of law, then jurisdictional rules are more important. This debate turns on an empirical question—viz., on what impact these social, economic, political, and cultural forces have on the administration of formal law. But the important point is that arguments in choice-of-law scholarship made on the assumption that choice of law is dominant often are equally applicable to jurisdiction or enforcement of judgments on the contrary assumption that one of these is dominant. Neglect of this point has led to an unfortunate splintering of the literature addressing the relevance of the Fact of Overlap to legal decision-making: the basic problem of private international law.

A nationalist might assess the relevance of the Fact of Overlap in two steps. First, ignoring it, he determines whether the ends justifying domestic law would be advanced by applying the rule in question to the case at bar. If so, there is a prima facie case for application of the rule. Second enters private international law: does the Fact of Overlap change the applicability of the legal rule in question?

Internationalist concessions often are justified by nationalism. Nationalism demands only that deviations from the result in ordinary, purely domestic cases be justified in terms of the ends justifying domestic law. Applying a do-

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

47 E.g., "To believe that a defendant’s contacts with the forum state should be stronger under the due process clause for jurisdiction purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether." Linda J. Silberman, Shaffer v. Heitner: The End of an Era, 53 N.Y.U. L. REV. 33, 88 (1978); James Martin, Personal Jurisdiction and Choice of Law, 78 MICH. L. REV. 872, 873 (1980) (arguing that contacts sufficient to support specific jurisdiction are a prerequisite to legitimate application of forum law).

48 I thank Professor Arthur von Mehren for making this point clear to me.
Domestic rule in the face of the Fact of Overlap may cause other interested states to respond in ways that negatively affect attainment of these ends. By declining to apply domestic law, legal decision-makers can avoid these undesirable responses, better advancing the ends justifying domestic law, all things considered.

In a world of nationalists, internationalist concessions come only at the price of reciprocal concessions. The more a state has to offer in terms of furthering the ends of other states, the greater are the internationalist concessions other states will be willing to offer in return. Nationalism would justify French enforcement of a Russian judgment contrary to French law only if, for example, this would likely lead to reciprocal Russian enforcement of French judgments. And China ought not to apply a human-rights law it would otherwise not apply unless, for example, Europe would then make its product markets more accessible to the Chinese. These are the sorts of justifications that support nationalist claims to the application of anything other than domestic law.

A state’s regulation, when the Fact of Overlap holds, may interfere with other states’ pursuit of their own regulatory interests. I call the foreign effects of a state’s claims to regulatory authority externalities of sovereignty. A state can punish such externality-imposing foreign regulation by imposing costs of sovereignty on the regulating state. The next Subparts identify three types of externalities of sovereignty and three types of costs of sovereignty, including the purposeful imposition of externalities of sovereignty. Costs of sovereignty suffered by a state are the negative effects in terms of attainment of the ends justifying its law that might justify a change in its legal rules in light of the Fact of Overlap. For a nationalist, they are the determinants of private international law.

B. Externalities of Sovereignty

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

A state imposes a *simple wrong-law* externality when it applies law that is wrong from the spillover state’s perspective in a case in which that state is interested. Simple wrong-law externalities arise because the ends justifying the laws of different states point to different outcomes in particular cases. State A seeks to maximize its citizens’ welfare, while state B seeks the same except that it prefers never to use certain cruel punishments.\(^{49}\) If A punishes theft with excruciating, cheap-to-inflict pain and applies that punishment, which B would find unacceptably cruel despite its excellent deterrent effect on theft, to a case in which B is interested, A will have imposed on B a simple wrong-law externality.

A state can impose wrong-law externalities even though its formal choice of law selects the law of the spillover state. States A and B might agree that A’s law is applicable, and yet B might be incapable of applying that law in precisely the way that would a court of A. A law refers a damages issue to the jury. B may agree that this law controls, but the result in B may nevertheless be different because, for cultural, economic, social, or other reasons, B juries award higher or lower damages than do A juries. If the end justifying A’s referring damages issues to juries is tied to the size of the resulting jury awards, then B imposes a wrong-law externality even if it refers the damages issue to a jury. On the other hand, it imposes no such externality if the end justifying A’s law is not tied to the resulting jury award: A might send issues to juries simple to satisfy a popular taste. Wrong-law externalities are measured in terms of the ends of the states involved.

Consider another example. State D might agree that the law of state C controls a particular issue but be unable to determine the content of that law. Courts of D might misunderstand the legal materials of C, rely on incorrect expert testimony about C law, or fall back on erroneous presumptions about the content of foreign law in general.\(^{50}\) In these A–B and C–D cases, the wrong-law externality arises unintentionally, as a consequence of the inability of B and D to apply a particular foreign law. Jurisdictional rules often acquire importance beyond the cost of travel because of such limits in *private-international-law technology.*

2. Inconsistent Law

A state imposes an *inconsistent-law externality* when it applies law that alone would advance the ends justifying the spillover state’s law as much as would application of that state’s own law, but which advances those ends less because of the concurrent application by the spillover state of its own law. Sup-

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49 E.g., U.S. Const. amend. VIII (prohibition of cruel and unusual punishment).

pose states $A$ and $B$ both want adequately informed capital markets for their own, possibly different, higher-order reasons. Mandatory disclosure and merit regulation (under which the state investigates a firm's operations before licensing its participation in the capital markets) may be equally effective means of pursuing this end.\(^{51}\) The concurrent application of both systems, however, may be worse in terms of obtaining adequately informed capital markets than the application of either system alone.\(^{52}\) If so, $A$'s mandatory-disclosure regime imposes a cost of inconsistent law when applied to cases in which $B$ applies its merit-regulation regime, and vice versa: $B$'s application of a merit-regulation regime to these cases imposes an inconsistent-law externality on $A$.\(^{53}\)

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

This approach can be costly, however, because the regulating state must process an increased case load;\(^{54}\) it may be difficult to distinguish cases in which both states are interested, and hence the internationalist compromise is applicable, from those in which only one state is interested, and hence domestic law should apply; domestic political systems may be designed to resist regulatory delegation to foreign entities, which might be good or bad from the perspective of attaining a state's ends,\(^{55}\) and deferring now may increase the cost of regulating later in light of a divergence in state ends.

\(^{51}\) *See, e.g.*, LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 32-45 (2004).

\(^{52}\) I thank Professor Andrew Guzman for suggesting the example.

\(^{53}\) In the antitrust context, see, for example, Frederic Jenny, *Competition, Trade and Development Before and After Cancun*, 2003 FORDHAM CORP. L. INST. 631, 640 (Barry Hawk, ed., 2004) (noting lack of "operational sovereignty" where cumulative regulation results in greater total regulation than under any state's laws applied alone), *cited in* Blumenthal, *supra* note 9, at 274.


\(^{55}\) "Nations differ in regard to how much 'freedom' they are prepared to sacrifice for some common enterprise or to some supranational institution." LOUIS HENKIN, HOW NATIONS BEHAVE 30 (1979).
These problems can all be reduced to a single cost of the cheapest regime that would satisfy both states. Nationalist states would adopt that cheapest regime if and only if the inconsistent-law externalities for each state exceed the cost of the cheapest regime.\textsuperscript{56} This process is more complicated when regulation concurrently imposes inconsistent-law and wrong-law externalities. The presence of both explains why nationalist states may resist unifying changes that would avoid inconsistent-law externalities at the cost of what appear from the outside to be mere details, but which, given the justifying ends of a state’s law, it would entail accepting large wrong-law externalities to sacrifice.

Externalities of inconsistent law include not only situations like the securities-regulation example, in which concurrent regulation is possible but on balance detrimental, but also situations in which the alternative laws are flatly inconsistent: drive on the left versus drive on the right. What makes this case easy (and, though simple, notice it is real), is that it is easy to assign classes of cases to regulatory rules on the basis of physical territory (the costs of the cheapest regime, including the costs of sorting cases, are low) and the precise outcome is much less important than the avoidance of concurrently applied conflicting laws from the perspective of all states involved (the inconsistent-law externality dwarfs the wrong-law externality). Still, nonunification imposes transaction costs on private parties operating across legal regimes.\textsuperscript{57} The international driver must investigate and keep track of the side of the road on which he is to drive. These costs constitute externalities of sovereignty to the extent costs inflicted on private parties factor into the ends of the states involved.

3. Inefficient Scope

An imposing state’s refusal to cooperate may force the spillover state to apply laws of inefficient scope: second-best laws enacted because first-best laws

\textsuperscript{56} Consider a simple case in which there exists some cheapest equally effective regime that could be implemented entirely by either state acting alone. The cost of this regime for either state is C, and the cost of the current regulatory regime of each state is C_A and C_B respectively, so that the marginal cost of adoption of the cheapest regime for each state is C \(- C_A\) for state A and C \(- C_B\) for state B. The cheapest regime in the text will then be adoption of the cheapest regime by the state for which the marginal cost of adoption is least: assume it is A. If the marginal cost of adoption exceeds the cost of inconsistent laws state A suffers, I_A, but is exceeded by the sum of the costs of inconsistent laws for both states, C \(- C_A\) < I_A + I_B, B will pay A to induce it to adopt the cheapest regime. More generally, the cheapest regime might involve implementation in part by A and in part by B; so long as the sum of the costs of inconsistent laws for all states exceeds the sum of the marginal cost of adoption for all states, there is room for a deal of this sort.

\textsuperscript{57} See, e.g., Blumenthal, The Challenge of Sovereignty, supra note 9, at 272 (private costs of multiplicity of antitrust/competition-law regimes).

Id. at 61-62. Cf. Goldsmith, supra note 28, at 1668 (noting effects of the liberal democratic structure for a state’s ability to discount national welfare).
would require enforcement too costly in light of the imposing state’s refusal. Consider the bankruptcy of a corporation with operations in states $A$ and $B$.\textsuperscript{58} $A$ would prefer reorganization to liquidation if all of the firm’s assets are available for reorganization, but would prefer liquidation otherwise. Some of the assets are under the effective control of $B$ in that it would be very costly for $A$ to control their disposition. Seizing these assets, let us say, would require officers of $A$ to intrude on $B$’s territory, an invasion that $B$ would forcibly resist. $B$’s bankruptcy law has no provision for reorganizations. $B$ bankruptcies always result in liquidation. In this situation, $B$’s mandatory liquidation rule coupled with its effective control of some of the assets imposes an externality of inefficient scope on $A$ in that $A$, unable to involve all the assets in its reorganization, is driven to adopt its second-best rule, liquidation. The effect is that all of the assets, both those in $B$ and those in $A$, are liquidated.

