FEAR OF COMMITMENT IN INTERNATIONAL BANKRUPTCY

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I. INTRODUCTION

International bankruptcy law reform has captured the attention of policy analysts at all levels—in national governments, in multilateral organizations, in the bankruptcy bench and bar, and in the legal academy. Until quite recently, the idea of universalism dominated discussion of this issue. Recent critiques of universalism and the introduction of alternative proposals, however, have served to reopen the discussion.[1] While these critiques of universalism have questioned its promised efficiency advantages, this Article focuses

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1. *See, e.g.*, Lynn M. LoPucki, *The Case For Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000) (stating that universalism can only work in a world that does not exist and therefore territoriality is the soundest basis for international cooperation) [hereinafter LoPucki, *Cooperative Territoriality*]; Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1 (1997) (proposing to allow firms to select which country's law to apply when facing financial distress) [hereinafter Rasmussen, *A New Approach*].

instead on its political feasibility, explaining why states might be reluctant to commit to universalism.

Throughout the world, bankruptcy reform proceeds apace. These reform efforts may be understood as part of a broader search by policymakers for effective mechanisms to dampen shocks from economic volatility. As market forces replace bureaucracies both within and among nations, change is overtaking once stable arrangements. Within particular nations, socialist and developing economies experiment with market mechanisms. Among nations, new liberal trading arrangements are being established, and existing ones are being progressively liberalized. With increased trade in goods have come increased cross-border flows of services, technology, and capital. Along with these economic reforms, the Internet and technological innovation are lowering the costs of transacting and facilitating new transactional forms.

These market transformations have no doubt generated new efficiencies and new wealth. But nimble and interconnected markets also foster economic volatility. Policymakers have been left groping for mechanisms to moderate the impact of destabilizing events. Bankruptcy has become a focus of attention. As market reforms beget winners and losers, enterprise failure has highlighted the crucial role that bankruptcy law plays in established and aspiring market economies. The World Bank,[2] the Asian Development Bank,[3] the Organization for Economic Cooperation and Development,[4] and other multilateral institutions have recently initiated active bankruptcy law research agendas, sponsoring conferences and producing reports.[5] The International Monetary Fund has included bankruptcy law reform in its conditionality arrangements with Russia and Southeast Asian nations following their recent economic crises.[6] The newly independent states of Central and Eastern Europe place bankruptcy law high on their wish lists for legal

2. *See* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, WORKING GROUP ON INSOLVENCY LAW, *Possible Future Work on Insolvency Law: Note by the Secretariat*, at 8, U.N. Doc. A/CN.9/WG.V/WP.50 (1999) [hereinafter UNCITRAL, *Possible Future Work*].

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

4. *See* UNCITRAL, *Possible Future Work*, *supra* note 2, at 7.

5. *See id.*

6. *See Board Receives Report on Russian Program; Structural Benchmarks Remain to Be Met*, IMF SURVEY, Dec. 13, 1999, at 389; IMF STAFF, *Recovery from the Asian Crisis and the Role of the IMF*, INTERNATIONAL MONETARY FUND ISSUES BRIEF 9 (2000).

infrastructure. And in the United States, bankruptcy law reform is high on the policy agenda as well.[7]

When a firm fails, bankruptcy law attempts to maximize the value of the firm's assets for the benefit of the firm's creditors. Bankruptcy law also determines how that value should be distributed among those creditors. The failure of a multinational firm typically leaves assets and unpaid creditors in several jurisdictions. However, no overarching international bankruptcy system exists. Instead, the national bankruptcy laws of several states might plausibly apply to govern the firm's bankruptcy or particular aspects of the case. Conflicting claims of jurisdiction often arise.

States have traditionally guarded their territorial prerogatives, with each state applying its own laws to the debtor's assets and creditors within its own borders. Commentators roundly criticize this territorial approach, which often leads to piecemeal dismemberment of the firm and uncoordinated, territory-based distribution of value to creditors. This approach may destroy value that could have improved creditor recoveries overall. In addition, uncoordinated territorial treatment of creditors' claims raises fairness concerns.

Over time, various proposals for international bankruptcy cooperation have emerged. Historically, analysts have almost invariably advocated a universalist approach.[8] Under universalism, the courts of the debtor's home country would have worldwide jurisdiction to conduct a worldwide insolvency proceeding under home country insolvency law. This unified proceeding would address all the debtor's assets and creditors wherever located, displacing local law and courts in the process.[9] According to its proponents, universal-

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7. *See generally* Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001) (proposing a "comprehensive package of reforms pertaining to consumer and business bankruptcy law." 147 CONG. REC. H133 (daily ed. Jan. 31, 2001) (statement of Rep. Gekas)); Bankruptcy Reform Act of 2001, S. 420, 107th Cong. (2001) (same); REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION, BANKRUPTCY: THE NEXT TWENTY YEARS, i-xiv (1997) (describing work of commission in producing 170 individual recommendations for improving bankruptcy law and procedure).

8. *See* John Lowell, *Conflict of Laws as Applied to Assignments for Creditors*, 1 HARV. L. REV. 259, 264 (1888) ("[I]t would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place."); Donald T. Trautman, *Foreign Creditors in American Bankruptcy Proceedings*, 29 HARV. INT'L L. J. 49, 58 (1988); Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L REV. 2276, 2277 (2000) [hereinafter Westbrook, *Global Solution*]; Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 515 (1991) [hereinafter Westbrook, *Choice of Avoidance Law*].

9. Universalism comes in several flavors, ranging from purely theoretical to the more modest and pragmatic. *See* Westbrook, *Global Solution*, *supra* note 8 at 2284, 2287 (describ-

ism would provide predictability and efficiency, thereby avoiding the drawbacks of piecemeal administration that result from a territorial approach. While analysts have traditionally favored universalism, however, policymakers have not. Universalist cooperation has not been forthcoming. The few regional treaties that exist represent only modest progress toward universalism.[10]

Despite this historical dearth of universalist cooperation, until recently, no competing ideas had emerged for a comprehensive approach to international bankruptcy. This history is perhaps understandable. Not only had universalism enjoyed long-standing, widely shared, uncritical acceptance, but the idea of universalism has several attractive qualities. It is conceptually neat and tidy. It is internationalist. It smacks of cosmopolitan sophistication. To embrace universalism is to subscribe to a vision of one-world government and to signal a forward-looking, forward-thinking global perspective. By contrast, territoriality is parochial, isolationist, piggish. It represents grubby chauvinism and national self-interest. Analysts use the term "territoriality" as a pejorative.[11]

Recently, however, Professor Lynn LoPucki first suggested that the sow's ear of territoriality might in fact have silk-purse potential.[12] LoPucki calls for cooperation on a territorial basis,[13] with each state applying its own laws to debtor assets within its borders. States could negotiate cooperative asset disposition on a case-by-case basis,[14] and particular inefficiencies from territoriality could be remedied through specific international arrangements. LoPucki contests the claimed efficiency advantages of universalism, arguing among other things that universalism cannot deliver on its promise of ex ante predictability.[15]

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ing ideal, theoretical universalism as a single international bankruptcy court system applying a single international bankruptcy law in contrast with modified universalism); Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 514-18; *see also* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 704-32 [herinafter LoPucki, *Cooperation in International Bankruptcy*] (separately discussing "pure" and modified universalism). "Modified universalism" describes a sort of watered down version that leaves discretion with local courts to reject the jurisdiction of the home country court in order to protect local creditors. Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 517. The ensuing discussion encompasses even this weak form of universalism. Obviously, the fear of commitment I describe will vary with the degree of commitment at issue.

10. *See infra* note 42.
11. *See infra* notes 23-24 and accompanying text.
12. LoPucki, *Cooperation in International Bankruptcy*, *supra* note 9, at 761.
13. *See id.* at 760.
14. *Id.* at 742.
15. *Id.* at 753-59.

In addition to LoPucki's cooperative territoriality proposal, Professor Robert Rasmussen has introduced his own challenge to universalism. He advocates a "debtor's choice" approach, under which each debtor's corporate charter would specify a choice of national insolvency law that would apply in case of financial distress. The impetus to this approach is that the universalist choice of home country law may not necessarily be the most efficient choice. Instead, private parties allowed to choose their own governing law are better able to pick the optimal set of rules.[16]

These recent critiques of universalism have focused largely on its hypothetical efficiency: even if universalism were adopted in the form advocated by its proponents, it would be less efficient than rival proposals. However, little attention has been paid to the question of why the popular and long-standing faith in universalism has not been vindicated with concrete universalist policy enactments.[17] Despite universalism's historical favor with bankruptcy analysts, no universalist arrangements exist. This Article explores that question.

