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Greed and Pride in International
Bankruptcy: The Problems and
Proposed Solutions to “Local Interests”

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**GREED AND PRIDE IN INTERNATIONAL
BANKRUPTCY: THE PROBLEMS OF
AND PROPOSED SOLUTIONS TO
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*John A. E. Pottow**

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The collapses of Yukos, Parmalat, and other international juggernauts have focused scholarly attention on the failure of multinational enterprises. Even what one might consider “American” companies, such as Chicago-based United Airlines, have made clear in their restructuring plans that their operations have profound effects on the dozens of nations around the globe

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where they transact business.¹ Government and quasi-government reform efforts to regulate these cross-border insolvencies have abounded, including among others, the UNCITRAL Model Law on Cross-Border Insolvency.² UNCITRAL is also building on World Bank and INSOL³ efforts at promulgating a Legislative Guide for “best practices” bankruptcy codes.⁴

Scholars vary in their enthusiasm toward these reform efforts, but most will agree that these initiatives should be grounded in a coherent theory of cross-border financial distress.⁵ Debate to date in international bankruptcy theory has centered on two competing paradigms, universalism and territorialism.⁶ This rich scholarly discussion is replete with complex overlays, such as the proper role of private ordering by parties within either proposal.⁷ One of the principal sticking points of this debate, however, has been how best to protect what are often called “local interests.”⁸ While scholars and courts are not as precise in their use of this term as they might be, they express serious concern over the perils local creditors and small-country sovereigns face in trying to design a viable international bankruptcy system.⁹

The purpose of this Article is twofold. First, it explores what exactly we mean in cross-border insolvency law when we talk about “local” creditors and protecting “local interests.” Because these local interests are crucial to the debate between universalists and territorialists (with the latter claiming

1. See United Airlines’ Filings in U.S. Bankruptcy Court, <http://www.ilnb.uscourts.gov/chapter11/0248191.pdf> (last visited Apr. 12, 2006).

2. U.N. Comm’n on Int’l Trade Law [UNCITRAL], Model Law on Cross-Border Insolvency with Guide to Enactment, U.N. Sales No. E.99.V.3 (1999) [hereinafter Model Law].

3. INSOL is the International Association of Restructuring, Insolvency & Bankruptcy Professionals. See INSOL International, <http://www.insol.org/> (last visited Feb. 21, 2006).

4. The Secretary-General, *Report of the Secretary-General on the Draft Legislative Guide on Insolvency Law, delivered to the Commission on International Trade Law, Working Group on Insolvency Law*, U.N. Doc. A/CN.9/WG.V/WP.54 (May 22, 2001) [hereinafter *Draft Legislative Guide*].

5. For a disagreement over the coherence of just one such proposal, compare Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 Va. J. Int’l L. 743 (1999) with André J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 Tul. J. Int’l & Comp. L. 309 (1998).

6. Both paradigms are attacked and defended in Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 Mich. L. Rev. 2177 (2000).

7. See, e.g., Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 Mich. L. Rev. 2252 (2000) [hereinafter *Resolving Transnational Insolvencies*]; Robert K. Rasmussen, *A New Approach to International Insolvencies*, 19 Mich. J. Int’l L. 1, 17–18 (1997) [hereinafter *International Insolvencies*].

8. See, e.g., Bob Wessels, *The European Union Insolvency Regulation: An Overview with Trans-Atlantic Elaborations*, 2003 Ann. Surv. Bankr. L. 481, 487 (noting that territorialism and territorialist retrenchments within universalist systems build upon the premise that “territorial proceedings protect local interests and for that purpose the national law of that [local country] applies”).

9. See, e.g., Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 Brook. J. Int’l L. 499, 518 (1991) (“The inevitable consequence is that local claimants will be prejudiced in some cases. International cooperation will be achieved despite local prejudice only if policymakers are convinced of [offsetting benefits].”). For a translation of the concerns about protecting local creditors into international bankruptcy reform proposals, see Model Law, *supra* note 2, art. 21(2).

that the former cannot protect these interests sufficiently),¹⁰ rigorous analysis is imperative to permit meaningful critique. Second, this Article advances policy recommendations to address the problems of local interests (as properly understood) and suggests the next stage in designing a theoretically sound but pragmatically functional international bankruptcy system.