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

One reason why problems of inefficient scope merit special attention is that the disagreement can easily seem to be over a minor matter from the perspective of one of the states involved. The wrong-law externality may be small relative to the inefficient-scope externality. Consider, again, the bankruptcy hypothetical, except that both $A$ and $B$ think reorganization desirable. Their disagreement is only over particulars. For $A$, it is critical that the headquarters of the reorganized firm be in its territory because it values very much the ability of its courts swiftly to intervene in corporate affairs. In the absence of $A$’s interest, $B$ would place the headquarters of the reorganized firm in its own territory, but $B$ cares much less about the location of the headquarters than about there being a successful reorganization. There is an externality of inefficient scope imposed on $B$ if $A$ moves to liquidation instead of enforcing $B$’s decision on placement of the headquarters, and this externality far exceeds the wrong-law

\textsuperscript{58} I thank Professor Andrew Guzman for suggesting this example. \textit{See also} Robert K. Rasmussen, \textit{A New Approach to Transnational Insolvencies}, 19 Mich. J. Int’l L. 1, 18 (1997) ("A successful reorganization depends on keeping assets spread across various countries in the firm.").
externality that would have been imposed had the outcome been reorganization, but with the headquarters in A’s territory.

In situations like this, nationalist states should cut a deal: the state for which the location decision is minor (B) should defer to the state for which it is major (and which therefore blocks reorganization in cases where the location decision is wrongly made, forcing liquidation) (A), or pay the state for which it is major an amount that makes that state neutral between accepting the wrong location decision plus the payment and blocking the reorganization by moving to liquidation. 59

This sort of deal suffers, however, from a variety of complications. Deference may be administratively costly, as where there are lots of apparently minor issues about which one state feels strongly. If one state feels strongly on apparently minor issues 1, 2, and 3, but the other feels strongly on apparently minor issues 4, 5, and 6, one state cannot simply hand over the entire reorganization to the other. The state running the reorganization must understand the other state’s preferences as to those issues it feels strongly about. Conveying this information may be costly because experts in foreign law are costly, and because joint adjudication mechanisms, which would be an alternative to courts of the reorganizing state learning about foreign preferences second-hand, are costly. These costs may be especially large in the context of an apparently minor issue since the importance of the issue for the state for which it is a major issue may be difficult for a legal decision-maker steeped in the view that the issue is minor to grasp: there is a greater likelihood of a cultural barrier to understanding. 60 Payment may also be difficult to arrange because of the cost of placing a monetary value on the wrong decision on an apparently minor issue. In particular, states may dislike the very idea of being bought off in this fashion; as a matter of practice, however, this seems to depend on the subject at issue. 61

Inefficient-scope externalities also include distortions of private behavior caused by limits on the enforcement power of states. For example, a state’s

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

60 Information exchange institutions such as the International Competition Network in the antitrust field are one way of addressing this problem. See generally Blumenthal, supra note 9.

61 For example, selling the right to travel through a nation’s airspace, or to use a nation’s territory as the basis for military operations seems less troublesome than selling the recognition and enforcement of foreign marriages or a more favorable securities regulation regime. Cf. Ward Farnsworth, Do Parties to Nuisance Cases Bargain After Judgment?: A Glimpse Inside the Cathedral, 66 U. Chi. L. Rev. 373, 397–406 (1999) (suggesting explanations for hostility to money transactions over certain rights).
bankruptcy preference for certain sorts of creditors may distort firms' investment decisions in favor of investment in places beyond the reach of the mechanisms by which that state enforces its bankruptcy preference. By investing in such places, the firm is able to shift some of the downside risk of a venture onto its formerly preferred creditor. More generally, consider an asset-protecting state into which private parties can funnel funds to secure them from the enforcement mechanisms of other states. Such a state will attract more assets than will a state that is less protective of private assets, all else equal; the movement of assets into such a state might hurt objectives that look favorably on wealth-maximizing investment. Whether a particular distortion of private behavior is a negative or positive externality of inefficient scope (or of any sort) will depend on the particular objectives with reference to the advancement of which the distortion is assessed: a private distortion may be favorable, of no concern, or unfavorable from the point of view of a legal decision-maker seeking to maximize the attainment of the ends justifying a state’s law. It may be that the distortion of private behavior caused by the asset-protecting state in fact furthers the objectives of another state: protecting the wealth expropriated by its dictatorial masters, for example. In such a case, the distortion would not be a cost of inefficient scope, but rather a service extended by the asset-protecting state.

C. Costs of Sovereignty

To deter (encourage) the imposition of negative (positive) externalities of sovereignty by other states, states can purposefully raise (lower) the cost of externality-creating exercises of sovereignty by imposing costs of sovereignty. The more important the area of imposition to the target state, the costlier will a given imposition be to that state and thus the greater will be the deterrent effect. Often, the best way to discourage imposition of externalities of sovereignty in one area is not to impose costs of sovereignty in the same area, but rather to target an area more important to the target state. If regulating conduct $X$ is most important to state $A$, but regulating conduct $Y$ is most important to state $B$, then $A$ can better deter $B$ from wrongly regulating $X$ by imposing costs on $B$’s regulation of $Y$ than on its regulation of $X$.

In deciding to apply domestic law in the face of a foreign interest, it is improper to focus exclusively on the sacrifice of a state’s own ends as they re-

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62 The example is from Lucian A. Bebchuk & Andrew Guzman, \textit{An Economic Analysis of Transnational Bankruptcies}, 42 J. L. & ECON. 775, 790-93 (1999).

63 \textit{Id}.

late to the area immediately in question. Attention should also be paid to the possibility of advancing domestic ends in other, more important areas, while deferring to the foreign interest immediately at issue. Courts should refuse to enforce punitive damages awards on grounds of public policy whenever, all things considered, that enforcement would undermine the attainment of ends justifying domestic law, even if the particular ends so advanced are unrelated to punitive damages.

1. Externalities of Sovereignty as Imposed Costs

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

2. Legal Impositions

A state’s ordinary legal-judicial proceedings may constitute legal impositions on other states. One type of legal imposition is that resulting from the protection by a state of its jurisdiction over a certain category of conduct. Suppose that states A and B are concurrently interested in regulating some particular private conduct. A can make it more difficult for B to regulate by making it harder for parties to make use of legal remedies provided by B. Most simply, A can deny its aid in enforcing judgments of B. A need not necessarily stop with recognition and enforcement, however. A might grant anti-suit injunctions making a private party liable in its courts if it invokes legal remedies provided by B, or grant anti-anti-suit injunctions, enjoining the pursuit by a private party of an anti-suit injunction in the courts of B.

Denial of recognition and enforcement bars access to assets within the control of the denying state; a state can go further, however, and make the enforcement of a foreign judgment abroad itself domestically actionable. Not

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65 "The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there." Cuba Ry. v. Crosby, 222 U.S. 473, 478 (1912).
66 See, e.g., Yahoo! Inc. v. La ligue Contre le Racisme et l’Antisemitisme, 169 F.Supp.2d 1181 (N.D. Cal. 2001) (denying enforcement to French judgment because of inconsistency with American policies embedded in the First Amendment), rev’d, 379 F.3d 1120 (9th Cir. 2004) (reversed for lack of personal jurisdiction).
67 See generally Schimek, supra note 2; Note, supra note 2.
68 This is called a claw back law. See, e.g., Joseph Griffin, Extraterritoriality in U.S. and E.U. Antitrust Enforcement, 67 ANTITRUST L. J. 159, 197-99 (1999); Daniel K. Tarullo, Norms and
only would a party with a judgment from B be unable to enforce that judgment on assets in A’s effective control, but, if he enforced it by levying on assets in B’s effective control, he would become liable in courts of A for the value of those assets—conversion with sovereign accomplice.

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

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

There are also legal impositions even more clearly substantive than those first considered. A state’s willingness to consider legal outcomes elsewhere in setting its own law can aid or retard the achievement of other states’ regulatory objectives by aiding or retarding the international convergence of substantive law. In order from imposing the most to imposing the least cost, a state might take one of several positions. It might treat foreign legal outcomes as entirely irrelevant. It might treat foreign legal outcomes as useful for their reasoning and the light they shed on empirical outcomes under different legal regimes. 69

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rules. Or it might treat the fact that foreign legal systems have arrived at some outcome, say the illegality of capital punishment, as itself a reason to reach that outcome domestically. A state can aid the advancement of the objectives of other states by viewing their legal decisions with more respect.

See generally Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Int’l L. 1103 (2000). The last position might rest on a view that the legal reasoning processes of legal decision-makers are imperfect signals of an objective reality. That is, all legal decision-makers are striving toward the same goal, but each particular decision-maker’s view of the path is blurred. See, e.g., Kersch, *supra* note 27, at 7 (“Advocates of judicial globalization have defended the process on the ground[] of . . . moral universalism.”); Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Int’l L. 1103, 1124 (2000) (judicial globalization “requires recognition of participation in a common judicial enterprise, independent of the content and constraints of specific national and international legal systems.”). Under these circumstances, the fact that many other legal decision-makers see the path as extending in a certain way is evidence that the path does extend that way since the probability that their vision has led them all on the same wrong path is less than the probability that their vision has led them all on the same correct path. If everyone thinks this way, however, there is a substantial risk that an initial wrong decision by one or several legal decision-makers will cascade into a series of wrong decisions by all observers. See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 Stan. L. Rev. 683, 761-68 (1999); cf. Lawrence v. Tex., 539 U.S. 558, 572-73 (2003) (Kennedy, J.) (citing European Court of Human Rights decision in *Dudgeon v. United Kingdom* as evidence of “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex,” striking down criminalization of homosexual sodomy); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948-50 (Mass. 2003) (citing *Lawrence* in opinion holding denial of marriage licenses to homosexuals violates Massachusetts constitution). If the doctrine of precedent involves balancing efficiency (in not reconsidering issues) and predictability against the risk of perpetuating wrong decisions, the balance must shift when decisions more likely to be wrong are considered.