Universalism requires that a state defer to foreign legal proceedings with respect to property within its own territory and legal relationships formed and conducted wholly within its own borders. This a state will naturally be reluctant to do. States take as an article of faith that their sovereign powers extend to their borders. Each state takes as given that persons and property within its borders are subject to its rules. Numerous attempts at international insolvency treaties confirm nations' reluctance to commit even to modest cooperation far short of the universalist ideal. Even among nations with common cultural and legal traditions, cooperation has been spotty.[18]

Indeed, universalist advocates concede that universalism will flourish only under specified conditions.[19] At the same time, universalists condemn the territorial tendencies of states as "primi-

16. *See* Rasmussen, *A New Approach*, *supra* note 1, at 5; *see also* Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252 (2000) [hereinafter Rasmussen, *Private Ordering*].

17. Jay Westbrook is an exception in this regard. *See* Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 489 (1991) [hereinafter Westbrook, *Theory and Pragmatism*] (describing "rough wash" and "transactional gain" ideas).

18. *See infra* notes 45-47 and accompanying text.

19. *See* Westbrook, *Theory and Pragmatism*, *supra* note 17, at 467 (asserting that rough similarity of bankruptcy laws and "critical-mass reciprocity," a minimum number of states sharing the perception of mutual gain, is a necessary condition for universalism).

tive," "chaotic," "deplorable,"[20] and "tyranny."[21] States should cease their nitpicking over their parochial sovereignty interests and should seize the cooperative gains from universalism.[22] However, universalists have failed to take sovereignty seriously, or even to consider the question.

This Article explores states' reluctance to adopt universalism. It identifies various factors that make states averse to universalist commitments. Some of these factors fall under the general rubric of sovereignty, an issue of concern to every state. Bankruptcy law has special far-reaching effects that make assertion of its extraterritorial reach particularly antagonizing, and that make universalism especially unappealing. Other factors are specific to particular states. States of certain types will simply see no advantage to universalist arrangements. Explaining the absence of universalism is critical to the design of an international bankruptcy system, for it helps to highlight political and economic constraints with which *any* reform proposal must contend.

After discussing states' fears of commitment, this Article raises a question, speculating that even states wishing to adopt universalist arrangements may have difficulty doing so. The Article offers a game-theoretic framework for future research to assess the likelihood of universalism among states that prefer it to territoriality. It may be that universalism is not only unattractive to many states but unattainable even among sympathetic states.

Part II of this article summarizes the various competing approaches to international bankruptcy and sketches the universalist proposal. Parts III, IV, and V explain why states might fear making the universalist commitment. Part III compares universalism with existing international arrangements on conflicts of law. The constraints on cooperation in the latter context forecast dim prospects for the former. Part IV describes the export of social policy that universalism entails. Part V addresses predicaments of particular types of states. It identifies types of states whose circumstances make universalism particularly unattractive. Part VI raises the possibility that even for states that might wish to adopt universalism, arranging regularized universalist cooperation might be difficult.

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20. *Id.* at 458.

21. Donald T. Trautman et al., *Four Models of International Bankruptcy*, 41 Am. J. Comp. L. 573, 575 (1993).

22. *See* Westbrook, *Theory and Pragmatism*, *supra* note 17, at 489 (arguing that states should all accept and be content with the "rough justice" that universalism could provide).

It also suggests a game-theoretic approach to future research on this question. Part VII concludes.

II. Universalism And Its Rivals

Territoriality simply honors the age-old behavior of nations in exercising jurisdiction over assets and parties within their borders. Analysts agree that territoriality is and has always been the dominant practice.[23] Each nation in which a multinational debtor owns assets decides under its own laws how the assets within its territory should be treated in the face of creditor claims. Historically, however, analysts have agreed that a universalist approach is preferable to one segmented by territorial boundaries. The financial distress of a multinational firm should come under one insolvency regime, even though several states may claim jurisdiction over various pieces of the firm or over claimants located in or having some other connection with those states. Under universalism, the insolvency law and courts of the firm's home country should govern, and other interested states should defer to the home country proceeding.[24]

Conceptually, universalism is attractive. A unified proceeding enables one court to administer the entirety of the debtor's assets. This maximizes the value that can be preserved for creditors by facilitating a coordinated disposition of the debtor's assets.[25] It assures creditors' equal treatment,[26] and it avoids the duplicative

23. *See* Lucian Arye Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & Econ. 775, 787 (1999) (surveying laws of various jurisdictions and concluding that "the dominant approach to transnational bankruptcies remains territorial"); LoPucki, *Cooperative Territoriality*, *supra* note 1, at 2218; Westbrook, *Theory and Pragmatism*, *supra* note 17, at 460.

24. Universalists assert that determination of the home country will not be difficult in most cases. *See, e.g.*, Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 Mich. L. Rev. 2177, 2179 (2000) ("[T]here is widespread agreement . . . that in the vast majority of cases, the home country will be easy to identify."); Westbrook, *Global Solution*, *supra* note 8, at 2317 ("There should not be great differences in identifying the proper court to play the primary role"); Jay L. Westbrook, *The Lessons of Maxwell Communications*, 64 Fordham L. Rev. 2531, 2541 (1996) [hereinafter Westbrook, *Lessons of Maxwell*] (noting unusual case of *Maxwell*, in which identification of home country was debatable). Various standards—principle place of business, state of incorporation, headquarters, center of main interests—have been used, however, with no single standard having emerged. *See* LoPucki, *Cooperation in International Bankruptcy*, *supra* note 9, at 713-16.

25. Westbrook, *Theory and Pragmatism*, *supra* note 17, at 465.

26. Some creditors, however, are typically more equal than others. *See* Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 508-509 (explaining role of priority rules in favoring some classes of creditors over others).

administrative costs that multiple proceedings would entail.[27] Standardizing home country law as the governing law promotes predictability, thereby lowering the costs of credit and facilitating economic activity.[28] Professor Jay Westbrook has been a leading and eloquent advocate for this approach.[29] Recent scholarship by Professors Lucian Bebchuk and Andrew Guzman has also touted the efficiency of universalism.[30]

Lynn LoPucki has questioned the promised efficiencies of universalism.[31] LoPucki has instead proposed a system of cooperative territoriality, in which each state exercises jurisdiction over and applies its own laws to the debtor's assets within its territory, as states have done since time immemorial. Parallel bankruptcy proceedings could occur in each state with debtor assets, and cooperation would occur through the interaction of agents appointed by each state to represent the bankruptcy estate located there.[32] Comparing the benefits of this system to universalism, LoPucki argues that universalism does not enhance predictability or lower borrowing costs because the "home country" concept is indeterminate,[33] and the scope of bankruptcy jurisdiction ceded to a universalist court would always be open to question.[34]

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27. *See id.* at 515; *See also* J.H. DALHUISEN, 1 DALHUISEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY 3-186 (1986).

28. Westbrook, *Theory and Pragmatism, supra* note 17, at 469. Professor Westbrook has recently cautioned against overstating claims of predictability in any general default situation. Westbrook, *Global Solution, supra* note 8, at 2326.

29. *See* Westbrook, *Theory and Pragmatism, supra* note 17, at 458.

30. *See* Bebchuk & Guzman, *supra* note 23, at 778; Guzman, *supra* note 24, at 2193.

31. *See* LoPucki, *Cooperation in International Bankruptcy, supra* note 9, at 699; LoPucki, *Cooperative Territoriality, supra* note 1, at 2220.

32. LoPucki, *Cooperative Territoriality, supra* note 1, at 2219. These estate representatives could agree or not, presumably negotiating the fate of the debtor's assets in the shadow of the separate territorial outcomes that would occur absent cooperation. *Id.* at 2220.

33. *Id.* at 2222-23. Problems with corporate groups may be especially intractable. *Id.* at 2229-30.

34. The interface between local nonbankruptcy law and universalist—foreign—bankruptcy law would be problematic. Attempting to characterize a particular issue as a bankruptcy issue or a nonbankruptcy issue—on which the universalist choice of law turns—would often be difficult and unpredictable. These issues are much more manageable under a territorial system. *Id.* at 2227-28. Universalists recognize these issues as well. *See* Jay Lawrence Westbrook & Donald T. Trautman, *Conflict of Laws Issues in International Insolvencies, in* CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 655, 661 (Jacob S. Ziegel ed., 1994) [hereinafter, CURRENT DEVELOPMENTS] (describing difficulty of deciding where municipal property law ends and universalist bankruptcy rules should take over); Westbrook, *Theory and Pragmatism, supra* note 17, at 461-62 (distinguishing choice of law from forum choice and illustrating when intersection of local and home country laws may create difficult questions).

Bob Rasmussen questions universalist efficiency from a different perspective. LoPucki's critique might be labeled conservative for its anti-internationalist bent; Rasmussen's is conservative for its contractarian flavor. Rasmussen argues that the universalist choice of home country law may not be the most efficient, and indeed, that any government-imposed choice of law would be inefficient given the heterogeneity of firms.[35] Instead, each firm should be able to choose in its charter which bankruptcy regime would govern in case of its financial demise. Because creditors would price their credit to account for a firm's choice of bankruptcy regime, each firm would have incentive to choose the most efficient regime for its particular circumstances. According to Rasmussen, this private choice approach would lower each firm's costs of capital, thereby increasing firm value.[36]

While the efficiency critique of universalism is important, it is incomplete. The design of an international bankruptcy regime cannot proceed without some consideration of the feasibility constraints that reform efforts must face. The balance of this article focuses on the feasibility of universalism. It identifies significant political and economic factors that may make universalism unappealing to many states, and which ultimately raise the question whether universalism is plausible as a general prescription for international bankruptcy cooperation.