The Article proceeds as follows: Part I summarizes briefly the universalist-territorialist debate in international bankruptcy theory. Part II first looks at the concern of protecting “local creditors” and unpacks that concept into its constitutive parts. It argues that this construct is actually an amalgam of what is called the local asset-claims ratio (a legally neutral, unpredictable-before-bankruptcy happenstance) and the content of the local state’s substantive bankruptcy laws (an arguably predictable factor *ex ante* to any given debtor’s default). These components both affect the overriding motivation of the local creditor in a cross-border insolvency, which I characterize as “greed.” Part II further explores the idea of protecting “local states” and argues that these are distinct concerns from the problems of local creditors. These state-specific interests present separate obstacles for international bankruptcy that operate on a parallel but distinct track from greed. The related vice of these local sovereign policymakers that matches their local constituents’ greed is what I loosely call “pride.”

Armed with a more accurate and honest understanding of the challenges local greed and local pride present in cross-border insolvencies, Part III turns to policy recommendations, focusing on the more intractable but at least more predictable problem of pride. It offers a first-best resolution from a theoretical standpoint, contending that recharacterization of the conflicts of laws presented by cross-border disputes—by focusing on diffuse reciprocity and the identification of bankruptcy meta-norms—provides the clearest path to taming the problem of sovereign pride. It suggests that the project of substantive harmonization, especially the reduction of priority payout provisions within domestic bankruptcy laws, begins this task. Because international bankruptcy is an inchoate and fluctuating field, however, Part III also offers some second-best, pragmatically oriented policy alternatives. It first critiques two of the dominant proposals, liens and circumscription. It then proposes a new and arguably better idea: a substantive carve-out in favor of the local territorial state within an overarching universalist framework. The carve-out proposal, while directed at pride, may have spillover potential that will help with greed; it thus takes aim at two birds with one stone.

Part I—International Bankruptcy Theory

In broad summary, international bankruptcy creates enormous problems for commercial actors because of a combination of at least three general attributes of insolvency law. First, insolvency laws have an expansive reach. That is, when an entity commits general default on its various financial obligations, the resolution of that failure requires that all participants be bound to the legal outcome. Accordingly, bankruptcy proceedings are in *rem* and

10. Sefa M. Franken, *Three Principles of Transnational Corporate Bankruptcy Law: A Review*, 11 Eur. L.J. 232, 235 (2005) (“The protection of local creditors and local policies is the most common justification for denying the effects of [universalist] foreign bankruptcy proceedings.”).

bind all potential stakeholders in the debtor's property.¹¹ This broad-sweeping and compulsory law corrals those constituents who would prefer to defer collective resolution and deal with their debts on an individual in personam basis. All must join a group resolution.¹²

In addition to this breadth, bankruptcy law intrudes upon another axis: it invades and displaces pre-existing legal relationships. What otherwise is a perfectly enforceable executory contractual obligation can find itself dishonored or modified by a debtor under the jurisdiction of a bankruptcy court, often to the dismay of the contractual counterparty. Some have termed bankruptcy a type of "meta-law" that swoops in and trumps baseline legal relationships in the unusual circumstance of general financial default.¹³

In addition to being invasive along these two axes, bankruptcy law is also "prickly." That is, despite the protestations of many scholars who insist (with some merit) that the principal focus of a bankruptcy law should be the efficient resolution of financial distress,¹⁴ the bankruptcy laws on the books in myriad jurisdictions around the globe unabashedly contain a panoply of redistributive provisions.¹⁵ Among the most vivid of these are the priority payout rules of estate distribution. Although the baseline norm of bankruptcy distribution is "equality is equity," and therefore that limited assets should be distributed pro rata to share the burden of nonrecovery equally, the norm is most often honored in the breach.¹⁶ For example, employee-creditors owed back wages for unpaid services are arguably no different from a bank owed back payments for unpaid loan invoices; yet many systems advance the employees to the front of the line, offering them special, preferred payment before the garden-variety creditors (or, as Professor White prefers, the "dross")¹⁷ scrounge for the scraps.¹⁸ While scholars differ in their views as to what these priority payout provisions represent—important normative policy preferences regarding conceptions of fairness, economic assessments of comparative bargaining ability, or simply the spoils of domestic rent-seeking contests—the point is that these provisions

11. The in rem nature of bankruptcy law and its need to bind all participants, including sovereign states, is underscored in federalist systems such as the United States. See *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); see also 11 U.S.C. § 106 (2000).