In certain political regimes, citation of and reliance on foreign decisions may actually make judicial claims to power appear more legitimate; Kersch, *supra* note 27, at 6 (“For judges in nations that were not so long ago living in isolation and tyranny, drawing a demonstrable connection to a worldwide project involving a movement toward ‘global governance’ became a key source of judicial legitimacy. For them, put otherwise, the process of ‘judicial globalization’ was itself the *sine qua non* of the construction of judicial legitimacy.”).
3. Political Impositions

Finally, states have access to political impositions. These are distinguished from legal impositions only in that they are more traditionally political-executive than legal-judicial. They include, for example, a state’s law regarding complex cooperation in regulatory investigation and enforcement; the application of diplomatic pressure; trade sanctions such as tariffs, special preferences, bans, and blockades; the granting or withholding of aid, whether it be financial, in the nature of training or other services, or goods such as medicine or food; and, ultimately, the application of military force.\(^{72}\)

The precise location of the border between legal and political impositions—is withholding cooperation on antitrust investigations a legal or a political imposition?—is arbitrary. On the political side of the line is the territory of the international-relations specialists. In this literature, the realists are closest to my own view, although much of the realist work in international-relations theory purports to be positive.\(^{73}\)

The nationalist theory is not that realism is an accurate description of the world, particularly in the realm of legal impositions, where the special forms and curious formalities of the law more than occasionally outweigh pragmatic considerations,\(^{74}\) but rather that behavior in accord with realist predictions is normatively desirable for legal decision-makers setting private international law.\(^{75}\) In any event, there is nothing particularly legal about the political impositions—noting their presence as potential costs of sovereignty suffices.

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\(^{72}\) See, e.g., Trimble supra note 37, at 706-07.

\(^{73}\) In the legal literature, see, for example, Jack L. Goldsmith & Eric A. Posner, A Theory of Customary International Law, 66 U. CHI. L. REV. 1113, 1113 (1999) (arguing that customary international law results merely from the coincidence of interests of the states involved and lacks any further binding authority, for example, moral); Jack L. Goldsmith & Eric A. Posner, Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective, 31 J. LEG. STUD. 115, 115 (2002) (replying to arguments that states’ use of moral and legal rhetoric is evidence to the contrary); Eric A. Posner, Do States Have a Moral Obligation to Obey International Law?, 55 STAN. L. REV. 1901, 1902 (2003) (no). Compare Jack L. Goldsmith, Liberal Democracy and Constitutional Duty, 55 STAN. L. REV. 1667, 1667 (2003) (the design of liberal democracies makes it difficult to sacrifice national welfare), with Casey B. Mulligan, Ricard Gil & Xavier Sala-i-Martin, Do Democracies Have Different Public Policies than Nondemocracies?, 18 J. ECON. PERSP. 51, 52 (2004) (“democratic institutions have important effects on the degree of competition for public office, but otherwise have effects on public policies that are insignificant”).

\(^{74}\) Cf. Charles Fried, The Artificial Reason of the Law or: What Lawyers Know, 60 TEX. L. REV. 35, 35-38 (1981) (carving law off from the “big picture” disciplines of moral philosophy and that branch of it which passes under the name of normative economics); Goodman & Jinks, supra note 10, at 1752-53 (global legal norms shape state behavior). I think the argument of Goodman and Jinks is more plausible in the context of juridical than of political sanctions, since pragmatics will generally be clearer in the latter than in the former.

\(^{75}\) Again, however, I should emphasize that I take no position on the substantive ends that ought to underlie a state’s law, whereas some forms of international-relations realism take or recommend that those ends be the maximization of a state’s “power” or international influence.
This Part identifies four paradigm positions that a nationalist state might adopt in setting its private international law of jurisdiction and choice of law. For each such position, it identifies examples of actual states that have adopted similar positions in specific doctrinal areas. The aim is to give a sense of nationalism's application, although still at a high level of generality. Specific doctrinal applications must await further work in the field.

A. Scales of Sovereignty

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

More precisely, a state's private international law is an object in an abstract, multidimensional sovereignty space. The multiple dimensions represent different aspects of private international law, for example, jurisdiction, choice of law, and the enforcement of judgments, or the sets of facts on which these three depend. Each dimension is a scale with many possible values. A choice-of-law rule might point to a foreign state's rule, some commonly developed substantive law, a domestic law specially tailored to compromise ordinary domestic objectives somewhat in light of the regulatory interests of other states, or simply the ordinary rule applied in entirely domestic cases. Similarly, a jurisdictional rule might assign a case to a foreign court, to some international or private tribunal, or to domestic courts; and all of the above might be exclusive or available by

My normative framework transcends the issue of what ends a state ought to pursue and of what ends ought to underlie its law.

Sovereignty space is similar to the law space of Davids Johnson and Post. See David R. Johnson & David Post, Law and Borders—The Rise of Law in Cyberspace, 48 STAN. L. REV. 1367, 1368 (1995). They write:

There has until now been a general correspondence between borders drawn in physical space (between nation states or other political entities) and borders in "law space." For example, if we were to superimpose a "law map" (delineating areas where different rules apply to particular behaviors) onto a political map of the world, the two maps would overlap to a significant degree, with clusters of homogeneous applicable law and legal institutions fitting within existing physical borders.

Id.

See von Mehren, supra note 45, at 347.
election of the parties. In general, the more numerous are the dimensions necessary to fully represent a state’s private international law, the more particularistic are its determinations as to when a state should make claims to sovereignty.

Nationalist legal decision-makers set private-international-law rules so as best to attain the ends justifying the law of the state they serve, keeping in mind that regulation of conduct in which other states are interested may result in costs of sovereignty. The following Subparts identify four paradigm positions, objects in sovereignty space that a nationalist legal decision-maker might adopt. For each such position, they identify considerations that might move a nationalist legal decision-maker to adopt it and situations in which actual states have adopted similar positions. I obtain the paradigm positions by moving along the dimensions of jurisdiction and choice of law. Occasionally this obscures the distinct positions a legal decision-maker might adopt by extending or limiting claims to sovereignty along other dimensions of sovereignty space.

B. Domestic Jurisdiction and Domestic Law

Least internationalist of the paradigm positions is a claim to domestic jurisdiction and the application of domestic law. The actual severity of this type of claim depends on how vigorously it is enforced. Least severe is simply to accept jurisdiction when cases come before the court and to apply domestic law in those cases. More severe is to refuse to enforce foreign judgments on the ground that foreign courts lack jurisdiction or to refuse to enforce those judgments to the degree that they differ from those that would result under domestic law. Still more severe is to enjoin, at the instance of a party, the pursuit of foreign legal remedies, with the injunction backed up by fines or criminal penalties. Most severe is to criminalize the pursuit by any person of foreign legal remedies, with enforcement by the normal criminal complex—in the United States, police, district attorneys, grand juries, criminal trials and prisons.

More severe domestic-jurisdiction, domestic-law positions cross the line into public international law. The American invasion of Iraq in response to its imposition of costs of wrong law (failure to deter terrorist groups, say by penalties, indoctrination, or education) is an extreme example of a claim to domestic jurisdiction and domestic law. Another example is the American Servicemembers’ Protection Act of 2002 (ASPA), which adopts a fairly stiff domestic-jurisdiction, domestic-law position as against the International Criminal Court (ICC). The congressional findings in ASPA declare that “[t]he United States will not recognize the jurisdiction of the International Criminal Court over

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United States nationals,"80 that "[m]embers of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court,"81 and that "[t]he United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by the International Criminal Court."82 To back up this claim, ASPA bars any “agency or entity of the United States Government or of any State or local government, including any court”83 from, among other things, cooperating with formal ICC requests for cooperation,84 extraditing persons to the ICC for trial,85 sharing certain classified information with the ICC,86 and using congressionally appropriated funds to support the ICC.87 Further, ASPA forbids the participation of American troops in United Nations peacekeeping operations without guarantees that they will not be subject to ICC jurisdiction,88 prohibits American military assistance to states participating in the ICC (with exceptions for certain allies),89 and authorizes the use of “all means necessary and appropriate” to recover Americans subjected to ICC jurisdiction.90

Still another example of an area in which states make claims to domestic jurisdiction and domestic law is the recognition of marriages for purpose of civil benefits, criminal prohibitions (e.g. on bigamy or adultery), and divorce.91 In the United States, the Full Faith and Credit Clause92 has been interpreted to afford states virtual carte blanche in declining to recognize foreign marriages as

81 Id. at § 2002(8).
82 Id.
83 22 U.S.C. § 7423(e). Other provisions use slightly different language, but the differences are minor for our purposes here.
84 Id. at § 7423(b).
85 Id. at § 7423(d).
86 Id. at § 7425(a).
87 Id. at § 7423(f).
88 Id. at § 7424. There is an exception for participation certified by the President as in “the national interests of the United States.” Id. at § 7424(b)-(c).
89 Id. at § 7426(b).
90 Id. at § 7427.
91 On these incidents of marriage, see, for example, Opinions of the Justices to the Senate, 802 N.E.2d 565, 565 (Mass. 2004) (Cordy, J.) (advisory opinion on legislative proposal of civil unions in response to Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948-50 (Mass. 2003) (denying marriage to same-sex couples violates Massachusetts constitution)).
92 “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. CONST. art. IV § 1.
contrary to public policy.\textsuperscript{93} The recent authorization by Vermont of same-sex civil unions\textsuperscript{94} and the recent decisions by the Supreme Judicial Court of Massachusetts requiring that state to permit same-sex marriages\textsuperscript{95} are placing new pressure on the use of public policy to deny recognition of foreign marriages valid where entered into.

Over 35 states have passed Defense of Marriage Acts (DOMAs) announcing their intent not to recognize foreign same-sex marriages.\textsuperscript{96} Courts in Georgia\textsuperscript{97} and Connecticut,\textsuperscript{98} interpreting the body of their state law pertaining to marriage, have denied recognition to Vermont same-sex domestic partnerships on public-policy grounds.\textsuperscript{99} It is likely that the DOMA states will follow suit and unlikely that there will be any constitutional bar to their so doing. (Even if there were a constitutional bar, what I am interested in here is a state's adoption of a domestic-jurisdiction, domestic-law policy, not the acceptability of that policy under federal or other higher standards.) States have often refused to recognize immoral—polygamous, incestuous, juvenile, &c.—marriages.\textsuperscript{100}

\textsuperscript{93} See, e.g., Sun Oil Co. v. Wortman, 486 U.S. 717, 717 (1988); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302, 302 (1981); Jack L. Goldsmith, Against Cyberanarchy, 65 U. CHI. L. REV. 1199 (1998) ("In practice, this standard is notoriously easy to satisfy."). It is important to distinguish the choice-of-law issue (whether to recognize as married a couple married elsewhere) from the enforcement-of-judgments issue (whether to honor a foreign judgment premised on a couple's marriage). States are not permitted to decline enforcement of judgments as contrary to public policy under the federal statute implementing the Full Faith and Credit Clause. See generally Ralph U. Whitten, Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns, 2001 BYU L. REV. 1235 (including a discussion of these and other cases).


\textsuperscript{95} See Goodridge, 798 N.E.2d at 948-50; Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (holding same-sex civil unions insufficient).