III. Conflicts of Bankruptcy Law

The bankruptcy of a multinational enterprise raises conflict of law issues, for which universalism provides one possible approach. This Part explains this conflict of laws and shows why the universalist solution is politically unattractive.

A conflict of laws arises when a legal dispute implicates the interests and legal systems of more than one state. In the typical bankruptcy context, a conflict arises when the debtor owns assets outside of its home country. The debtor will typically enter formal bankruptcy proceedings in its home country, whose courts will apply home country bankruptcy laws. The home country court will attempt to include the debtor's foreign assets in the proceeding, claiming extraterritorial jurisdiction over those assets and extending the effect of its bankruptcy law to those assets. However, local courts in these other states will also claim jurisdiction over the

35. Rasmussen, *A New Approach*, *supra* note 1, at 20; Rasmussen, *Private Ordering*, *supra* note 16, at 2255.

36. Rasmussen, *A New Approach*, *supra* note 1, at 21.

assets within their territories. They will seek to apply their own bankruptcy or other debt collection laws to those assets, typically to the benefit of local creditors.[37] Conflicts arise because each state will wish to apply its own bankruptcy laws to firms and assets within its borders, and may attempt to extend effects extraterritorially as well. One state's bid for extraterritoriality of course conflicts with another's desire to apply its own laws locally. States will be wary of the extraterritorial ambitions of other states. They will be leery of giving local effect to determinations of foreign bankruptcy courts.[38]

The universalist proposal resolves this conflict in favor of the home country court and its bankruptcy law, requiring the deference of the local court. However, this concession of sovereignty is a greater one than states have shown any willingness to make. Bankruptcy law is perhaps the area of law least amenable to international harmonization or cooperation,[39] and to date the history of multilateral insolvency cooperation has been marked by frustration.[40] Only a handful of treaty efforts has been implemented

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37. The benefits might not always be easy to limit to local creditors:

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

Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 514.

38. *See* DALHUISEN, *supra* note 27, at 3-162. Japan was unusual among industrial nations in having no extraterritorial ambitions for the reach of its bankruptcy laws, even for assets owned by a Japanese debtor. *See* Hasan hô [Bankruptcy law], Law No. 71 of 1922, art. 3, no.1; Wagi hô [Composition law], Law No. 72 of 1922, art. 11; Kaisha kôsei hô [Corporate reorganization law], Law No. 172 of 1952, art. 4, no.1. Recent legislation, however, codifies current practice giving extraterritorial effect to Japanese proceedings. *See* Minji saisei hô (Civil rehabilitation law), Law No. 225 of 1999, art. 38(1) (providing debtor's estate includes foreign property in legislation effective April 1, 2000); Kokusai tôsan hôsei ni kan suru yôamian (Draft proposal regarding the legal regime for international insolvencies), arts. 2-1(2), 2-2(1), *available at* Ministry of Justice, http://www.moj.go.jp/PUBLIC/MINJI06/pub_minji06-1.htm (last visited Aug. 15, 2001) (same in draft legislation to modify bankruptcy and reorganization laws). I am indebted to Kent Anderson for providing these up-to-the-minute references.

39. Ian F. Fletcher, *Commentary on Boshkoff: Some Gloomy Thoughts Concerning Cross-border Insolvencies*, 72 WASH. U. L.Q. 943, 943 (1994). "[I]t would if anything be a gross understatement to claim that the age-old problems of international bankruptcy are among the most intractable to have presented themselves to scholars and practitioners searching for workable and just solutions to the legal complexities of our increasingly interdependent global community." *Id.* *See also* Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 WASH. U. L.Q. 931, 932 (1994).

40. *See* Jay Lawrence Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 570 (1996) [hereinafter Westbrook, *Creating Law*] (asserting that "[t]here has been remarkably little success in international conventions on the subject of bankruptcy, despite great interest in the subject since the Nineteenth Century."); *see also* Harold S.

among a few close neighbors with common cultural and commercial ties.[41] Most of these treaties are modest in their aspirations and fall far short of the universalist ideal.[42]

Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, 64 FORDHAM L. REV. 2543, 2544 (1996) (discussing failed efforts at international insolvency reform).

The United States and Canada, two countries with very strong commercial ties and cultural affinities and the world's longest unguarded border, could not come to terms on an insolvency treaty at all. *See* Burman, *supra* note 40, at 2556 (describing treaty negotiations); Richard A. Gitlin & Evan D. Flaschen, *The International Void in the Law of Multinational Bankruptcies*, 42 BUS. LAW. 307, 309 (1987); Westbrook, *Creating Law*, *supra* note 40, at 570. The American Law Institute has, however, undertaken the Transnational Insolvency Project, initially involving the three NAFTA countries, to promote understanding of and cooperation among the municipal bankruptcy systems of these countries. *See* AM. LAW INST., TRANSNATIONAL INSOLVENCY PROJECT: INTERNATIONAL STATEMENT OF CANADIAN BANKRUPTCY LAW (Tentative Draft Apr. 15, 1997).

So dismal has been the experience with treaties that when the United Nations Commission on Trade and Development Law turned its attention to the subject of international insolvency reform, it chose to pursue a model law instead of a treaty. "The consensus so far at UNCITRAL is that a model law may be easier to do." Westbrook, *Creating Law*, *supra* note 40, at 571.

41. *See generally* Burman, *supra* note 40.

42. The Montevideo Treaty of 1889, among Argentina, Bolivia, Paraguay, Peru, Uruguay and Columbia, provides for the possibility of a universal proceeding, but only if local creditors have not exercised their right to open local proceedings, which favor the local creditors in each case. *See* MINISTERIO DE RELACIONES EXTERIORES Y CULTO, REPUBLICA ARGENTINA, ACTAS Y TRATADOS DEL CONGRESSO SUD-AMERICANO DE DERECHO INTERNACIONAL PRIVADO, MONTEVIDEO 1883-1889, arts. 39, 42 (E. Restelli ed., 1928), *translated in* IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW: NATIONAL AND INTERNATIONAL APPROACHES, app. V(A) (1999). A 1940 revision, ratified by only Argentina, Paraguay, and Uruguay, appears to grant priority to local creditors in each state over their foreign counterparts. *See* FLETCHER, *supra* note 42, App. V(B), art. 48.

In addition, the Convention on Private International Law; a comprehensive treaty on private international law issues among fifteen Latin American countries, also provides for possible universalist cooperation. Convention on Private International Law, Feb. 20, 1928, 86 L.N.T.S. 111 [hereinafter Havana Convention]; *see also* FLETCHER, *supra* note 42, at 232. It also provides, however, for multiple parallel proceedings in states in which the debtor has economically independent commercial establishments. *See* Havana Convention, *supra* note 42, art. 415, 86 L.N.T.S. at 362. Unfortunately, in the event of separate proceedings, the convention fails to describe their relation to one another. It contains no provisions coordinating the separate proceedings. This Convention is customarily referred to as the "Bustamante Code," in recognition of the profound influence of Antonio Sanchez de Bustamante y Sirven, a Cuban jurist, on the agreement. *See* FLETCHER, *supra* note 42, at 232.

The Convention Regarding Bankruptcy, concluded in 1933 among the five Scandinavian countries—Denmark, Finland, Iceland, Sweden and Norway—seems to offer a strong possibility of regular universalist cooperation among its members. Convention Regarding Bankruptcy, Nov. 7, 1935, 155 L.N.T.S. 115 [hereinafter Nordic Bankruptcy Convention]; *see also* FLETCHER, *supra* note 42, at 237. While the general rule is unified distribution of assets in the home country court, however, tax claims and certain priority rights in specific assets are accorded territorial treatment. *See* Nordic Bankruptcy Convention, *supra* note 42, art. 7, 155 L.N.T.S. at 136. In addition, the convention apparently also leaves open some possibility of competing parallel bankruptcy proceedings among member states. *See* DALHUISEN, *supra* note 27, at 3-266; FLETCHER, *supra* note 42, at 239 (both characterizing

To illustrate universalism's excessive ambition, the following discussion abstracts from existing international arrangements on conflicts of laws. It disaggregates insolvency law, unpacking its components in order to facilitate and sharpen comparison with existing cooperative arrangements in the area of judgment recognition. This discussion shows the limits of states' cooperative inclinations in these existing arrangements. The observed reluctance of nations to commit to relatively narrow cooperation suggests even greater reluctance to accede to the broader cooperative arrangement demanded under universalism.