12. See Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 7–19 (1986) (analogizing the bankruptcy process to the solution of a collective action problem).

13. See Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 *Geo. Wash. Int'l L. Rev.* 555, 566 n.44 (2001) (attributing the term "meta-law" to Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 *Am. Bankr. L.J.* 485, 486 (1996)).

14. See, e.g., Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 *Yale L.J.* 573 (1998) (outlining debate between those who embrace and those who reject a redistributive function for bankruptcy).

15. See, e.g., 11 U.S.C. § 507(a)(5)(B) (priority preference for "United States fisherm[e]n"). There is also disagreement at higher levels of system operation, such as the degree to which reorganization or liquidation more efficiently resolves financial distress and which way regimes should tilt in the face of uncertainty. For a recent comparative analysis, see Nathalie Martin, *Common-Law Bankruptcy Systems: Similarities and Differences*, 11 *Am. Bankr. Inst. L. Rev.* 367 (2003).

16. See Model Law, *supra* note 2, pmb1.

17. James J. White, *Death and Resurrection of Secured Credit*, 12 *Am. Bankr. Inst. L. Rev.* 139 (2004).

18. See Guzman, *supra* note 6, at 2197 ("Under the laws of the United States, Canada, Germany, Israel, Australia, Switzerland, England, and Egypt, employees receive priority behind secured claims and administrative expenses. In Japan, the Netherlands, and Argentina the same is true, although employees also recover behind at least one tax authority.").

implicate prickly issues that reveal a legislator's redistributive values in a sensitive legal context in which insufficient assets guarantee that unhappiness and pain will abound.¹⁹

Given this combination of attributes—broad-reaching scope, invasively displacing power, and normatively touchy legal rules—that characterize a typical bankruptcy code, it should not be surprising that international coordination engenders some difficulties.²⁰ And in an increasingly globalized economy, cross-border failures are becoming more and more common. When an international enterprise fails, several jurisdictions plausibly can lay claim to resolving the dispute.²¹ Because bankruptcy laws tend to be broad-reaching, conflicting claims are likely. Because bankruptcy laws are invasive and prickly, these conflicts are likely to be thorny.

To illustrate with a quick example, consider a Canadian-based manufacturer (incorporated in Ontario) with a plant, workforce, accounts, and sales force in Canada that also has a branch office and warehoused inventory in the United States (perhaps Michigan). Both Canada and the United States have colorable claims to regulate the resolution of that debtor's distress. The claims to jurisdiction are greatest regarding the assets located in the Michigan warehouse: Canada is presumably interested in governing the resolution of a "Canadian" debtor, and the United States in adjudicating property rights of assets located within her physical territory. This is a potential zone of conflict in which two sovereigns could both seek to exert regulatory control.²²

Bankruptcy scholars have coalesced around a discussion of two dominant forms of international regulation under such a scenario. ("Regulation" is being used loosely to refer to the systematic resolution of these situations, beyond the baseline quagmire of international comity.) The first approach is called "territorialism." Finding its animation in traditional rules of private international law, this approach advocates the bright-line rule of strict territorial jurisdiction. In the example above, the Canadian-situated assets would be administered in a Canadian bankruptcy proceeding under Canadian bankruptcy law to whichever creditors participated, and the American assets would be dealt with in an American proceeding under American law. Good borders make good neighbors: international tension is minimized, and commercial actors have *ex ante* clarity regarding which substantive law will govern the resolution of any given asset (even though that asset's location

19. See Jay Lawrence Westbrook, *Universal Priorities*, 33 *Tex. Int'l L.J.* 27, 30 (1998).

20. I deal only with private debtors; sovereign default raises different concerns.

21. Multiple claims to prescriptive jurisdiction is, of course, not a bankruptcy-specific phenomenon, although it may be a frequent one in bankruptcy due to the *in rem*, all-encompassing nature of a bankruptcy proceeding. Overlapping claims to prescriptive jurisdiction are behind Section 403 of the Restatement (Third) of Foreign Relations Law, which requires each country's claim to legislative reach to be "reasonable" and counsels deference to the state whose interest is "clearly greater" when more than one claim is reasonable. Restatement (Third) of the Foreign Relations Law of the United States § 403(3) (1987). Justice Scalia has characterized the Section 403 principles as either reflecting or being a good attempt at reflecting "the law of nations." See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) ("It is relevant to determining the substantive reach of a statute because 'the law of nations,' or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe.") (citation omitted).