\textsuperscript{96} These are modeled on the federal DOMA, passed in response to Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (state failure to recognize same-sex marriages was sex discrimination under state constitution) (mooted by HAW. CONST. art. I, § 23 (2003) limiting marriage to opposite sex couples). The federal DOMA provides that "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding . . . respecting a relationship between persons of the same sex that is treated as a marriage . . ." 28 U.S.C. § 1738C (2004).


\textsuperscript{98} Rosengarten v. Downes, 802 A.2d 170, 170-75 (Conn. App. 2002).


The same-sex issue is merely the latest focus in a long tradition of state claims to domestic jurisdiction and domestic law in this area of the law of persons.\(^{101}\)

A firm domestic-jurisdiction, domestic-law position often imposes the greatest externalities of sovereignty on other states relative to the other paradigm positions. When the United States undermines participation in the ICC, it undermines the objectives of those states that want to see a regularized international adjudication mechanism for war crimes. When Texas refuses to honor Massachusetts' same-sex marriages, it undermines the objective of protecting homosexuals from the harm that flows from treatment as an outlaw class.\(^{102}\)

(assuming, of course, that this is in fact an objective underlying the law of Massachusetts; that is, either that Goodridge made it that way, or that Goodridge was correctly decided in a more traditional sense.)

It is sensible to adopt a domestic-jurisdiction, domestic-law position only when the gain from so doing in terms of the advancement of the ends justifying domestic law is great, or the ability of the other states affected to respond is small. The first justification holds when the subject matter is very important in terms of domestic objectives, and the alternative (deference to international or foreign law or to an international or foreign dispute-resolution mechanism) is quite different from the domestic rule. Some of the alternatives in the ICC and same-sex marriage examples are easy to see: the United States could defer to the ICC and Texas could recognize Massachusetts' same-sex marriages. But intermediate alternatives are also possible: recognizing ICC jurisdiction for very serious violations of international law (ius cogens or some further subset) and recognizing Massachusetts same-sex marriages for some purposes (wrongful death standing), but not others (divorce, alimony, adoption).\(^{103}\)

The less important is the subject and the less difference being obstinate makes, the less is gained by so acting. Where fine gradations are possible, claims to domestic jurisdiction and domestic law should generally be limited to the areas most important to a state and in which its substantive stance is furthest from those of other interested states.

C. **International Jurisdiction and Domestic Law**

The second paradigm position concedes jurisdiction to an international body on condition or on the understanding that it will apply domestic law. Again, this can be done with different levels of firmness. The international dis-

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\(^{101}\) *Cf.* Scott v. Sandford, 60 U.S. 393, 405-07 (1857) (chattel slave not a United States citizen for purposes of federal jurisdiction).


\(^{103}\) *See*, e.g., *Langan*, 765 N.Y.S.2d at 449 (recognizing Vermont same-sex civil union for purposes of New York wrongful-death statute).
pute-resolution body might be the court of a foreign state, the court of a federal entity with regulatory authority over other matters, or a genuinely international court not attached to any federal entity with a more general purpose. The constraint of domestic law can vary in tightness, and the mode by which that constraint is enforced can vary in severity. The domestic-law constraint would be very tight if the dispute-resolution body were tied to explicit, authoritative declarations of domestic law made by domestic institutions. It would be less tight if it were merely a requirement that the outcome not be an outrageous interpretation of domestic legal materials. The mode of enforcement would be less severe if it were simply a practice or a matter of fidelity to federal or international law on the part of the dispute-resolution body. It would be more severe if it involved the nullification by domestic institutions of decisions falsely purporting to apply domestic law. The greater the stringency with which such a nullification procedure is applied, the less the degree in fact of the jurisdictional delegation to the international dispute-resolution body. In the limit, domestic institutions would simply be engaging in plenary review.

The American law of federalism presents some nice examples of states taking a position like this on the scale of sovereignty. Consider the authority of the federal courts under Erie Railway Co. v. Tompkins.\(^{104}\) Erie holds that the grant of diversity jurisdiction, unlike, say, the grant of jurisdiction over suits between states, is not a grant of federal common-lawmaking power.\(^{105}\) In the absence of that power, federal courts must turn to state law for rules of decision. The constitution so-interpreted is a decision by states (albeit one bundled with the decision to accept a variety of other rights and responsibilities as against other states) to cede jurisdiction in certain cases in which nonstate jurisdiction might be thought desirable, without also ceding their right to determine the applicable regulatory rules. This reservation is strengthened by the doctrine of Murdock v. City of Memphis,\(^{106}\) which obliges the federal courts to obey authoritative state constructions of state law rather than construing that law independently. Murdock has the effect of tightening the constraint that the reservation by states of the right to set the law imposes on federal courts.

Weaker claims of international jurisdiction and domestic law are possible under the New York Convention.\(^{107}\) The New York Convention obliges parties to it to honor arbitral judgments rendered abroad, but preserves the applicability of domestic law with respect to arbitrability and when enforcement


\(^{106}\) 87 U.S. 590, 592 (1874).

"would be contrary to ... public policy." Although states such as the United States have exercised this authority sparingly in recent years, it does provide room for them to take the position that arbitrations in certain subject areas will be enforced only if undertaken in accordance with United States law. That would be a claim to international jurisdiction and domestic law.

The United States has refused to enforce arbitral awards when the contract to arbitrate is invalid under United States law (and the connection of the parties to the United States justifies subjecting their contract to that law). That is a delegation of international jurisdiction (to decide on the validity of the contract), but only under domestic law (a restriction backed by denial of recognition and enforcement). The larger are the areas subject to review for compliance with domestic law, the closer a position of international jurisdiction and domestic law slips toward one of domestic jurisdiction and domestic law.

An internationalist position on jurisdiction coupled with an insistence on domestic law can be particularly useful when other states are more concerned about the dispute-resolution institutions of a state than about its law, and when the areas of domestic law on which the state wishes to insist are relatively narrow and do not require processes unique to domestic dispute-resolution institutions. The first would be true when the concern of other states is with the particularity of decision-making institutions—the old justification for diversity jurisdiction; when the concern of other states is with the competence, sophistication, or speed of decision-making institutions—the courts of third-world countries, or notoriously slow Italy; or, more generally, when the concern is that dispute-resolution institutions will not apply the law in force. The second would be true when domestic issues are likely to arise as small parts of large cases: the issue of the validity of an arbitration clause in a complex commercial arbitration, for example; it would not be true when domestic decision-making institutions are charged with the protection of the interests of third parties, of whose interests arbitrators who receive their business from the parties might be insufficiently protective—think of incompetent class members or the general public.

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109 See, e.g., Christine Davitz, U.S. Supreme Court Subordinates Enforcement of Regulatory Statutes to Enforcement of Arbitration Agreements: From the Bremen’s License to the Sky Reefer’s Edict, 50 Vand. J. Transnat’l L. 59 (1997) (charting the Court’s retreat from substantive scrutiny of arbitral awards).


111 This is aptly termed corruption or an agency cost of decision-making institutions.

112 A similar problem comes up in the context of preservation of issues for appellate review. On one hand, declining to consider issues not preserved below encourages parties to clearly present their contentions in district court. On the other hand, many legal rules are animated not only by concern for the parties, who might then be said to have waved their entitlement to those rules.
D. Domestic Jurisdiction and International Law

The third paradigm position retains domestic jurisdiction, but concedes the applicability of international law. Domestic jurisdiction might be available at the election of the parties, or it might be exclusive of the jurisdiction of foreign and international dispute-resolution bodies. A claim to exclusivity can be defended with various levels of ferocity, from a simple statement of exclusivity to the refusal to enforce judgments rendered by other courts, to the issuance of anti-suit and anti-anti-suit injunctions in defense of jurisdiction, or even to the issuance of writs of prohibition directed at foreign courts and backed by the threat of military enforcement. Similarly, a state can defer entirely or only partially to international law, taking a broad or narrow view of its contents, and accepting all or only part of what it views as international law as trumping contrary domestic law. This can take the place of requiring good evidence of international law: formalized, written agreements as opposed to longstanding custom proven by past statements of officials, diplomatic correspondence, and the like.113

Domestic-jurisdiction, international-law positions are common: for example, the United States’ rejection of the International Criminal Court coupled with its acceptance of its own Alien Tort Claims Act (ATCA),114 which authorizes the application of central norms of international law (ius cogens) by domestic courts,115 amounts, with respect to those central norms, to a concession of the applicability of international law conditioned by a refusal to entrust application of that law to an international dispute-resolution body. There is considerable controversy over how much of international law the ATCA makes applicable in the federal courts. Some argue for a restrained view, restricting it to international law at the time of the ATCA’s passage or current ius cogens, while others argue for an interpretation so broad as to encompass what are ordinarily thought of as purely domestic crimes or the mere taking advantage of a state’s particularly loose labor-law regime.116 The narrower is the interpretation of interna-

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by not pressing them below, but also by concern for nonparties who had no control over the lower-court litigation.


116 See, e.g., Anthony D’Amato, It’s a Bird, It’s a Plane, It’s Jus Cogens!, 6 CONN. J. INT’L L. 1 (1990); Steve Kuan, Alien Tort Claims Act—Classifying Peacetime Rape as an International Human Rights Violation, 22 HOUS. J. INT’L L. 451 (2000) (arguing that ATCA should cover rape); Joshua Ratner, Back to the Future: Why a Return to the Approach of the Filartiga Court is Essential to Preserve the Legitimacy and Potential of the Alien Tort Claims Act, 35 COLUM. J.L. & SOC. PROBS. 83 (2002) (setting out the debate, including citations to cases taking narrower views, and
ational law, the less is the difference between an international law and a domes-
tic-law claim.

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

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

E. International Jurisdiction and International Law

Most internationalist of the paradigm positions is the position that con-
cedes international jurisdiction and the applicability of international law. At its most absolute, it would be a complete abdication of regulatory authority—of sovereignty—in a particular subject area. Such a position can be moderated by increasing the level of domestic scrutiny afforded the international dispute-
resolution body’s decision that a particular dispute falls within its jurisdiction;

or by confining the scope in which the international body is free to select the applicable law. That is, the acceptance of international law may be conditional on that law falling within certain parameters, truly outrageous international law remaining unaccepted. The stricter are these constraints on the scope of delegation, the closer is a particular international-jurisdiction, international-law position to one of the earlier paradigms.