A. *Bankruptcy as Meta-Law*

Unlike other areas of law, bankruptcy law is wholesale. It is law in bulk. And it is drastic. Most types of legal proceedings decide a particular issue or transaction. By contrast, bankruptcy affects not merely one or a few distinct transactions but *every* legal relationship involving the debtor firm. Ideally,[43] bankruptcy effects a comprehensive restructuring of the debtor's legal arrangements with creditors and equity holders, marshaling all the debtor's assets while also holding out the possibility of saving the going concern. The collective proceeding effects a complete reshuffling of rights among a debtor and its various classes of claimants, overriding legal rights that exist outside of formal insolvency proceedings.[44]

> [A]t the outset the debtor will be dispossessed or be placed under supervision, and the creditors will be denied their right to enforce their claims. At the end of the procedure there may be expropriation: of the debtor through liquidation of his assets,

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Article 13 of the Convention). No doubt the cultural, ethnic and linguistic homogeneity among these countries has facilitated their steady and close cooperation in international legal affairs, including insolvency law. *See* Michael Bogdan, *International Bankruptcy Law in Scandinavia*, 34 INT'L & COMP. L.Q. 49, 86 (1985). The convention may therefore have only limited utility as a general model.

The European Union has been unable to agree on universalism. Having accomplished economic, military, social, and even monetary integration over the last half century, the EU has been negotiating various insolvency conventions on and off over the last forty years. Despite multilateral integration at so many levels, the EU insolvency convention offers only territorial cooperation. For an account of the difficulties encountered with initial ambitious attempts to draft a truly universalist treaty, see FLETCHER, *supra* note 42, at 250. Several bilateral treaties among European countries also exist. *See* DALHUISEN, *supra* note 27, at 3-162.

43. That is, in the absence of jurisdictional impediments. Municipal bankruptcy regimes are not identical, of course. My description abstracts from the most salient features of most bankruptcy regimes.

44. Manfred Balz has aptly referred to insolvency law as "meta-law, which modifies or supersedes practically all other branches of national legal systems." Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485, 486 (1996).

> and of the creditors through the extinction or reduction of their claims or through conversion of their claims to shares in the debtor company or other lower-ranking entitlements.[45]

Nonclaimant interests are affected as well. Employees' future employment prospects, suppliers' prospects for future business, customers' prospects for future goods and services, and local governments' prospects for future tax revenues may all be improved by a successful rescue, or dashed by a piecemeal liquidation.

While perhaps sui generis, the complexity of bankruptcy proceedings can be disaggregated into familiar components. First, initiation of a proceeding may effect what is essentially prejudgment attachment of the debtor's assets.[46] Individual creditor remedies are typically stayed,[47] and a court or court-appointed officer takes charge of the debtor's estate.[48] This attachment is immediate, and it may take effect without any particular creditor having proven a claim or shown the debtor's insolvency.[49] At the outset, then, bankruptcy proceedings effect an aggressive provisional remedy in aid of creditors.

Following the immediate prejudgment attachment and moratorium on creditor collection efforts, bankruptcy must accomplish two fundamental tasks. It must decide upon disposition of the debtor's assets and the distribution of value among claimants.

As to the assets, the outcome of the proceeding may be the piecemeal liquidation of the assets, the rescue of the enterprise, its sale as a going concern, or some combination. Pre-distress management is typically displaced. In essence, bankruptcy may modify the size, form, and function of the firm's business, or cause its demise altogether. In addition, a bankruptcy system must provide for the husbanding of the debtor's assets during the course of the proceeding. A court or court-appointed official usually manages, or at least oversees, the use and assures the preservation of the assets.

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45. Axel Flessner, *Philosophies of Business Bankruptcy Law: An International Overview*, *in* CURRENT DEVELOPMENTS, *supra* note 34, at 19.

46. *See* DALHUISEN, *supra* note 27, at 3-6.

47. *See* PHILIP R. WOOD, PRINCIPLES OF INTERNATIONAL INSOLVENCY 189 (1995) (noting that stay is probably universal).

48. Even if the debtor's management remains in place, as in a U.S. reorganization proceeding, its latitude to dispose of assets is typically circumscribed. *See, e.g.*, 11 U.S.C. § 363 (1994) (describing notice and hearing requirement for debtor's use of cash collateral and for use of estate assets out of ordinary course of business).

49. *See* WOOD, *supra* note 47, at 186-87 (describing threshold entry issues under various systems).

With respect to creditor distributions, the central function of bankruptcy is to decide which among debts justly owed and rightfully asserted are most worthy. Given the scarcity of assets, not all creditors get paid, and many get nothing at all. Setting the distribution scheme effectively renders judgment with respect to all claims. Nominal amounts of claims are recognized but then scaled down based on creditors' priority rankings and the value available for distribution. In addition, vindication of the distribution scheme may require avoidance—unwinding—certain of the debtor's pre-bankruptcy transfers to creditors or insiders. Once asset disposition has been decided upon and the distribution scheme finalized, the bankruptcy dominion over the debtor's assets effects a sort of execution—i.e., enforcement—of all creditors' claims.

Bankruptcy, then, fundamentally reorders the legal relationships between the debtor and its claimants, remakes the enterprise, and enforces all bankruptcy judgments against all assets and all interested parties.

B. *Extraterritorial Jurisdiction*

Given these various serious effects of a bankruptcy proceeding, it is not surprising that states might be reluctant to make the universalist commitment to one another's bankruptcy laws. Universalism requires deference to the bankruptcy law of the debtor's home country, provides a forum selection—the home country court—and demands acquiescence to an aggressive extraterritorial jurisdiction for that court in the service of the bankruptcy proceeding. Finally, universalism demands recognition and enforcement of home country bankruptcy court determinations on the basis of this extraterritorial jurisdiction.[50]

In general, a court facing a request for recognition of a foreign judgment will have several basic concerns, foremost of which is that the court rendering the judgment did so with appropriate jurisdiction over the defendant-judgment debtor.[51] When local creditors' rights are affected by a foreign—home country—bankruptcy pro-

50. DALHUISEN, *supra* note 27, at 3-181. Recognition of judgments becomes an issue when one state has rendered a binding decision between private parties, but the winning party must seek enforcement—e.g., collect against assets—outside the territory of the rendering state. Both the winning party and the rendering state will be interested in seeing the judgment accorded respect in a state where the defendant's assets may be found.

51. "[N]o state recognizes or enforces the judgment of another state rendered without jurisdiction over the judgment debtor." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, ch. 8 intro (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS]; *see also* EUGENE

ceeding, these jurisdictional concerns are implicated. Local creditors are placed in a position analogous to that of the defendant-judgment debtor in ordinary civil litigation, insofar as their rights may be affected by the judicial edicts of a foreign state with which they may have had no previous contact or relationship. Local creditors' dealings with the debtor may have occurred only locally. The adverse intervention of a foreign proceeding will trigger extraterritoriality concerns.

Separate consideration of the various components of a bankruptcy proceeding in light of the basic jurisdiction issue demonstrates the boldness of the universalist demand for recognition of foreign bankruptcy proceedings. The aggressive jurisdictional reach of a universalist bankruptcy proceeding has no parallel outside the bankruptcy context. A similar assertion of jurisdiction made in the nonbankruptcy context—typically involving a proceeding of more limited scope, concerning only one or a few distinct transactions among a handful of private actors—would have little hope of foreign recognition.[52] The wholesale nature of bankruptcy makes wholesale recognition even less appealing.[53]

A universalist system would displace local debtor-creditor and bankruptcy law with foreign bankruptcy law. It would disempower local courts, requiring their deference to those of the home country. With its bankruptcy filing, the debtor would effectively drag all local claimants into a foreign court, even those with no connection to the home country whatsoever except having engaged in a wholly local transaction with the debtor. The home country court would assert jurisdiction over local assets, local parties, and wholly local legal relationships. Finally, universalism would require local courts to recognize and enforce decisions rendered in the foreign proceeding.

F. SCOLES & PETER HAY, CONFLICT OF LAWS 1011 (2d ed. 1992); DALHUISEN, *supra* note 27, at 3-70.2

52. Jurisdiction based on the nationality of the plaintiff—in the insolvency context, the party instigating the foreign proceeding would be the appropriate analogue—is considered "exorbitant." *See* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 51, ch. 2, intro. cmt. (1987).

53. [B]ecause of the larger dimension and the greater impact recognition of bankruptcy may have in the recognizing state, matters of principle and genuine conflicts of interests of the parties involved, of the public at large and of the adjudicating or recognizing state, may be expected to carry more weight than in the case of recognition and execution of ordinary foreign judgments. As a consequence, there may be even less room for an abstract system of recognition rules, if some recognition can at all be conceded.

DALHUISEN, *supra* note 27, at 3-181.

Each aspect of the universalist insolvency proceeding involves a substantial assertion of extraterritorial jurisdiction. The wholesale prejudgment attachment and moratorium with respect to the foreign debtor's local assets asserts an extraterritorial dominion that is nowhere accorded routine recognition.[54] The bankruptcy attach-

54. A few of the existing insolvency treaties arguably contemplate the possibility of such deference. *See infra* note 42. But even under those treaties, one state's extraterritorial jurisdiction may get trumped by the initiation of a separate local proceeding. *See infra* note 42.