22. See Frederick Tung, *Is International Bankruptcy Possible?*, 23 *Mich. J. Int'l L.* 31, 48–52 (2001). The United States "gregoriously" asserts bankruptcy jurisdiction over all the assets, not just the ones within the zone of regulatory conflict. See 11 U.S.C. § 541(a) (2000).

may change ex post to lending).²³ Many countries' extant bankruptcy laws reflect territorialist conceptions of jurisdiction.²⁴

The competing paradigm, "universalism," probably enjoys a privileged academic status inversely proportionate to its current acceptance by policy-makers in countries around the world. In their theoretical critique, universalists contend that the territorial regime begets inefficiencies in a variety of ways, including skewing investment patterns, imposing transaction costs (from the opening of multiple bankruptcy proceedings), raising information costs of mastering different insolvency laws, and inflicting monitoring or covenanting costs regarding the international movement of assets.²⁵ The universalists posit that a more desirable system would be a "one law" approach where in any given bankruptcy, one substantive bankruptcy law would be chosen to control resolution of the worldwide dispute.²⁶ Assets located in "ancillary jurisdictions"—countries other than the primary one whose laws were chosen to control—would either be repatriated to that controlling jurisdiction for administration or be subject to ancillary proceedings conducted under the substantive bankruptcy law of the controlling jurisdiction.²⁷ The choice of law rule favored by universalists to select the controlling jurisdiction is based on the "home" jurisdiction of the debtor.²⁸

Thus in the example above, in a universalist system of international bankruptcy, the assets would be administered according to Canadian bankruptcy law, including those assets physically located in the United States. This global application of Canadian law to the debtor's collapse minimizes the necessity to monitor the interjurisdictional movement of assets because Canadian insolvency law will always apply, regardless where the debtor's assets may travel. This reduced monitoring expenditure should theoretically reap, among other benefits, a cheaper cost of capital for debtors whose creditors pass along their ex ante savings (as they presumably must in a competitive lending environment). To follow the previous example under

23. The leading academic proponent of territorialism is Professor Lynn LoPucki. See Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 Cornell L. Rev. 696 (1999).

24. See, e.g., Sumant Batra, *Indian Insolvency Reforms—An Update* 6 (Nov. 2004) (unpublished paper, presented at the Forum on Asian Insolvency Reform 2004, on file with author) (describing India's "[u]nfortunate[]" territorialist laws regarding cross-border insolvencies and advocating reform); see also Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 Mich. L. Rev. 2216, 2219 (2000) ("Territoriality is currently the international law of bankruptcy.").

25. See Lucian Arye Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & Econ. 775 (1999); Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 Am. Bankr. L.J. 457 (1991); Guzman, *supra* note 6.

26. See Westbrook, *supra* note 19.

27. For ease of discussion, I am leaving aside parallel plenary proceedings in two jurisdictions, although these "dual" proceedings arise in the discussion of *L&H*, *infra* Part III.C. I am also for simplicity somewhat collapsing the (important) issues of choice of forum and choice of bankruptcy law.

28. The UNCITRAL Model Law ascribes predominant jurisdictional power in a multijurisdictional insolvency to the country housing the "center of the debtor's main interests." See Model Law, *supra* note 2, art. 2. This rule has served as a springboard for subsequent universalist projects. See John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 Va. J. Int'l L. 935 (2006).

universalism, a Canadian bankruptcy representative would make a limited appearance in U.S. bankruptcy court to seek a so-called “turnover” order of the American assets so that they could be administered under Canadian substantive bankruptcy law in a Canadian court notwithstanding their initial physical location in the United States.²⁹

Part II—Local Interests: Defining the Problem

A. Introduction

If scholars tend as a majority to support the enhanced efficiency (and, at some level, fairness) of universalism,³⁰ then why has such a supposedly superior international regime not come into being? Critics cite at least two roadblocks, although to be sure these are not the sole challenges.³¹ The first is simply operational: universalism, as fashioned above, requires a viable choice of law rule to select the jurisdiction entitled to control the worldwide bankruptcy. Thus, a choice of law rule must be crafted—and accepted—to anchor a universalist regime. This challenge has generated considerable discussion in its own right. Suffice it to say that territorialist critics who find such a rule elusive or unattainable may overstate their case.³²