Full-scale internationalist concessions often depart the doctrinal realm of private international law and become reclassified as issues of federalism. The recognition by American states of the Supreme Court’s authority, indeed the authority of the entire federal judiciary, to promulgate and apply federal law, is an example of an international-jurisdiction, international-law position. It is helpful to remember that this authority has not been taken for granted at all times in American history.\footnote{“The U.S. Supreme Court, the European Court of Justice (“ECJ”) duly noted, had helped to nationalize American politics by gradually negotiating away key aspects of the sovereignty of the American states.” Kersh, supra note 27, at 5; see, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (permitting Congress to apply wage-and-hour restrictions of the Federal Labor Standards Act to state officers); Wickard v. Filburn, 317 U.S. 111 (1942) (Congress may regulate intrastate economic activity that, in the aggregate, substantially affects interstate commerce—here, growing wheat for domestic consumption.). But see United States v. Morrison, 529 U.S. 598 (2000) (Rehnquist, C.J.) (striking down Violence Against Women Act as beyond commerce power); Alden v. Maine., 527 U.S. 706 (1999) (Kennedy, J.) (state sovereign immunity applies in state court); Idaho v. Coeur d’Alene Tribe, 521 U.S. 261 (1997) (Kennedy, J.) (sovereign immunity bars even prospective relief affecting critical aspect of state sovereignty—here, sovereignty over certain lands); City of Boerne v. Flores, 521 U.S. 507 (1997) (Kennedy, J.) (under § 5 of the Fourteenth Amendment, enforcement legislation must be congruent to the constitutionally guaranteed right and proportional to the violations of that right by the states); Printz v. United States, 521 U.S. 898 (1997) (Scalia, J.) (Congress may not commandeer officers of state executive to enforce federal law—here, background-check provisions from Brady Handgun Violence Prevention Act); Seminole Tribe of Fla. v. Fla., 517 U.S. 44 (1996) (Rehnquist, C.J.) (Congress may not abrogate sovereign immunity using its commerce power); United States v. Lopez, 514 U.S. 549 (1995) (Rehnquist, C.J.) (striking down Gun-Free School Zones Act as beyond commerce power); N.Y. v. United States, 505 U.S. 144 (1992) (O’Connor, J.) (Congress may not compel state legislature or other lawmaking body to enact federal regulation, here taking title to certain radioactive waste).}

\footnote{Cooper v. Aaron, 358 U.S. 1 (1958). “[T]his case . . . raises questions of the highest importance . . . . It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court’s considered interpretation of the United States Constitution. We reject these contentions.” Id. Under the duress of superior forces—the federal military—Arkansas and the rest of the Southern states again conceded jurisdiction and lawmaking authority in this area to the federal courts.}
scale internationalist concessions may be so longstanding as to feel inevitable: for example, a state’s decision not to interfere with another state’s resolution of purely domestic disputes despite the first state’s generalized interest in doing justice.119

An international-jurisdiction, international-law position is desirable when other states are very interested in regulating certain conduct and likely to back that interest up in ways that would be particularly harmful. Threats of military force, as in the case of disobedient American states, or their absence, as in the stance of the United States and Europe on military intervention to prevent human-rights abuses in North Korea or China, often weigh heavily in the adoption or rejection of full-scale internationalist positions.

V. OBJECTIONS TO NATIONALISM

Objections to nationalism come in three flavors.120 First and most frequently put are objections to the idea of the ends justifying domestic law, which nationalism holds legal decision-makers ought to serve. Second and third are two varieties of internationalism. The first of these argues that nationalism encourages judges to overlook important internationalist interests that would be important even on a nationalist calculus, properly done. The second argues that nationalism is unsound as a moral-philosophical matter; that its view of states operating in a state of nature is unsound; that the moral duties of man to man conduct to judges and other legal decision-makers through the political processes that authorize them to exercise power over others. This Part addresses each of these three principal objections.

A. "The Ends Justifying Domestic Law"

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

119 Such generalized interests are not at all uncommon. Consider the taste of many in the United States and Western Europe for the avoidance of human-rights violations on nonstrategic grounds in parts of the world no matter how distant or divorced from matters of immediate concern, such as petroleum prices.

120 I am particularly indebted in this Part to participants in seminars at Harvard Law School, workshops at the Berkman Center for Internet & Society, and the Harvard Law & Economics Lunch Group.
Judges deciding cases in which objectives conflict implicitly prioritize or weigh those objectives against each other. Where policy \( A \) suggests outcome \( X \), but policies \( B \) and \( C \) suggest outcome \( Y \), the judge's arrival at \( X \) implies that \( A \) either is prioritized or else outweighs \( B \) and \( C \). Because cases frequently involve conflicting objectives, Bart's objection is not special to private international law. In purely domestic cases, judges are obliged to assign weights, at least implicitly, to competing policy considerations. Together, these competing policies and their relative weights define a function that maps the policies involved in fact situations to corresponding legal outcomes.

The justification of this law function depends on the justificatory institutions—like legislatures, elections, filibusters, and life tenure—that support the political processes from which these policies and their relative weights emerge. This function, so justified, is what I mean by the ends justifying domestic law, the attainment of which nationalist legal decision-makers, in private international law and elsewhere, are duty-bound to maximize.\(^{121}\)

Nationalism demands of the legal decision-making system that it pursue the ends justifying domestic law. Having each legal decision-maker independently work upward to a crisp statement of the ends justifying domestic law by examining, prioritizing, and weighing conflicting policies; then take that crisp statement and descend through successively more specific policies down to the facts of the case to determine what outcome best advances the crisp statement up top is not the best way for the legal decision-making system to do this. Limits on the time, dedication, and intellectual capacity of actual legal decision-makers make it more effective for the system if particular legal decision-makers localize their efforts.

Judges might consider only the policies directly in play in the case at bar and give weight to earlier resolutions of conflicts among policies rather than undertake that work directly and thereby incur the risk of error such an effort entails.\(^{122}\) The judicial system might be set up such that fundamental conflicts of policies, or conflicts discovered, by the failure of other legal decision-makers consistently to resolve them, to be difficult to resolve, are decided by the best interpreters or by legal decision-makers specializing in the unification, by prioritizing and weighing, of conflicting policies at a high level. When policies that require swift, flexible, and ad hoc adjustment of outcomes are involved in the

\(^{121}\) In cases in which one or another policy controls, we can think of this function as a surface lying in however-many-policies-there-are dimensional space. For example, when there are two competing policies, the weighing or prioritizing of one against the other defines a line in two-dimensional space that separates the points (policy balances) at which one policy wins out from the points at which the other does. When the policies both contribute to an outcome, we get a mapping from policy space to outcome objects in however-many-characteristics-there-are-of-outcomes-dimensional outcome space.

\(^{122}\) In Professor Sunstein's words, it is not necessary that judges in every case make a complete conceptual ascent, only that the legal system aim at what such an ascent would reveal. Cass Sunstein, supra note 34, at 786; see also Ronald Dworkin, Does Law Have a Function? A Comment on the Two-Level Theory of Decision, 74 YALE L.J. 640, 646–47 (1964).
conflict, the assignment of the resolution may be not to judges at all, but to officers of the executive: the president, his secretaries, generals and commissioners.\textsuperscript{123} Nationalism as a statement of the ends legal decision-makers should serve does not assume a particular structure of the legal decision-making system.\textsuperscript{124} Objections based on the incapacities of a particular structure are not objections to nationalism.

“All well and good,” Bartholomew might say, “but we know that in fact it doesn’t work that way. Statutes are not enacted as the best expression of past institutional history blah blah blibbity blah;\textsuperscript{125} rather, they reflect some balance between the moneyed interests, popular movements, and legislators’ oft-overwhelmed senses of civic duty. Even if the various legal outputs of a state can be woven together, even if they must, at least implicitly, be woven together in deciding particular cases, if they are not meant to be woven together, then why ought legal decision-makers, in private international law or elsewhere, concern themselves with so doing?”

\textsuperscript{123} See, e.g., Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 375 n.9 (2000) (citing considerations of flexibility advanced by proponents of bill giving President authority over sanctions against Burma); Ye v. Zemin, 383 F.3d 620, 627 (7th Cir. 2004) (“The determination to grant (or not grant) immunity can have significant implications for this country’s relationship with other nations. A court is ill-prepared to assess these implications and resolve the competing concerns the Executive Branch is faced with in determining whether to immunize a head of state.”); Spacil v. Crowe, 489 F.2d 614, 619 (5th Cir. 1974) (“[I]n the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves.”); Bradley & Goldsmith, supra note 37, at 352; Trimble, supra note 37, at 706-07. Cf. Lea Brilmayer, The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal, 50 LAW & CONTEMP. PROBS. 11, 20-21 (1987) (arguing judicial ineptitude at considering “general concerns” such as comity).

\textsuperscript{124} The primacy of legislatures in a political system says nothing about the desirability of placing private-international-law decisions in their hands. We might accept that legislatures have authority to identify the ends justifying domestic law—promoting competition with the antitrust law or what not—and yet maintain that to determine how these ends are best advanced in the face of the Fact of Overlap, the legislature is not the most competent institution. But see Lea Brilmayer, Governmental Interest Analysis: A House Without Foundations, 46 OHIO ST. L.J. 459, 468 (1985). Professor Brilmayer finds something upsetting about urging courts to defer to legislatively defined ends while telling legislators how to set private international law. Oughtn’t deference to encompass private international law too? This argument is not well put against nationalism, however, because the binding nationalism requires of legal decision-makers to the ends justifying law applies to all legal decision-makers, including legislators. Fidelity to law is not the same as judicial restraint. But see Martin S. Flaherty, The Future and Past of U.S. Foreign Relations Law, LAW & CONTEMP. PROBS. (forthcoming 2004), available at http://ssrn.com/abstract=600679 at 15 (“To [nationalism’s critics], [nationalism’s proponents] merely serve up Federalist Society dogma up one level on the international plane, mainly on the supposition that keeping things local, rather than international, and presidential, rather than Congressional and judicial, will serve a particular political agenda.”); Trimble, supra note 37, at 684 (nationalism may incidentally restrict the power of the judiciary).

\textsuperscript{125} Cf. Inca Mummy Girl, 2 BUFFY THE VAMPIRE SLAYER 4 (1997) (“Slaying entails certain sacrifices blah blah blibbity blah, I’m so stuffy give me a scone.”).
One answer with which I am sympathetic is that legal decision-makers should concern themselves with the coherence of law because this coherence, or at least the effort of the system toward it, provides some of the justificatory force of law. Law binds, in part, because it is principled; because it is not the ad hoc exercise of power, policy A winning here against B and C not because of priority or weight attached to it itself, but merely because of priority or weight attached to it here, in this case, by this decision-maker. Stated this way, coherence is part of the rule of law: the independence of the judgments, the trade-offs, made by the law from certain situational features like the identities of the decision-maker or the parties, their wealth, or their present popularity. The search for legal coherence—for the ends justifying domestic law—is thus a contribution of legal decision-makers to the justification of law; a part of their competitive strategy against other normative sources, like economics, media, the church, and the charismatic leader.