UNCITRAL's Model Law on Cross-Border Insolvency Law contains a moratorium provision, but it is discretionary, neither mandatory nor automatic. A stay may be ordered at the time an application for recognition is filed. *See Newly Revised Articles of the Draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency: Note by the Secretariat,* UNCITRAL, 21st Sess., art. 19, A/CN.9/WG.V/WP.48 (1996) [hereinafter UNCITRAL Model Law on Cross-Border Insolvency]; *see also* Westbrook, *Creating Law, supra* note 40, at 572 (noting difficulty of achieving international consensus on mandatory stay).

Crossborder recognition of provisional measures is now not uncommon, but only provided that any underlying proceeding itself have an acceptable jurisdictional basis. *See* Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commerical Matters, Oct. 30, 1999, art. 13, *available at* http://www.hcch.net/e/conventions/draft36e.html (last visited Jan. 25, 2001) [hereinafter Hague Convention]; European Convention on Jurisdiction Enforcement of Judgments in Civil and Commercial Matters, July 28, 1990, arts. 25, 28, 29 I.L.M. 1413, 1425 [hereinafter Brussels & Lugano Convention]; *see also* Adrian U. Dorig, *The Finality of U.S. Judgments in Civil Matters as a Prerequisite for Recognition and Enforcement in Switzerland,* 32 TEX. INT'L L.J. 271, 281 n.65 (1997) (discussing recognition of provisional measures under Brussels & Lugano Conventions). These provisional measures typically arise in the context of discrete disputes, in which specific parties assert specific rights to particular assets, and these conventions explicitly exclude coverage of insolvency proceedings. *See infra* note 81 and accompanying text; *see generally* George A. Bermann, *Provisional Relief in Transnational Litigation,* 35 COLUM. J. TRANSNAT'L L. 553 (1997).

Bankruptcy analysts like to cite the famous case of *Cunard Steamship Co. Ltd. v. Salen Reefer Svcs. AB,* 773 F.2d 452 (2d. Cir. 1985), as evidence of U.S. courts' willingness to grant comity and to recognize provisional measures of foreign bankruptcy proceedings. *See* Bermann, *supra* note 54, at 600; Westbrook, *Theory and Pragmatism, supra* note 17, at 481. A careful reading of the case, however, shows it to be at least as good an exemplar of territorial tendencies as one for an internationalist agenda.

While the court in that case was willing to defer to a Swedish bankruptcy proceeding, the court explicitly noted that its generous attitude toward that foreign proceeding turned in large measure on the fact that no U.S. interests were implicated. The court granted recognition of a Swedish bankruptcy proceeding and the related stay, ordering that a creditor's attachment of assets located in the U.S. be vacated, despite the fact that the Swedish court had neither personal jurisdiction over the creditor nor in rem jurisdiction over the U.S. assets. The court understood that lack of jurisdiction would bar the foreign court from rendering a binding money judgment under similar circumstances. Cunard Steamship Co., 773 F.2d at 458. Given the special nature of bankruptcy proceedings, however, the court was willing to extend comity. *Id.*

At the same time, the court was quite careful to suggest limits to its holding. It noted that (a) the attaching creditor was not a U.S. company but an English one; (b) its transaction with the Swedish debtor had no connection with the U.S; (c) the Swedish proceeding would not prejudice the creditor; and (d) comity would not be granted if that would result in prejudice to U.S. citizens. *See id.* at 459.

ment effects a blanket arrest of all local assets in the service of some uncertain future disposition at the hands of a foreign court. Moreover, this foreign arrest occurs in the face of local creditors' rightful claims that may derive wholly from local transactions.

In addition, to the extent that local courts would be expected to turn over assets to home country courts at the outset of formal insolvency proceedings, this effects not only a prejudgment attachment of local assets but also a recognition and enforcement of whatever eventual "judgments" arise as a result of the plenary disposition of creditor claims in the foreign insolvency proceeding. Essentially, judgments of the foreign court would be recognized and enforced—at least as to the assets surrendered—even before local claimants' substantive rights had been determined.[55]

Besides prejudgment attachment and possible surrender of local assets, the home country court would hope to manage those assets while deciding on their disposition.[56] In the case of rescue, this would mean the foreign court's active management of the debtor's business pending a final resolution of the case, and resort to home country law to resolve any disputes as to the firm's interim operations. This interim management under home country law, which could last months or even years, may be cause for concern in other states. For example, to improve the prospects of successful rescue, home country law might relieve the firm—on an interim basis or even permanently—of its obligation to fund its retired workers' pension plans.[57] That law might authorize the debtor firm to obtain interim financing while the case is pending. This new financing may be granted priority over pre-bankruptcy creditors,

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55. Pursuant to § 304 of the Bankruptcy Code, U.S. courts routinely authorize the transfer of debtors' assets out of the U.S. for disposition under the insolvency proceedings of another state, albeit sometimes with strings attached. *See, e.g.*, In re Culmer, 25 B.R. 621 (Bankr. S.D.N.Y. 1982); Aranha v. Eagle Fund (In re Thornhill Global Deposit Fund, Ltd.), 245 B.R. 1 (Bankr D. Mass. 2000); In re Treco, 239 B.R. 36 (S.D.N.Y. 1999) (ordering turnover of assets to Bahamian liquidation proceeding); s*ee also infra* note 88; Mary Elaine Knecht, Comment, *The "Drapery of Illusion" of Section 304—What Lurks Beneath: Territoriality in the Judicial Application of Section 304 of the Bankruptcy Code*, 13 U. PA. J. INT'L BUS. L. 287 (1992). Universalists applaud such instances of deference to foreign proceedings. *See* Westbrook, *Global Solution, supra* note 8, at 2323; Westbrook, *Theory and Pragmatism, supra* note 17, at 471 (approving instances of judicial deference to foreign proceedings); s*ee also infra* note 88.

56. As a practical matter, absent turnover of the assets to the home country court, the home country proceeding would ordinarily require aid of the local court to effect its rulings with respect to local assets.

57. *Cf.* 11 U.S.C. § 1114 (1994) (detailing fairly strict requirements for modification of retiree benefits).

including secured creditors and employees.[58] These and other rescue-facilitating measures may be inimical to local policies or may place disproportionate risk on local claimants.[59]

At the same time, the foreign proceeding would subject local claims to ranking and scaling down pursuant to foreign priorities, based on the value recovered from the debtor's assets as a whole and the amount and rank of competing foreign claims. This might require unwinding—based on home country avoidance law—of certain of the debtor's pre-bankruptcy payments or pre-bankruptcy transfers of local assets to local claimants. Finally, the foreign court would then effectively execute its determinations with respect to local claims and local assets, typically in full satisfaction of the local claims.

In effect, local claimants' rights, which would ordinarily include collection rights against the debtor's local assets, adjudicated by local courts under local law, would instead under universalism be disaggregated from those local assets and subjected to foreign rules applied by a foreign court in light of foreign claims. Again, this jurisdictional reach is uniquely a bankruptcy aspiration. In the basic civil judgment context, the foreign court would have no jurisdiction over local assets or local creditors that had no contact with the foreign state. The foreign judgments would therefore not merit recognition.

Even Jay Westbrook admits some discomfort at the breadth of this jurisdictional reach of universalist bankruptcy proceedings in particular contexts. He admits "real difficulty" in applying home country avoidance law to purely local transactions.[60] This "difficulty," however, is exactly why states scrutinize jurisdiction of the rendering court before granting recognition of civil judgments, and the difficulty is simply multiplied under a universalist bankruptcy system. At the same time, Westbrook eschews conventional conflicts analysis as "unsuited to current realities" of modern mul-

58. *Cf.* 11 U.S.C. (1994) § 364 (authorizing debtor-in-possession financing with possible priority or senior lien status). In effect, this would subordinate existing creditors to the new lender's loan, placing the risk of further loss on the firm's pre-bankruptcy creditors, who might instead prefer immediate liquidation, i.e., the bird in the hand.

59. These issues are particular examples of the more general question of how strongly a particular bankruptcy regime favors rescue over liquidation. *See infra* note 73 and accompanying text. For examples of similar issues, see LoPucki, *Cooperative Territoriality*, *supra* note 1, at 2224.

60. "There would be real difficulty in applying Hong Kong preference law to a small United States supplier who was dealing with a local branch of a Hong Kong debtor in a transaction that was in every way local except for the nationality of the debtor." Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 534.

tinational enterprise regulation.[61] He may be right in terms of his universalist goals, but as long as states care about their "prickly rights of sovereignty,"[62] universalism has some conventional jurisdictional obstacles to overcome.

IV. Exporting Social Policy

Assertion of expanded jurisdiction enables a state's courts to export social policy to other states.[63] The jurisdictional test for recognition of foreign judgments can be understood as a mechanism to deter such ambitions.[64] Given the meta-law nature of bankruptcy, the potential for export of social policy is great when a state asserts extraterritorial bankruptcy jurisdiction. Potential importing states, understandably vigilant about such large-scale imports, may reject universalism on that basis.