The second problem with universalism is what Professor Westbrook, universalism’s primary academic champion, calls the “acceptance of outcome differences,”³³ whereby the application of different insolvency law (the home jurisdiction’s) to a different asset base (all global assets) under universalism creates the potential that local creditors fare worse than they would under local law. Professor Guzman aptly summarizes this collection of concerns by concluding that “territorialist objections to universalism center on the treatment of small, local creditors.”³⁴ The thrust of the concerns is that local creditors dealing with a local branch office of an international debtor presumably expect the application and related protections of local commercial law in the event of financial default.³⁵ As Professor LoPucki explains: “Yet in a universalist system, the priority of Mexican workers’ employment claims against a U.S. firm operating in Mexico would be determined by U.S. rules of priority—much to the disappointment of the affected Mexican workers.”³⁶ He concludes: “As a practical matter, the Mexican employee, the Mexican trade creditor, and even their U.S. counter-

29. See Model Law, *supra* note 2, arts. 20(1), 21(1)(e). Again, to be clear, I am deferring the issue of “dual” plenary proceedings, or even EU-style “secondary proceedings.”

30. See Tung, *supra* note 22, at 33 (acknowledging universalism as the preferred paradigm).

31. See, e.g., LoPucki, *supra* note 23, at 720–21 (discussing forum shopping and “havenism” concerns).

32. See Pottow, *supra* note 28, at 997 n.240 (critiquing Tung, *supra* note 22, at 70–82).

33. Westbrook, *supra* note 25, at 458.

34. Guzman, *supra* note 6, at 2180. Professor Guzman conducts an interesting analysis of how large a constituency these much-discussed small, local creditors are likely to be.

35. “Dunn is not a local U.S. creditor who should be given special protection by this court. Her relationship with [the debtor] began in Italy, where she was a consultant or employee of the firm. . . . She is not a ‘local’ creditor for whom the court should have solicitude” *In re Artimm, S.r.L.*, 335 B.R. 149 (Bankr. C.D. Cal. 2005).

36. LoPucki, *supra* note 23, at 711.

parts are unlikely to know enough about the foreign insolvency laws to adjust to them.”³⁷ Moreover, the concern over universalism’s ability to protect these “local interests” is not confined to American scholars. One of the leading European bankruptcy authors, Bob Wessels, also makes clear that territorial proceedings “protect local interests.”³⁸ This involves not only the individual creditors themselves but also the deferring states, which must suppress their own bankruptcy policies when universalism’s choice of law rule dictates that another state will be exporting its bankruptcy law to regulate the case.

In sum, “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 [applying foreign law]. Universalism effectively requires a state’s precommitment to wholesale deferral to other states’ various prescriptions for financial distress.”³⁹ Thus, it can be fairly said that strong concern exists that universalism’s broad-sweeping application of one law to worldwide financial failure has the potential to subjugate “local interests”⁴⁰ and that “[t]he protection of local creditors and local policies is the most common justification for denying the effects of [universalist] foreign bankruptcy proceedings.”⁴¹

The problem of “local interests,” on closer scrutiny, is actually a multifaceted matter that combines both the interests of local creditors (real, live claimants in a bankruptcy proceeding) *and* the interests of local governments (the sovereign states whose laws must be suppressed pursuant to universalism’s choice of law rule). Both of these “stakeholders” are deemed to be potentially disadvantaged, albeit under differing theories, by the resolution of cross-border insolvencies under the universalist system. Moreover, the arguments of how these constituencies might fare worse under universalism compared to territorialism only partially overlap, making it difficult to keep clear which problems implicate which group. Several, but not all, of these problems depend upon the content of local substantive bankruptcy law. Accordingly, this Part will try to address more rigorously the concerns commentators have raised regarding universalism’s impact on “local interests” in an effort to create a more coherent analytical framework. This analysis reveals that “local interests” actually shift from bankruptcy to bankruptcy, with sovereigns and their subjects sometimes clashing in what they prefer.

37. *Id.* Professor Westbrook similarly worries of the “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, *supra* note 9, at 534.

38. Wessels, *supra* note 8.

39. Tung, *supra* note 13, at 576.

40. The American Law Institute’s Transnational Insolvency Project takes some good first steps at more systematically dealing with “local creditor” concerns. *See infra* note 49.