Further along this line is the point that what Congress ought to do is independent of what it actually does. That legislators often err, succumbing to the moneyed interests or to the manufacturers of popular hysteria, is no objection to the normative claim that they ought to be maximizing the attainment of the ends justifying domestic law. It does raise the question, however, how subsidiary legal decision-makers ought to treat norms generated by processes other than pursuit of the ends justifying domestic law: the question, is extraconstitutional law unconstitutional? One response is to declare extraconstitutional law, law not motivated by coherent considerations, unconstitutional forthrightly. Another is to minimize the effect of that law, for example as “in derogation of the common law,” or in silence; and yet another is to take what the law actually does, the words of the enactment, and to include them as though they were the sincere product of a search for the ends justifying domestic law, to treat them as evidence of those ends. On the premise that legislators mainly err, the last is a noble lie. Subsidiary legal decision-makers might accept it for the justificatory power it lends the law. To trump outright legislative statements on the grounds of their motivation by the moneyed interests, popular hysteria or simple horse-trading might undermine too much the (illusion, myth, or perception of) democracy on which subsidiary legal decision-makers rely.

A second response is more forgiving of the legislative behavior that so upsets Bartholomew. The justificatory force of law may lie not in the complicated preservation of an illusion that legal decision-makers strive for coherence, but rather in the ability of all sorts of people, all sorts of policies, now and again to have the benefit of an ad hoc decision. The system in any particular case isn’t fair, but on balance it all works out. In performing the prioritizing and balanc-


127 I thank Charles Nesson for the notion of competition among normative sources.

128 Some might say, “Too often, vice versa.”
ing of conflicting policies, instead of the overriding policy of coherence, there is the overriding policy of fundamental fairness in the process. But substituting even distribution of ad hoc outcomes for reflection of a coherent system in each individual case doesn’t undermine the concept of the ends justifying domestic law. The difference is simply that what would have appeared to be inconsistent outcomes between policies in different cases on the coherence view are, on this view, consistent because of the addition of the further policy in back of even distribution of ad hoc outcomes.

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

Bartholomew, never at a loss for words, however, might press on: “That sounds a little fishy, but I’m willing to accept that there’s something different between domestic and foreign ends. Often, however, domestic ends include foreign-oriented behavior: sending AIDS drugs to Africa or ensuring that Chinese peasants don’t starve. Doesn’t nationalism foreclose these ends?”

No, it does not. To the extent that internationalist concessions are among the ends or are rightly derived from the ends justifying domestic law, nationalism commands that legal decision-makers pursue them. Nationalism’s quarrel is with the judge who writes, “After a careful survey of our law and institutional practice, I conclude that the ends justifying our antitrust laws mandate their application extraterritorially to this case; but such application would invade the sovereignty of another state, which we lack power to do,” not with the judge who honestly concludes, “After a careful survey of our law and institutional practice, which manifests a concern for the freedom of other nations to regulate themselves, I conclude that although some of the ends justifying our antitrust laws suggest their application extraterritorially in this case, on balance those ends mandate restraint.”

Neither does nationalism have a quarrel with persons who agree that the ends justifying domestic law do not presently warrant

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129 Professor Dworkin’s critique of the assumption of a function for law, for example, is not apposite against nationalism because its use here is only to distinguish national ends from foreign ends; not to aid legal decision-makers in determining those national ends. See Dworkin, supra note 122, at 644.

130 Nationalism does not merely require legal decision-makers or opposing commentators to state their conclusions using magic language. There is a difference between according internationalist concessions the weight they deserve as a domestic matter, and according them independent weight as against the whole sum of domestic interests.
certain internationalist concessions but argue that those ends ought to be different. Nationalism has nothing to say about what the ends justifying domestic law should be; it merely insists that there are not other, trumping ends in private international law.\footnote{See, e.g., Bradley \& Goldsmith, Customary International Law, supra note 30, at 844, 857-59, 868, 874 (complaining about the elevation of norms with extraconstitutional origins, to the detriment of domestic law and domestic political institutions).}

Some of the traditional private-international-law policies are more likely to be included in the ends justifying domestic law than others: think of predictability as against global welfare maximization. If global welfare maximization were the end justifying domestic law, we would expect to see it manifested not only in private international law, but also in antitrust and intellectual property.\footnote{On my broad definition of private international law, those aspects of antitrust and intellectual property that intrude on the regulatory interests of other states are within private international law. But other commentators do not use so broad a definition. Consequently, when a theory is offered for, say, choice of law only, we may rightly ask why only choice of law and not the aspects of private international law more often treated under substantive headings.}

Still, the forthright arguer for change might justify treating private international law as though internationalist trumping ends did exist with an argument that change in the whole of the law should begin with private international law. Arguments for this view based on the low profile of private international law—"let's meddle here because we can get away with it"—seem ungentlemanly.

B. Second-Order Internationalism

"Perhaps in theory it all works out," Bartholomew might continue, "but in practice, if you hook judges and other legal decision-makers on nationalism, they will refuse to make internationalist concessions that would be justified on your 'enlightened' nationalist theory. Before refusing to make an internationalist concession, an enlightened nationalist would consider the possibility of reciprocity, for example a reciprocal withholding of jurisdiction in a case where the dominant interests are reversed; of reciprocity in other areas, for example cooperation in disclosure of bank holdings in exchange for cooperation in extradition of war criminals; and of reciprocity in unforeseen areas, for example cooperation in antitrust investigations in exchange for flyover permission granted in the wake of a terrorist attack sometime in the future. An enlightened nationalist would consider the benefits of an international rule of law, under which concessions are made according to rules, not the shifting power of competing states."\footnote{"Indeed, one might . . . plausibly urge that the prevalence of force—even the threat that it might be used, for whatever reason—makes for international instability, which generally discourages the observance of international law. On the other hand, if force is unavailable, there may be greater disposition to pursue consensus, to develop and maintain law." HENKIN, HOW NATIONS BEHAVE, supra note 55, at 163-64.}

"Where a current concession is exchanged for the expectation of future reciprocity, a regime of mutual trust and credible commitment may develop to
the advantage of many. More than that," Bartholomew might say, "your enlightened nationalist would realize that internationalist concessions could facilitate a beneficial exchange of ideas, a sounder understanding of the policies and interests underlying foreign law, and so a firmer basis for cooperation or even a reconsideration of the ends justifying domestic law. Indeed, enlightened nationalism doesn't seem so different from internationalism. Perhaps cooperation in private international law is necessary scaffolding, a first step toward greater cooperation or political unification. These are things the enlightened nationalist would consider."

"The trouble," Bartholomew might insist, "is that actual legal decision-makers are unavoidably immersed in the domestic legal system. Their absorption of its ends, of its perspective, clouds their view of the benefits of internationalism and makes them unduly stingy in their internationalist concessions."

First, it is not clear that the bias of legal decision-makers is nationalist rather than internationalist. On one hand, there is the cultural immersion Bartholomew identifies; but on the other, there is the insulation of many legal decision-makers—consider United States federal judges—from direct political pressure. Further, great academic energy is devoted to encouraging legal deci-

\[134\] Cf. Nev. v. Hall, 440 U.S. 410, 427 (1979) (Blackmun, J., dissenting) ("[T]he Court's basic and undeniable ruling is that what we have always thought of as a 'sovereign State' is now to be treated in the courts of a sister State, once jurisdiction is obtained, just as any other litigant. I fear the ultimate consequences of that holding, and I suspect that the Court has opened the door to avenues of liability and interstate retaliation that will prove unsettling and upsetting for our federal system.")

\[135\] See, e.g., Brilmayer, supra note 123, at 19 (arguing benefits of sovereignty more apparent to judges than costs, in international context); Lea Brilmayer, Interest Analysis and the Myth of Legislative Intent, 78 Mich. L. Rev. 392, 411 (1979) (arguing for consideration of "system-coordinating values"). As Professor Henkin described British decision-making in the Suez canal incident, "The other 'costs,' e.g., 'world opinion,' the effect on order and stability and on the influence of law, if considered, were probably too intangible and too indeterminate to be given much weight." HENKIN, HOW NATIONS BEHAVE, supra note 55, at 255 n. 1.

It involves some faith to insist that every violation damages the total structure to the detriment of all, or that in a particular case the specific advantages of violation are less weighty than incalculable costs, and the immediate benefits less important than eventual loss. Attitudes which see law observance as being in opposition to national interest inevitably discourage policy-makers from including in the balance any but patent and immediate interests. The policy-maker is even reluctant to consider law observance at some immediate cost if he sees himself as 'sacrificing national interest' to some legal obligation.

\[136\] Compare Goldsmith, supra note 28 (the design of liberal democracies makes it difficult to sacrifice national welfare), with Mulligan et al., supra note 28, at 52 (2004) ("democratic institutions have important effects on the degree of competition for public office, but otherwise have effects on public policies that are insignificant").

\[137\] As Professor Henkin writes:
sion-makers to make internationalist concessions for internationalist reasons. Legal decision-makers are not immune to educational and social pressures imposed by their intellectual peer groups. If the commentary to which legal decision-makers are exposed is biased in favor of internationalism that is a further reason to fear excessive concessions. The magnitude and direction of bias no doubt depend on the particular legal decision-maker in question—judges will have different biases than ambassadors eager to reach a deal or senators facing an upcoming election.

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

C. First-Order Internationalism

Aghast, Bartholomew might object, “No, no, I’m hardly conceding that. My objection to nationalism is deeper than an argument about the bias of decision-makers: nationalism is morally bankrupt and in a way that reveals a gross internal inconsistency. Legal decision-makers’ obligation to advance the ends justifying domestic law rests on the justificatory characteristics of the political system in place; that is, on the righteousness of its rule of recognition or the legitimacy of its constitution. Nationalism therefore recognizes that citizens of the same state have political-philosophic claims against one another, for example that a law not be applied into which each did not have an opportunity for formal input.”

Every day, legal counsel suppress or modify proposals that are deemed illegal before they reach the level of decision; political officers themselves stifle or fail even to think of measures which they know would probably be unlawful. In the life of a foreign office it is not uncommon that officers responsible for relations with Country X wish particularly that those relations remain friendly and untroubled; ‘desk officers’ are even known to acquire special sympathies for their ‘clients.’ They would hardly propose policy that would violate law and roil relations, and would resist any such proposal by others. If a political officer were tempted to propose a violation of a norm or treaty, it is highly probable that the proposal would be sent to the office of the legal adviser for clearance, and it would be stopped or modified there.