Differences in social policy embedded in states' various bankruptcy regimes are not difficult to detect. Creditor priorities provide a crisp example. Each state has its favored creditors, whose recoveries take priority over the general body of creditors. In the United States, grain producers and United States fishermen enjoy special priority over general creditors in certain cases.[65] These favored industries are peculiar to the United States, of course; there is no widespread international norm that suggests grain producers and United States fishermen deserve special protections in the face of corporate financial distress. In South Korea, Mexico, and France, employee priority claims are senior to secured

61. *Id.* at 503.

62. Jay Lawrence Westbrook, *Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business*, 25 Tex. Int'l L.J. 71, 76 (1990) (reviewing A.D. Neale & M.L. Stephens, International Business and National Jurisdiction (1988)) (decrying conflicts rules that impede effective regulation of multinational firms).

63. *See* LoPucki, *Cooperation in International Bankruptcy*, *supra* note 9, at 759 (noting that an involuntary claim is "the direct product of some country's social policy" and that "[t]o require a second country to recognize that claim exports the social policy of the first.").

64. Michael Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 Melbourne U. L. Rev. 416, 426 (1999); Dalhuisen, *supra* note 27, at 3-9. Efforts to expand jurisdiction may also appeal to the local bar, which stands to gain in terms of increased representations as the scope of cases that may be heard locally increases. *See* Whincop, *supra* note 64, at 425. Judgment recognition conventions and municipal judgment recognition laws also typically allow for refusal of recognition if it would be incompatible with the state's public policy. *See* Hague Convention, *supra* note 54, art. 28(11)(f); Scoles & Hay, *supra* note 51, at 1015; Whincop, *supra* note 54, at 428. This basis for refusal of recognition further limits states' social policy exporting ambitions.

65. 11 U.S.C. § 507(a)(5) (1994).

claims.[66] By contrast, in most countries, employee claims—almost invariably unsecured—are not excepted from the general rule that secured claims have priority over unsecured claims with respect to the secured creditors' collateral.[67]

Vindication of the distribution scheme may in addition require avoidance of certain pre-bankruptcy transfers. Failing to unwind these transactions would enable parties to thwart the distribution scheme. On the other hand, permitting certain pre-bankruptcy transfers favors the likely recipients of those transfers. Therefore, the rules distinguishing valid from invalid pre-bankruptcy transfers are integral to a state's distribution scheme.[68] But states differ on avoidance rules. For example, pre-bankruptcy setoff is permitted in some states, but not in others.[69] States differ as to the circumstances under which debtors are permitted to prefer certain creditors on the eve of bankruptcy.[70]

More generally, states take differing approaches to resolving corporate financial distress and addressing the various interests implicated. States may have quite divergent views of the appropriate methods and goals for an insolvency regime.[71] Some protect secured creditors above all else.[72] Others focus primarily on rescuing the going concern and maximizing employment, with creditor recoveries being less important.[73] Some eschew formal legal proceedings in favor of more informal mechanisms for resolution of

66. Soogeun Oh, *Creditor Rights in Insolvency Procedure*, Address Before OECD, World Bank, APEC, and the Australian Treasury (Nov. 29-30, 1999) (South Korea), *available at* http: //www.oecd.org/daf/corporate-affairs/insolvency/in-asia/oh.pdf (last visited Aug. 15, 2001) (on file with the George Washington International Law Review); AM. LAW INST., TRANSNATIONAL INSOLVENCY PROJECT: INTERNATIONAL STATEMENT OF MEXICAN BANKRUPTCY LAW 71 (Tentative Draft Apr. 15, 1998) (Mexico); WOOD, *supra* note 47, at 24 (France).

67. WOOD, *supra* note 47, at 25.

68. Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 508 (noting connection between avoidance law and integrity of priority distribution scheme).

69. WOOD, *supra* note 47, at 101. Allowing prebankruptcy setoff favors those creditors most likely to be in a position to exercise set off rights. Banks are likely beneficiaries.

70. *Id.* at 109-10; Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 504-05.

71. *See* WOOD, *supra* note 47, at 7 (ranking various jurisdictions as debtor- or creditor-friendly based on various factors).

72. *See id.* at 189 (describing treatment of security interests in various jurisdictions' corporate rehabilitation proceedings).

73. The corporate insolvency regime in France, for example, values rescue of the going concern above all else. Its primary objectives are "safeguarding the business" and "maintaining the firm's operations." Firms in insolvency continue operations under the observation of a court-appointed official for anywhere from six to eighteen months, during which time the official makes the decision whether to liquidate or rescue the firm. This official represents the State, not creditor interests, and creditors have little influence. *See* James Beardsley, *The New French Bankruptcy Statute*, 19 INT'L LAW. 973 (1985); Michelle J. White, *The Costs of Corporate Bankruptcy: A U.S.-European Comparison*, *in* CORPORATE BANK-

financial distress.[74] Some visit personal liability on corporate directors for insolvent trading.[75] With respect to asset disposition, substantive rules address (a) what items count as debtor assets subject to bankruptcy jurisdiction,[76] (b) the terms, if any, on which a rescue attempt will be permitted,[77] (c) how and by whom the choice between liquidation and rescue should be made, (d) who should manage the firm in the interim, and (e) what if any restrictions are to be placed on the firm's interim management.

To the extent that universalist interjection of home country law reorders a state's distributions to creditors such that recoveries for intended local beneficiaries are frustrated,[78] fundamental public policy considerations are implicated.[79] To the extent universalism

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RUPTCY: ECONOMIC AND LEGAL PERSPECTIVES 475-76 (Jagdeep S. Bhandari & Laurence A. Weiss eds., 1996).

74. Across states, differences in corporate finance and capital structure matter. For states in which banks dominate corporate finance, informal workouts are viable substitutes for formal insolvency regimes. By contrast, for states that rely on securities markets to finance corporate activity, collective action problems tend to require resort to legal avenues. *See* Ulrich Hege & Pierre Mella-Barral, *Reorganization Law and Dilution Threats in Different Financial Systems, available at* http://papers.ssrn.com/sol3/delivery.taf (last visited Aug. 15, 2001). Informal resolution of financial distress also substitutes for formal legal proceedings in states with weak legal infrastructure. *See* Stacey Steele, *The New Law on Bankruptcy in Indonesia: Towards a Modern Corporate Bankruptcy Regime*, 23 MELB. U. L. REV. 144, 156-57 (1999) (describing Jakarta Initiative and its relation to IMF-driven insolvency law reform efforts in Indonesia); Michelle Schreiber, Comment, *Beyond the Economic Turmoil of the Asian Financial Crisis: Indonesia's Struggle to Cope with Insolvency*, 12 TRANSNAT'L LAW. 353, 374 (1999).

75. *See* Insolvency Act, 1986, § 214 (Eng.); Corporations Law, Pt. 5.7B, Div. 4, § 588G (Austl.); *see also* L.S. Sealy, *Personal Liability of Directors and Officers of Insolvent Companies: A Jurisdictional Perspective (England), in* CURRENT DEVELOPMENTS, *supra* note 34, at 486.

76. *See* WOOD, *supra* note 47, at 35-36 (describing various estate property issues and their treatment across various jurisdictions). For example, under U.S. law, certain types of trust assets are excluded from the debtor's estate. *See* 11 U.S.C. § 541 (1994).

77. I use the term "rescue" to refer to a proceeding triggered by a firm's financial distress that is meant to save some or all of the firm's business as a going concern. Examples include Chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 (1994 & Supp. IV 1998); the French *redressement*, Loi no. 85-98 relative au redressement et la liquidation judiciaire des enterprises; and administration under the English Insolvency Act, Insolvency Act, 1986, §§ 8-27 (Eng.).

78. Especially considering that throughout the world, payments to priority creditors typically exhaust all the value available for bankruptcy distribution, states will be quite concerned that their priority schemes are vindicated to the extent possible. Westbrook, *Choice of Avoidance Law, supra* note 8, at 517

79. Moreover, particular aspects of a state's bankruptcy rules may constitute only incidental wrinkles that are part of broader programs. A state's priority ranking of personal injury tort creditors in bankruptcy, for example, may relate to the breadth and quality of its state-sponsored health care system. A state with relatively comprehensive health coverage may depend less on tort law as a compensatory device. A state's ranking of employee wage claims may reflect to some extent the state's intended division of the costs of social stability between the public and private sectors. The more generous the benefits to employees, the

demands a rescue attempt when liquidation is the local preference, or vice versa, domestic policies are thwarted.[80] These complications may explain why recognition conventions typically exclude insolvency recognition from their coverage.[81]

Insolvency law's wholesale purview means that recognition of a foreign proceeding effects the wholesale import of another state's regime for deciding sensitive policy issues. Political judgments about local asset disposition and allocation of local losses from the foreign firm's demise are left in the hands of a foreign court. Universalism effectively requires a state's precommitment to wholesale deferral to other states' various prescriptions for financial distress. This is no small request.[82]

V. Systematic Bias

In addition to the general sovereignty concerns that all nations share, universalism may implicate other concerns specific to particular states. A universalist system might systematically favor some states and their creditors over others, making universalism unattractive to the disfavored.