41. Franken, *supra* note 10, at 235. The Preamble to the European Union’s Insolvency Regulation concedes that its convoluted structure of allowing “secondary proceedings” (which function like mostly territorialist proceedings with some universalist caveats) is intended to “protect the diversity of interests,” which it later implies is code for the “protection of local interests.” Council Regulation 1346/2000, 2000 O.J. (L 160) 2 (EC) [hereinafter EU Insolvency Regulation].

B. *The Interests of Local Creditors*

1. *Content-Neutral Interests: Asset Coverage Ratio (“ACR”)*

a. *The Problem*

One of the most important concerns of local creditors pertains to the payoff they may expect to receive on account of their insolvency claims under a territorialist regime as opposed to a universalist one. Under the most uncooperative form of territorialism, local creditors seize local assets within their country and divide them up in local bankruptcy proceedings; this results in a separate proceeding in each of the several jurisdictions where an international debtor has assets.⁴² (The assumptions underlying this extreme case, such as the inability of creditors to travel to and participate in proceedings outside their home countries, are addressed below, but for simplicity the extreme case is considered at the outset.) Universalism, by contrast, takes an “everyone in” approach and pools all the internationally dispersed assets (and claims) together to be administered collectively under one substantive bankruptcy law—that of the controlling jurisdiction. It is like a giant potluck where all the debtor’s worldwide creditors are invited, bringing with them various assets from around the globe. As a result, if we control for any substantive differences in bankruptcy law, “local creditors” under universalism who anticipate they have a high ratio of local assets to local claims, or, more precisely, a higher ratio of local assets to local claims than the global average, would rationally prefer the isolated distribution of territorialism to the collective distribution of universalism. The creditors who would so prefer would be in a “surplus” jurisdiction. They would gain nothing from sharing their local assets of the debtor with their international creditor colleagues, even if those international colleagues brought other assets of the debtor to the table for sharing. A good chef hates potluck; he is happy to stay home and cook for himself.⁴³

By corollary, creditors who anticipate that the debtor’s asset base located within their country’s territory will generate a lower coverage ratio than the global average are in a “deficit” jurisdiction. They would happily and anxiously seek universal pooling; while potluck is the gourmet’s bane, it is the graduate student’s feast. This ratio of local-debtor assets to local-creditor claims is what I refer to as the local “Asset Coverage Ratio” (“ACR”). What is important is that the ACR, from an analytical standpoint, is independent of the content of local law.⁴⁴ In other words, the ACR of local creditors is

42. See *Resolving Transnational Insolvencies*, *supra* note 7, at 2257 (summarizing standard argument).

43. Professor Westbrook was the first to articulate this concern: “The bulk of countries most likely to join in transnational cooperation are those who believe that they are deficit countries at least as often as they are surplus countries. Countries that think they will routinely be in surplus will not be very eager to join an international scheme” Westbrook, *supra* note 25, at 465 n.26. While it is difficult to improve upon Professor Westbrook’s analysis, it should be noted that this observation equates countries with creditors; in the corresponding text, his summary keeps the asset-coverage focus where it more properly belongs—on creditors. See *id.* at 465.

44. This broad proposition, like many broad propositions, dissolves with greater nuance. Directly, local law defines property exemptions from creditor seizure, thus affecting the numerator. More indirectly, local law may have *ex ante* incentive effects, both positive and perverse, that affect where international firms situate investment assets, a consideration well beyond the scope of this

theoretically “content-neutral” regarding the substantive content of their governing domestic bankruptcy law. ACR varies only as a function of assets and claims by jurisdiction, and thus it can vary from bankruptcy to bankruptcy in an unpredictable manner.

Injecting some numbers from the ongoing example, if the American inventory is worth \$100,000 and all the American creditors together only have claims totaling \$50,000, then they would recover fully in an American-only territorial bankruptcy (without Canadian creditor participation) because the ACR would exceed 1.0.⁴⁵ If the Canadian assets amounted to \$1.0 million but the Canadian debts against the company totaled \$3.0 million, then the Canadians’ ACR of 0.33 would pale in comparison to their southern creditor-neighbors under territorialism. The Americans would be surplus-ACR creditors who would favor strict territorialism and its full payout, and the Canadians would be deficit-ACR creditors who would seek universalism and its more attractive 0.36 dividend.