HENKIN, How Nations Behave, supra note 55, at 47. “Middle-level officers in foreign offices assigned responsibility for activities of international organizations, and often particularly dedicated to their ideals, recommend support for human rights measures.” Id. at 238. One suspects this phenomenon prevails elsewhere, for example in the Civil Rights Division of the United States Department of Justice.
“Nationalism holds, however, that these interpersonal political obligations end at the national border: while legal decision-makers’ binding a citizen is premised on justificatory characteristics of the political process, legal decision-makers’ binding an alien is not. If the need for the justificatory characteristics of the political process in the domestic case has to do with something other than citizenship, for instance simple personhood, then the line between citizen and alien is arbitrary. My objection is that nationalism treats foreigners not merely as noncitizens, but as nonpersons, or anyway as having inexplicably weaker political-philosophic claims to respect than do citizens.”

I agree with Bartholomew that nationalism requires a political-philosophic foundation. It is not itself a way of avoiding questions of that sort; rather, it allows legal decision-makers operating after its adoption to avoid questions of that sort, which are more likely to arise under an internationalist regime. Its defense, therefore, requires at least some initial steps toward such a foundation. As for any moral-philosophic story, the acceptability of this foundation is a matter of personal taste. All that can be done is to write for both sides persuasively, identify consequences and analogies, and urge reflection in the hope that agreement is reached.

Bartholomew’s view, the internationalist view, imagines rights-bearing units—people—that exist antecedently to states and owe political duties to each other by virtue of their common status as people. These duties are not lost when a subset of people band together and, putting in place justificatory political processes, bind themselves together under law. Instead, on the internationalist view, the duties owed by people to each other are conducted by the justificatory political processes up to the legal decision-makers so empowered. Duties to aliens are part of the justification for law’s binding effect on aliens.

The nationalist view has a different initial picture. Although it admits the existence of duty-creating transactions such as taking something in use by another or the accidental causing of harm to another, it views political duties as created by the association of people one with another. When a subset of people band together and put in place justificatory political processes to bind them-

138 That is, I agree with Professor Brilmayer that “the question must be phrased in” terms of “what might count as an adequate justification” for the “exercise [of] coercive authority over [a foreign] individual.” Brilmayer, Interstate Federalism, supra note 7, at 972.

139 Kersch, supra note 27, at 13 (“It is hard not to conclude that many of the discussions of these issues [increased reliance on international sources of law], in their fussing over narrow, technical points, are either deliberately or in their effects, throwing a smokescreen over the profound issues of constitutional self-government that, at bottom, are at stake. [Shifts in emphasis . . . depend on whether the purpose of the [internationalist] argument is to rally the faithful or deflect the opposition.”)

140 See, e.g., Brilmayer, Interstate Federalism, supra note 7, at 972 (“I realize that this way of phrasing the issue leads inevitably into a natural law thicket. The relevant natural law precept is simply that no government is entitled to exercise coercive authority over an individual without adequate political justification.”)
selves under law, there are no duties to nonmembers of the band (aliens) that might conduct themselves up by virtue of the association's founding or the state's constitution. The creation with others of a state, as against non-citizens, is a duty-free transaction. "If I band with you, then I grant you, as part of the deal, special protections against the coercive power of the band; but against others, subject only to the individual-level moral obligations, the band is free to act." This freedom of people from each other is an important basis of the nationalist theory.

Another argument for the internationalist view relies on an analogy between duties created among citizens on the constitution of a state and duties, if any, that exist among states so constituted. It is important at the outset to note an important distinction between the case of cocitizenship within a state and the case of coexistence of states. Many commentators have found appealing the idea that individual merit, for example superior intelligence, strength, or birth, is undeserved, so that its holder is not entitled merely for that reason to whatever fruits it yields in the prevailing socioeconomic system. Differences in the relative power of states, however, may have to do with the quality of their political processes or of the decisions arrived at through those processes, which may be deserved in a way that individual merit is not. There is something odd to the notion that the rights incident to sovereignty do not depend on who it is that erects the new sovereign state and how they do the erecting. In sum, I take Bartholomew's central point, that nationalism requires a moral-philosophic basis just as much as internationalism does. I hope that the clear statement of the nationalist view and this sketch of the responses to the moral-philosophic objections that leap immediately to mind suffices at least to establish nationalism as plausible.

Before proceeding, however, we must deal with the problem of evil law, which all theories that bind legal decision-makers to bodies of law must confront. The standard example in the literature is the judge in Nazi Germany, for whom the correct thing to do is to not carry out Nazi atrocities.\(^{141}\) Reams have been spent on whether this is best called a limitation of Nazi law because of its inconsistency with some higher law so that the judge when he does the right thing is following law; or instead whether it is best to say the judge is violating the law when he does the right thing. I prefer the latter. When a legal decision-maker discovers that the ends justifying his law are evil, he may have a moral obligation to the parties affected by his decision (or to some higher institution) to decide otherwise than by law. Nationalism does not assert that the duty to serve the ends justifying domestic law is absolute; merely that no weightier duty arises simply from the Fact of Overlap.

\(^{141}\) The Hart-Fuller debate used this example. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1957); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1957).
VI. CONNECTIONS AND EXTENSIONS

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

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

As the frequency and intensity of conflicts between state regulatory interests increases, often because technological change expands the geographic impact of conduct, the cost of regulating that conduct increases as well. And if the benefit of regulation is local, it is unlikely to keep pace with this rising cost. If legal decision-makers behave in accord with nationalism, we would expect them to reduce claims to sovereignty in the face of such technological change. The rise of the Internet has this effect on defamatory speech and the business practices of firms selling to customers online; the internationalization of capital flows has this effect on securities regulation and accounting rules; the proliferation of destructive weaponry has this effect on education and indoctrination.

Similarly, as the regulatory ends of states converge—as more and more join the march to freedom—we should see a decrease in claims to sovereignty because the benefits of such claims will have decreased. The growing body of European substantive law should have this effect on the private international law of member states, while the introduction of new and different member states should have the opposite effect. Studies of these sorts of cost- or benefit-altering events are likely the easiest way to test for nationalism in practice.

Also of interest is the connection between certain structures of a state and its adherence to nationalism. Even if nationalism is accepted as an ideal, there remains the problem of allocating authority within a state's lawmaking structure so as to achieve a nationalist private international law. The modern


143 This issue has appeared in the courts. In Hampton v. Mow Sun Wong, for example, Mr. Justice Stevens, writing for the Court, rejected as a rational basis for excluding aliens from the federal civil service "that the broad exclusion may facilitate the President's negotiation of treaties with foreign powers by enabling him to offer employment opportunities to citizens of a given
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corporate-law literature addresses the same basic problem: identifying the control mechanisms that best constrain directors to the pursuit of shareholder wealth. The private-international-law context highlights a lesson that has only recently emerged in the corporate-law literature: that the types of incentives that work, market–financial, social–moral-philosophic, or political, depend on the relative levels of insulation of particular decision-makers from each type of force. A theory of the optimal structure of the state is thus a theory of the optimal deployment of insulation and force.

Finally, it is neat to notice a connection between nationalism and the theory of the firm. Ronald Coase's theory of the firm holds that it expands until the marginal cost of absorbing further factors of production and subjecting them to internal control mechanisms equals the marginal cost of contracting for them on the market. The existence of costs of contracting or transaction costs, and costs of internal organization or agency costs results in an optimal size of the firm. Similarly, in the private-international-law context, nationalism commands states to extend their laws until the marginal costs of sovereignty equal the marginal foregone benefits of sovereignty (the cost of accepting a nondomestic regulation of conduct). Costs and benefits of sovereignty lead to an optimal size of the state in sovereignty space.

B. Sticky Sovereignty and Private-International-Law Technology

Sovereignty is sticky. In the course of regulating target conduct, a state often winds up regulating sideswiped conduct as well. This is undesirable for the regulating state when regulation of target conduct alone better furthers the ends justifying its law than would regulation of both target and sideswiped conduct. Other states might care more about regulation of sideswiped than target

foreign country in exchange for reciprocal concessions, an offer he could not make if those aliens were already eligible for federal jobs.” 426 U.S. 88, 104 (1976). The Court pierced the executive veil, writing, “We may assume with the petitioners that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes; but we are not willing to presume that the Chairman of the Civil Services Commission, or any of the other original defendants, was deliberately fostering an interest so far removed from his normal responsibilities.” Id. at 105.


145 See, e.g., K.A.D. Camara, Classifying Institutional Investors, 30 J. CORP. L. — (forthcoming 2005) (discussing the three types of forces and the concept of insulation).

146 See e.g., Ronald Coase, The Nature of the Firm, 4 ECONOMICA (N.S.) 386 (1937).

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

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conduct such that the marginal benefit of regulating sideswiped conduct is outweighed by the cost of retaliation expected from other states for so doing. Cases like this feature a failure of private-international-law technology in that a state’s private international law cannot discriminate between target and sideswiped conduct. If the state could so discriminate, there would be no problem of sideswiped conduct being tied to target conduct because the state could regulate target conduct alone. Because it cannot discriminate, the state must regulate either both target and sideswiped conduct, or neither.

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

Or consider a state that finds jurisdiction very important in a particular sort of case, say because it is highly disruptive for evidence and witnesses to be displaced, but finds the application of its particular law not very important. Think of an ordinary marriage or divorce. If other states feel strongly about their law, it would often make sense for this state to strictly assert jurisdiction, but to be at the same time quite flexible about applying the law of other states. In this way, it would claim the aspect of sovereignty (advance the position of its private international law along the dimension of sovereignty) most important to

149 “Consider the Bavarian Justice Ministry’s threat in December of 1995 to prosecute CompuServe for carrying online discussion groups containing material that violated German antipornography laws. CompuServe responded by blocking access to these discussion groups in Germany. Because of the state of then-available technology, this action had the effect of blocking access to these discussion groups for all CompuServe users worldwide.” Id. at 1224.
150 My law-school classmate Mike Zarren is working on a practical method of doing this, for example. See Michael Zarren (forthcoming 2004).
151 By ordinary, I simply mean not including any feature that is of strikingly high importance to one of the states involved, for example, homosexual marriages to Texas or Massachusetts.
it, while minimizing cost by yielding less important aspects of sovereignty to other states. Sovereignty moves to its highest-valuing user.

This scheme fails, however, if the state claiming jurisdiction cannot apply the law of foreign states. Its family-law courts might be corrupt or incompetent, or its judges and juries might infuse the conceptual apparatus of foreign law with domestically determined meaning—what constitutes good cause for divorce will vary across cultures. These features of the state’s law-application system mean that when it claims jurisdiction it necessarily claims a bit of choice of law as well. A reform of its law-application system to increase its ability to apply foreign law would allow it to make finer-grained claims to sovereignty.