If the debtor's home country law governs, then a state that is home to relatively more multinational firms will likely see its insolvency laws more often applied extraterritorially. Given the current pattern of investment flows, less developed countries (LDCs) are far more likely to be the targets for assertion of extraterritorial bankruptcy jurisdiction, rather than their initiators. For most multinational corporations, the home country will be an industrial

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worse recoveries general creditors receive. To the extent they are able, general creditors will pass these losses on to borrowers in the pricing of credit.

80. A rescue or reorganization attempt in effect trades a bird in the hand—the liquidation value of the debtor firm—for the possibility of two or more birds in the bush—the possible higher value of the firm as a salvaged going concern. As with any investment, however, the rescue attempt may end up destroying value instead of increasing it. Creditors who bear a disproportionate risk of loss will oppose a rescue attempt, while claimants standing to enjoy a disproportionate share of the possible gain will favor rescue. Each state, by setting the terms on which a rescue attempt may be permitted, decides this trade off among the various interests in the firm.

81. Brussels & Lugano Conventions, *supra* note 54, art. 1; Hague Convention, *supra* note 54, art. 2(e); Dalhuisen, *supra* note 27, at 3-8.

82. Professor Westbrook suggests that these problems can be avoided by applying universalism only to "large" multinationals. Westbrook, *Global Solution*, *supra* note 8, at 2298-99. If the size of the firm bears *any* relation to the level of its local activity, however, it would seem that a "large" firm would be at least as likely to engage in significant numbers of local transactions—employment and supply contracts, for example—as a smaller multinational firm. Moreover, the failure of the large multinational may have significantly greater local effects than failure of a small one.

country.[83] Therefore, under universalism, LDCs would regularly have to defer to industrial country insolvency regimes.[84] In addition to social policy concerns, LDC creditors would be forced to learn about and function under various foreign systems. But LDC creditors may be exactly the sorts of creditors most vulnerable to these international complications. In general, they will be less sophisticated than their industrial country counterparts. They are less likely to be able to adjust appropriately—even on average—to the risks of various foreign insolvency regimes.[85]

Universalism might systematically impose other costs as well. A given state may routinely be "asset-heavy." That is, its creditors would tend to do better under a territorial approach because multinational debtors' assets tend disproportionately to wind up within that state's jurisdiction relative to the amount of local creditors' claims.[86] "Countries that think they will routinely be in surplus will not be very eager to join an international scheme; the benefits to be realized by everyone from greater realization on assets are probably too imprecise to persuade them that greater asset prices will outbalance loss of a consistent surplus position."[87]

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83. International bankruptcy havens might also become popular as home countries by attracting eve-of-bankruptcy debtors shopping for favorable law and fora. *See* LoPucki, *Cooperative Territoriality*, *supra* note 1, at 2236. Bermuda and the Cayman Islands appear to be moving in that direction. *See id.* LDCs are unlikely to be successful competitors in the international bankruptcy haven market.

84. LDCs might also have to defer to other LDCs' insolvency regimes as well. That possibility does not alter the basic point that under universalism LDCs will more likely be targets of extraterritorial bankruptcy jurisdiction than instigators.

85. Andrew Guzman discusses the lending distortion that arises under universalism from creditors' inability to adjust to different insolvency regimes. Guzman, *supra* note 24, at 2190.

Developing country creditors may also be powerful interest groups within their own countries, and their governments may wish to protect them from harmful effects of first-world insolvency regimes. While most of the literature on international insolvency has to date focused only on industrial countries, major LDCs—China, India, Indonesia—are bound to become significant commercial actors in this new millennium. It is not too soon to begin considering issues related to their international commercial integration.

86. Moreover, the lion's share of administrative claims will likely be incurred in the home country as part of the insolvency administration. Typically priority claims, these home country administrative claims may severely diminish recoveries of other creditors. General creditors ordinarily fare poorly in any event. *See infra* note 78.

87. Westbrook, *Theory and Pragmatism*, *supra* note 17, at 465 n.26 (noting "rough wash" as a precondition to a state's adoption of universalism). National treatment of foreign creditors—treatment of foreign creditors on a par with local creditors—appears to be the formal rule in jurisdictions and may ameliorate this problem to some extent. *See* Westbrook, *Choice of Avoidance Law*, *supra* note 8, at 514 ("[M]ost modern legal systems permit foreign creditors to share on a basis of equality in the local distribution."). Even without formal discrimination, however, foreign creditors may do worse than local creditors simply

Despite the promised benefits of universalism, some states may anticipate systematic disadvantage from acceding to a universalist system. They will be reluctant to precommit to universalist principles. Instead, they will assert their sovereignty over assets within their borders. They may cooperate with foreign courts in an ad hoc way, but they will retain discretion over their assets.

VI. Next Steps: Is Universalism Possible?

The preceding discussion explained why states will be reluctant to adopt universalism. Every state will have sovereignty concerns, making it reluctant to commit to recognition of foreign bankruptcy court decisions applying foreign bankruptcy law. In addition, some states will anticipate only systematic disadvantage from universalism.

This Part proposes a next step for future research, raising the question of whether universalism is even possible. Though most states will fail to find universalism attractive, this is not to say that *no* states will be interested.[88] Assuming states exist that wish to adopt universalism, however, they may have difficulty establishing

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because of higher collection costs from not being "on the ground." *See infra* note 37 and accompanying text.

88. Some analysts argue that the United States has adopted a form of unilateral universalism with Section 304 of the Bankruptcy Code. "Section 304 of the U.S. Bankruptcy Code and the leading case law thereunder exemplify 'modified universalism.'" Jay Lawrence Westbrook, *Universal Priorities*, 33 Tex. Int'l L.J. 27, 28 (1998) (citations omitted); *see also* Westbrook, *Global Solution*, *supra* note 8, at 2300-01. Section 304 authorizes courts to enjoin enforcement or collection efforts against the debtor in the U.S., to order turnover of U.S. assets to a foreign representative, and to order other appropriate relief. It further provides that any relief granted should be consistent with:

> (1) just treatment of all holders of claims against or interests in [the] estate;
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
> (3) prevention of preferential or fraudulent dispositions of property of such estate;
> (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
> (5) comity; and
> (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 304(c) (1994).

The universalist characterization, however, does not fit the facts closely. A "universalism" that is contingent on preserving the entitlements of local creditors "is virtually indistinguishable from territoriality." LoPucki, *Cooperative Territoriality*, *supra* note 1, at 2221. Moreover, a casual inspection of Section 304 shows that it contains merely a laundry list of factors for judges to consider. *See* Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 Wash. U. L.Q. 931, 934 (1994); Westbrook, *Theory and Pragmatism*, *supra* note 17, at 472 Not surprisingly, results under Section 304 have been mixed, as universalists sometimes admit. *See* Bebchuk & Guzman, *supra* note 23, at 784 (discussing mixed results under § 304); Westbrook, *Theory and Pragmatism*, *supra* note 17, at 473

regularized universalist cooperation. This question is interesting and important because no states have adopted universalism despite its overwhelming and long-standing support among bankruptcy analysts. This Part offers a simple game-theoretic approach for future inquiry that may shed light on the prospects for universalism.

Game theory analysis is standard in the conflict of laws literature,[89] as well as in international relations discourse.[90] It provides a useful tool for understanding strategic interaction. States are interdependent, and one state's decisions or actions will affect those of other states.[91] In all sorts of contexts, analysts of international cooperation have relied on game theory to explain the conditions

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(describing "a mixed bag of judicial results" under § 304); *see also* Knecht, *supra* note 55, at 306-14 (discussing cases of conditional or incremental deferral to foreign proceedings).

89. *See* LEA BRILMAYER, CONFLICT OF LAWS 182 (2d ed. 1995) (proposing game models for choice of law analysis); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 161 (1998) (applying iterated prisoners' dilemma model to choice of law); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 339-44 (1990) [hereinafter Kramer, *Rethinking Choice of Law*]; Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1022-23 (1991). This resort to game theoretical analysis has not been without controversy. *See* Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 1000 (1994) (doubting that game theory prescriptions for achieving cooperative outcomes apply to judges' choice of law decisions); Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 55 (1991) (questioning applicability of prisoners' dilemma model to choice of law, and describing game theory and choice of law as "Godzilla Meets the Swamp Thing").

90. *See* Robert Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, *in* COOPERATION UNDER ANARCHY 235 (Kenneth A. Oye ed., 1986); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989); Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, 38 WORLD POL. 1 (1985); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998); Duncan Snidal, *Coordination versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923 (1985) [hereinafter Snidal, *Coordination*]; Duncan Snidal, *The Game* Theory *of International Politics*, 38 WORLD POL. 25 (1985) [hereinafter Snidal, *Game Theory*].