An American court—facing American creditors objecting to a turnover order to a Canadian “home” bankruptcy under universalism⁴⁶—would undoubtedly feel the pain of universalism. Instead of fully satisfying the American creditors, as territorialism would enable, the American judge under universalism would have to order the \$100,000 worth of American assets to join the Canadian proceeding (raising the global bankruptcy estate to \$1.1 million) and have the Americans join the Canadian creditor queue. Adding the Americans’ \$50,000 would make the global claim pool \$3.05 million—a universalist dividend of 0.36. The asset-rich American creditors lose in such a case under universalism.

b. Current Responses: Rough Wash and Universal Filing

Universalist scholars’ standard answer to this scenario is the “rough wash.” They contend that there is, at least theoretically, no reason for a creditor to anticipate that he or she routinely will be in a surplus or deficit jurisdiction—and by extension, no reason for policymakers or judges within a state to think that their country tends to be a high- or a low-ACR jurisdiction. “The central argument for the Rough Wash is that a universalist rule will roughly even out benefits and losses for local creditors, who will gain enough from foreign deference to the local forum in one case to balance any loss from local deference to the foreign forum in another.”⁴⁷ A judge should steel herself to potential complaining from local creditors seeking territorialist payout in a high-ACR bankruptcy proceeding and remember the pie-increasing “transactional gains” from universalism over the long haul.⁴⁸

discussion. Compare Alan Schwartz, *A Normative Theory of Business Bankruptcy*, 91 Va. L. Rev. 1199 (2005), with Bebchuk & Guzman, *supra* note 25.

45. It would be 2.0.

46. The ability to object stems from the application of modified universalism, discussed below, which permits judicial discretion regarding deference to a home country bankruptcy under the universalist choice of law rule.

47. Westbrook, *supra* note 25, at 465. *But cf.* Tung, *supra* note 13, at 577 (predicting that “multinational debtors’ assets tend to disproportionately wind up within that state’s jurisdiction relative to the amount of local creditors’ claims”).

48. Westbrook, *supra* note 25, at 465 (“If gains and losses even out, sharing in a much bigger pie will produce great benefits for local claimants overall.”); *see also id.* at 468–69. An excellent example of this fairweather preference for universalism or territorialism is the ongoing 2006 Yukos

A separate response to the ACR concern is to note that its anchoring premise—that only American creditors participate in the American bankruptcy proceeding and Canadian creditors participate in the Canadian one—may well be inapt. To be sure, there may be indirect burdens on participation: it may be inconvenient and expensive for an American creditor to retain counsel and file a claim in a Canadian proceeding.⁴⁹ But there is often no jurisdictional impediment from doing so, and double recovery is mitigated by traditional adjustment rules.⁵⁰ The problem is that this theoretical ability of cross-border participation is unlikely to be distributed uniformly. Sophisticated multinational creditors can likely file claims in either proceeding relatively painlessly compared to their smaller counterparts.⁵¹ So it is not so much “local” creditors who are sensitive to ACR, but “locally filing creditors” or “smaller state” creditors.⁵² This explains the principle behind “universal filing” policy recommendations, whose advocates recommend that all creditors be deemed to have filed everywhere as a matter of law in an international bankruptcy. If there is universal cross-filing, where every claim in a domestic bankruptcy is an automatic claim in all the jurisdictions where the debtor’s assets are being divided, the arbitrage potential of the ACR distribution is substantially diminished.⁵³

2. Content-Based Interests: The Content of Local Bankruptcy Law

All of the foregoing analysis assumes that domestic ACR is functionally dispositive of local creditors’ interests. But when that assumption is relaxed, the situation of the “local creditors” becomes immediately more complicated. Recalling that bankruptcy laws vary from country to country in their prickly redistributive priority provisions, it is entirely possible that the payoff of a filing creditor may vary not solely as a function of ACR richness but also as a function of the creditor’s substantive legal endowment under con-

insolvency proceeding, in which a Russian creditor-representative is complaining about the unfair “piecemeal dismemberment” of the debtor allowed under Russian territorialist law and the U.S.-related creditors are protesting the unfairness that would result from the universalist “pooling” of Dutch assets they had seized in the Netherlands with the Russian assets. *In re Yukos Oil Co.*, No. 06-B-10775-RDD (Bankr. S.D.N.Y. filed Apr. 13, 2006).

49. See 11 U.S.C. § 508(a) (2000); see also Model Law, *supra* note 2, art. 32 (adopting common law “hotchpot rule” of mitigating over-recovery in transnational insolvencies); TRANSNATIONAL INSOLVENCY PROJECT: INT’L STATEMENT OF UNITED STATES BANKR. LAW 115–17 & Procedural Princ. 25 (2002) [hereinafter ALI TIP] (proposing territorial confinement to priority claims); LoPucki, *supra* note 23, at 713 n.85.