It is sometimes useful to distinguish the type of absence of private-international-law technology in the Internet hypothetical from that in the family-law hypothetical. In the Internet hypothetical, there are chunks of fact—chunkiness as a feature of the factual architecture; in the family-law hypothetical, there are chunks of law—chunkiness as a feature of the regulatory process.

Chunkiness can be desirable for states. It can allow a state to credibly insist on regulating sideswiped conduct because of the admitted importance to that state of regulating target conduct—chunkiness becomes an architectural commitment device. A theory of the optimal private-international-law technology would be an interesting extension of the nationalist analysis.

C. Camouflaged Sovereignty

States impose costs of sovereignty to deter other states from making excessive claims to sovereignty. To avoid the imposition of such costs, a state must convince the imposing states that it is not the source of the regulation they find offensive. One way it can do this is by decreasing its claims to sovereignty: by regulating less. But another is by camouflaging its claims to sovereignty so that other states see them as originating elsewhere or nowhere. If other states do not associate claims to sovereignty they find excessive with the state in question, then they will have no reason to impose costs of sovereignty on that state.

Camouflage operates in at least three ways. First, states can make claims to sovereignty appear to be the inevitable consequences of the way the world works—they can embed sovereignty. A state embeds sovereignty when it disguises the limitation or facilitation of conduct desired as a feature of the factual architecture independent of its law. Consider a state that wants to ban Holocaust denial everywhere. If it designs the Internet, or permits the design of the Internet, in such a way that regulation of speech somewhere means regulation of speech elsewhere because it is difficult or impossible to reliably condition access on the geographic location or nationality of the user, the claim to sover-

152 See, e.g., Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 890 (6th Cir. 2002) (declining to base personal jurisdiction on the operation of a web site accessible in Michigan because "[a]n Internet website by its very nature can be accessed internationally") (emphasis added); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997) ("While there is no
eighty over holocaust denial outside its borders can seem an inevitable consequence of its internal regulation. Part of the breadth of the state's speech regulation is embedded in the architecture of the Internet. Similarly, by designing the Internet to use or not to use personal identifications traceable to particular users, a state can camouflage its regulatory preference for or against anonymity. The trick of embedding is to hide claims to sovereignty within a factual architecture: to make the limitations of the factual architecture appear proximately defined by the world out there rather than by the state in question.

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

Third, a state can allow other states or private institutions to act in ways that have an effect similar to direct regulation—it can privatize sovereignty. Take a state with ends that would be advanced by having a standard computer operating system as the domestic norm. One way to do this would be to mandate use of a domestically controlled operating system. Another would be to allow a private company to succeed in the prevailing socioeconomic system in such a way as to dominate the market for operating systems. The end result of the two approaches is the same with respect to the attainment of the state's ends, but the second approach can plausibly be said not to involve claims to sovereignty by the state itself. In fact, the state reaches its desired regulatory outcome through the background rules of private law, which have a greater apolitical naturalness to them than do direct regulatory mandates.

The ratio of private law to more obvious forms of regulation can decrease without wholly eliminating the camouflage value of private law. A less

question that anyone, anywhere could access the home page . . . we cannot see how from that fact alone it can be inferred that Cybersell deliberately directed its merchandising efforts toward Arizona residents." This is, however, at most a case of Florida taking advantage of other authorities' camouflaging behavior, since it is implausible to ascribe this aspect of the Internet architecture to Florida.

153 Cf. MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1992) (also with respect to the private–public distinction in the next text paragraph).

154 This can be viewed as creating the illusion of a precommitment device.
dramatic way of privatizing is to delegate regulatory authority to a body with the appearance of neutrality or internationality, but which is surrounded with control mechanisms that check divergences from domestic law. Instead of regulating Internet domain names directly, a state can pass the task to a purportedly international agency while ensuring that the cultural, legal, and personal influences on that agency's decision-making are largely consistent with the state's own ends. The supposedly internationalist institution is a means of legitimizing enhanced domestic claims to sovereignty. The trick of privatization is to cleanse a state of regulatory agency by funneling regulation through a plausibly independent decision-maker—a firm or international agency—or through a plausibly independent decision-making mechanism—the market or democracy.

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

D. Private Sovereignty

Nationalism as so-far presented is a normative framework for states. But a parallel theory can be similarly justified for institutions in general. Consider a technology industry standards-setting board or a team organizing an intercollegiate ballroom-dancing competition. An officer of either institution has a duty to advance the interests of the institution as manifested in its official statements and past practice. Intrusions by the institution on matters in which other institutions are interested ought then to be determined by comparing the benefits of each intrusion in terms of advancement of institutional interests with the costs of that intrusion in the same terms. For the standards-setting board, relevant considerations include backward compatibility (roughly, consumers preferring more and industry, all else equal, preferring less), interoperability (with the standards of other groups), and fees or other value extraction (cross-licensing agreements). For the ballroom-dancing team, relevant considerations include the events offered (because training programs elsewhere are structured

155 See, e.g., Helfer, supra note 54.

156 Corporate officers have an obligation to maximize shareholder wealth, unless something else is specified in the charter. See, e.g., Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919); see generally Camara, supra note 145. But see Einer Elhauge, Sacrificing Corporate Profits in the Public Interest (working paper 2004). Charter specifications of a non-profit-maximizing goal do exist, for example in the case of many incorporated newspaper companies.
around events offered at competitions), step syllabi and level restrictions used (increasing the field versus equalizing it), and scheduling (on top of or away from other teams’ events). There is a translation of nationalism from the case of states to that of private institutions.

The interest of this observation lies in the light it sheds on resistance to nationalism in the context of states. Private institutions generally operate against the backdrop of a state with a mixture of facilitative and regulatory laws in place. Contract allows for credible commitment and makes reputation less important, property allows a relaxation of institutional security, and so forth. Such regulatory regimes alter the payoffs attached to the potential strategies of institutions operating under them. A literal hostile take-over—with guns blazing—of a competitor’s manufacturing plant receives not only what retaliatory sanctions the competitor can must, but also the surer and stiffer intervention of the state. Commentators’ attachment to non-strategic limits on sovereignty may be in part a carrying-over of what are strategic considerations for institutional decision-makers operating in the shadow of state force.

At the international level, this condition is equivalent to the existence of a beneficent superpower enforcing a mix of facilitative and regulatory practices on all other states—the superpower as global policeman. A superpower might assume such a role because, on balance, its ends are best achieved through global law, because its ends are themselves the maintenance of global law, or because its legal decision-makers act inconsistently with nationalism. The expected actions of an agency on high possessed of ineluctable force translate nicely into natural or higher-order law in the absence of such an agent. Background conditions affect not only participants, but commentators too.

E. The Federal Perspective

Private international law can be set by a state deciding on the scope of its laws in the face of the Fact of Overlap—that is the perspective from which nationalism has been so-far considered. But nationalism is equally applicable to the case of a federal entity resolving regulatory conflicts between subsidiary states. From the federal perspective, the institutional duty is to advance the ends justifying federal law. The normal law-determining process yields for federal law, just as it does for the law of an independent state, a set of ends; and federal legal decision-makers are obliged to pursue those ends, just as state legal decision-makers are obliged to pursue state ends. What private international law between subsidiary states best advances federal ends depends on the relationship between state ends and federal ends. Consider nationalist subsidiary states—

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states that act so as to maximize the attainment of their own ends.\(^\text{158}\) If this behavior leads to results consistent with federal ends then there is no need for private international law. There will be substantive agreement on the entire law and so the Fact of Overlap, with which it is the province of private international law to deal, will not obtain. Similarly, if federal ends do not include anything substantive, but rather consist of maintaining a certain allocation of authority among subsidiary states—self-determination—what appears as a formalist private international law, for example a territorial theory, may be consistent with nationalist prescriptions.\(^\text{159}\)

The interesting cases arise when federal and state ends fall between these two extremes. Suppose that the federal entity and each subsidiary state aims to maximize the wealth of its citizens. Each state objective function depends positively and exclusively on the welfare of its citizens and the federal objective function is the same except that it is concerned with the citizens of the nation as a whole. To the extent the citizens of each state differ in their interests, occupations, and other characteristics, the outputs of state political processes will differ as well.

Suppose that a state containing the full base of producers and consumers in a particular market would have reason to enact the best antitrust laws for regulation of that market. If the demographics of the federal organization are such that producers are concentrated in one subsidiary state and consumers in another,\(^\text{160}\) the antitrust law of the producers’ state will be biased to-

\(^{158}\) Criticizing Professor Currie, Professor Brilmayer notes that interest analysts sometimes rely on their own determination of the ends justifying the law of a foreign state, rather than on the judicial (or other official) pronouncements of that state. Lea Brilmayer, supra note 124, at 469. Nationalist legal decision-makers are concerned with the potential reaction of foreign states. Thus, if foreign states view their interests through a nonnationalist lens, for example if they claim regulatory authority on a territorial or vested-rights theory, it is intrusions on those nonnationalist claims that the nationalist state should be concerned with. It will sometimes be proper to discount the pronouncements of a foreign state’s judiciary or other authorized law-applying body when the response to domestic claims to sovereignty is likely to come from a different organ of the foreign state, for example its executive or legislature.

\(^{159}\) See, e.g., Nev. v. Hall, 440 U.S. 410, 426-27 (1979). Hall held that California was not required by the Full Faith and Credit Clause to recognize Nevada’s sovereign immunity where Nevada had been sued by a California citizen for damages arising out of an automobile accident in California involving the Californian and an officer of Nevada. Id.

\(^{160}\) This example is drawn from Andrew Guzman, The Case for International Antitrust (working paper 2003).
ward producers, while the law of the consumers’ state will be biased toward consumers. The federal legal decision-maker should keep this in mind when setting rules to govern antitrust cases in which both subsidiary states are interested: the welfare-maximizing rule will be somewhere in between the rules of the producer state and the consumer state.

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

VII. SUMMARY, IMPLICATIONS, AND CONCLUSION

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

Much room remains for further work. On the descriptive side, we do not yet know how close state behavior comes to nationalist prescriptions; nor do we have an adequate theory of how to shape that behavior by the application of

161 See, e.g., Phillip E. Areeda & Herbert Hovenkamp, 1 ANTITRUST LAW § 276 (2d ed. 2000).
market, political, and social forces and insulation to conform to nationalist prescriptions. The questions here carry a close resemblance to those animating the modern corporate-law literature. The two fields have much to learn from each other: private international law can absorb the relatively advanced agency-cost analysis that has developed in corporate law, while corporate law can absorb the respect for nonmarket forces that is difficult to avoid in private international law. The strong resemblance nationalism bears to Professor Coase's theory of the firm is one example of the likely interconnections.

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