91. A "game" is simply a model of parties' interactive behavior. It illustrates how parties make decisions in situations of interdependence. A game specifies the players, their available strategies—the set of options or choices they each have—and the pattern of payoffs—what each player receives under each combination of independent decisions. *See* DOUGLAS G. BAIRD ET. AL., GAME THEORY AND THE LAW 8 (1994). Players are also assumed to be rational, insofar as they maximize expected utility—preferring outcomes with higher payoffs to those with lower payoffs—and make decisions based on the assumption that other players are also rational. *See id.* at 11-13.

Assumptions about players' information are also important. Many international relations problems are modeled as games of complete information. *See* Abbott, *supra* note 90, at 360. Each player knows the strategies and payoffs available to itself and the other players, but must make a strategy choice without knowing other players' actual choices. *See* BAIRD ET AL., *supra* note 91, at 10 (distinguishing among games of incomplete, complete, and perfect information). The purpose of the model is to generate predictions about how the

under which international cooperation may flourish or die.[92] Application of these lessons to international bankruptcy may generate interesting results. In particular, this approach may assist in designing useful institutions or co-opting existing ones to promote insolvency cooperation, steering us toward promising strategies and helping to eliminate less fruitful ones. This Part outlines one promising course of inquiry. It suggests that universalist-leaning states may find themselves in a prisoners' dilemma that may inhibit their cooperative endeavors.[93] Whether solutions to the dilemma exist is not obvious, and the answer to that question will be of enormous importance in fashioning an appropriate course for international bankruptcy reform.

Consider two states, A and B. Each state could simply follow its traditional territorial leanings with respect to every cross-border bankruptcy involving the other state. However, each state might instead decide that it is better off acceding to mutual universalist recognition with the other state—"cooperation" in the game parlance.[94] Each state presumably benefits when, as the home country, its assertion of extraterritorial bankruptcy jurisdiction is recognized by the other state, and each state would commit to defer when the other state is the home country, despite any short-term detriment to the policies of the deferring state. Each state presumably anticipates that overall it would gain from universalist cooperation.

Assuming this analysis accurately captures a plausible set of states' preferences, ambivalence toward mutual cooperation creates a prisoners' dilemma. While mutual universalist cooperation is

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players will behave given the constraints of the particular game. Modeling their interaction as a game helps to highlight important features of the interaction.

92. *See* Axelrod & Keohane, *supra* note 90, at 227; Abbott, *supra* note 90, at 335; Oye, *supra* note 90, at 2, n.2; Snidal, *Coordination*, *supra* note 90, at 923; Snidal, *Game Theory*, *supra* note 90, at 25.

93. For a description of the prisoners' dilemma game, see ROBERT AXELROD, THE EVOLUTION OF COOPERATION 7 (1984).

94. A more complete analysis would include some account of how various states form their preferences regarding international insolvency rules, including the influence of domestic interest groups on state policy. *See* Snidal, *Coordination*, *supra* note 90, at 926 (acknowledging drawbacks to realist assumption of states as goal-seeking actors with well-defined preferences); *cf* Jonathan R. Macey, *Chicken Wars as a Prisoners' Dilemma: What's in a Game?*, 64 NOTRE DAME L. REV. 447, 434 (1989) (reviewing JOHN C. CONYBEARE, TRADE WARS: THE THEORY AND PRACTICE OF INTERNATIONAL COMMERCIAL RIVALRY (1987)) (noting importance of public choice analysis in understanding trade policy formation); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L. ORG. 427, 451 (1988) (proposing two-level game analysis with respect to domestic-international interactions).

deemed superior to territoriality for both states, they may never succeed in establishing a cooperative arrangement. Even if both states committed to universalism, the non-home country might be tempted to defect—to cheat on its commitment. It might act territorially, refusing to defer to the home country bankruptcy proceeding in order to garner immediate gains by applying its own laws with respect to local assets.[95] Cooperation might never arise because each state anticipates the possibility of future defection by the other. Neither state would wish to bear the cost of unrequited cooperation, so each refuses to cooperate at all.

The dilemma arises because although—unlike the classic prisoners' dilemma story—states can and do communicate, states' promises may not be credible. Among sovereign states, no ultimate international authority exists to enforce states' promises. There is no supranational sovereign to force states to abide by their commitments. Therefore, states may not be able to guaranty future performance of those commitments.[96] With universalism, neither state may be able to make a credible commitment that it will defer as promised. Nor can it be assured of the other state's compliance. Each state may therefore have to protect itself by adhering to traditional territoriality, which results in a suboptimal outcome for both states.

Game theorists have taught us, however, that the prisoners' dilemma is not hopeless. Players may be able to avoid the mutual defection equilibrium and instead achieve mutual cooperation. Although enforcing commitments is always a problem in international affairs, states have managed to achieve cooperative outcomes. Are strategies available to prospective universalist states that may enable cooperation despite their dilemma? A few primary issues are enumerated below.

If credible commitments are the problem, can states improve the credibility of universalist commitments? In some international contexts, states may demonstrate commitment by taking steps to reduce their own prospective payoffs from defection. For instance, a state may demonstrate its commitment to the liberal international trading regime by permitting domestic industries to either

95. This assumes that a state "gains" when its policies are furthered through application of its laws. For example, in a particularly sensitive case, the non-home country may insist on distributing local assets according to local priorities that favor particular local creditors, instead of respecting the distribution scheme applicable in the home country proceeding.

96. *See* Oye, *supra* note 90, at 1.

thrive or fail based on their comparative advantage. As a domestic economy becomes more specialized, it depends more heavily on international trade. The state therefore becomes less likely to cheat on its trade commitments for fear of retaliation.[97] Are similar strategies available in international bankruptcy? Perhaps by taking steps to reduce payoffs from defection, states may be able to demonstrate commitment to universalist rules.

Repeat play may also improve cooperation. With expectations of repeat play, players know they will have opportunities to reward or punish each other by cooperating or defecting in future rounds of play. Given the prospect of future reward for current cooperation and future punishment for current defection, a stable pattern of reciprocal cooperation may emerge.[98] If the game is infinitely repeated, as is typically the case with international commercial relations, the prospects for stable cooperation are strong.[99]

But successful reciprocity depends on many factors. How "iterative" are states' interactions with respect to international bankruptcy? Iterations of the universalist recognition game must be regular enough between the two states, and their respective discount rates low enough, that each can anticipate future cooperative payoffs that outweigh the immediate payoffs from current defection.[100] Without these conditions, each interaction looks more like a one-shot game, for which defection is the dominant equilibrium. Are favorable conditions for cooperation likely?

Reciprocity also depends on states' ability to distinguish cooperation from defection in order to respond appropriately. While the conduct of bankruptcy proceedings may be fairly transparent, what counts as cooperation must be sufficiently clear that players can accurately distinguish cooperation from defection. Can universalist obligations be sufficiently specified such that foreign court decisions may accurately be interpreted as cooperation or defection? The current debate over universalism suggests that clear rules for determining the home country may be elusive.[101] Specificity with

97. *See id.* at 10-11.

98. *See* Axelrod & Keohane, *supra* note 90, at 235; *see generally* ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984) (describing experiments confirming evolution of cooperation with repeat-play prisoners' dilemma games).

99. Oye, *supra* note 90, at 13 n.25.

100. JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 38 (1994) (discussing preferences over time); Oye, *supra* note 90, at 12-13; Snidal, *Game Theory*, *supra* note 90, at 50-51. States might be able to improve the iterative quality of their interactions by resort to issue linkage. *See* Oye, *supra* note 90, at 17.

101. *See infra* note 24.

respect to this fundamental issue may be critical to successful reciprocity.[102]

In any event, a close look at the conditions of play in the international bankruptcy game will generate more and better information about the likelihood of universalism. More generally, further research along the lines described above will enable better assessment of the various proposals for international bankruptcy cooperation, allowing us to distinguish promising approaches from less useful ones and facilitating the design of an effective cooperative regime.

VII. Conclusion

This Article has elaborated states' reluctance to commit to universalism. Independent of the strength or weakness of universalist efficiency claims, this fear of commitment to universalism raises some question as to whether universalism could ever emerge as a popular prescription for international bankruptcy cooperation.

More generally, even as the world grows more economically integrated, and international borders become less and less relevant, there will remain social, economic, and political issues for which borders and local politics do—and perhaps should—matter. As globalization tends to homogenize tastes and preferences, some stubborn local variation will remain. Whether this local variation and local control should be condemned is debatable, and in any event, it may be unwise to rely solely on stylized efficiency as the metric by which to judge.

Local control and management of loss distribution from corporate financial distress may be an issue of particular significance for many states, especially in the face of international economic integration, attendant economic volatility, and the increasing influence of multinational enterprises. That territoriality remains the dominant practice in the world, despite theorists' longstanding esteem of universalism, suggests that this might be so. While the recent scholarly attention to international bankruptcy theory portends progress in this complex and important area, serious reform should account for states' territorial interests in designing the international bankruptcy regime of the future.

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102. Moreover, even under ideal conditions, cooperation is not the only possible equilibrium outcome. Mutual defection is also always a subgame-perfect equilibrium in iterated prisoners' dilemma games. *See* Morrow, *supra* note 100, at 267.