50. For an excellent critique of the hotchpot rule, see Ulrik Rammeskov Bang-Pedersen, *Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests*, 73 Am. Bankr. L.J. 385, 429 (1999).

51. See Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation*, 76 Am. Bankr. L.J. 1, 11 & n.33; see also ALI TIP, *supra* note 49, General Princ. VI, at 40–41 (discussing difficulty in defining “foreign creditors”).

52. See ALI TIP, *supra* note 49, at 40–41; see also Westbrook, *supra* note 51, at 11 (assuming national treatment of creditors, the effect of local proceedings “is to benefit those creditors, both local and foreign, who will achieve better results under local rules, while disadvantaging those creditors, both local and foreign, who would achieve better results under the foreign main proceeding [thus producing] the effect . . . if any . . . to privilege local law, but not necessarily to benefit local creditors.”).

53. See Westbrook, *supra* note 19, at 30–33 (analyzing the interaction effect of universal cross-filing within territorialist and universalist bankruptcy systems and the further effect of national treatment of claims).

trolling bankruptcy law. For example, it could be that local creditors are benefited under a priority distribution provision of local law that would be lost were the creditors subjected to foreign law that has no such priority provision. It is therefore only the interactive effect of *both* (content-neutral) ACR *and* (content-based) substantive legal entitlement under local law that can truly determine local creditors' preferences for universalism or territorialism.

From a theoretical standpoint, there is no intrinsic reason to assume that domestic priority rules will privilege a given domestic creditor any more than foreign law will. That is, controlling for ACR, it could conceivably be that otherwise unremarkable domestic creditors would find themselves subject to a *better* priority rule under the application of foreign law—a priority benefit wholly unknown under their own law.⁵⁴ Such “local creditors” would actually be universalism’s most enthusiastic proponents if the regime presented a realistic shot at the application of such favorable foreign law.⁵⁵ This is not mere theory. Consider the recent important cross-border dispute of *In re Aerovias Nacionales de Colombia S.A. Avianca*.⁵⁶ In *Avianca*, a Colombian company filed for reorganization proceedings in the United States. In fighting U.S. jurisdiction (over the objection of the Colombian debtor), a group of U.S. creditors railed against the affront to comity that the U.S. proceedings would have and insisted that reorganization of this Colombian debtor proceed in Colombia under a Colombian reorganization law “section 550 proceeding.” These worldly, cosmopolitan creditors, however, were lessors of the debtor’s aircraft. As such, they were likely animated by the fact that U.S. chapter 11 law allowed the debtor to terminate its unprofitable aircraft leases, a right unavailable in a Colombian 550 proceeding. To be sure, *Avianca* may be an unusual case, and there are some public-choice reasons why that might in fact be so, but it serves as a stark example to point out the lack of necessary preference for local law by local creditors.

Indeed, because ACR is presumptively independent from local legal content, it could well be that specific subsets of local creditors, even in a routinely ACR-*surplus* jurisdiction, might nevertheless prefer the potential application of foreign law that arises under universalism. This possible preference for universalism by ACR-*surplus* creditors would equate to a conclusion that the comparatively favorable content of foreign law relative to local law offsets the ACR advantage enjoyed by being located in a surplus jurisdiction. No one who is hungry likes to share his food with a larger pool of diners, but few mind if, in exchange for such sharing, they are al-

54. See *International Insolvencies*, *supra* note 7, at 8–9. See *In re Head*, 223 B.R. 648, 653 (Bankr. W.D.N.Y. 1998), in which a Canadian debtor tried to evade unfavorable Canadian law by filing a U.S. bankruptcy proceeding in the United States despite the lack of any real connection to the United States. Cf. *In re Yukos Oil Co.*, 321 B.R. 396 (Bankr. S.D. Tex. 2005) (seeking to avoid hostile and allegedly unfair legal system rather than unfavorable substantive law by filing U.S. reorganization petition of Russian oil company). The new 2006 Yukos filing is a *Head*-like stretch for U.S. jurisdiction to avoid unfavorable home bankruptcy law.

55. Professor Tung tries to provide a stylized fact pattern of an instance when this might be so. Tung, *supra* note 22, at 66 n.127. The ALI TIP tries to discourage this potentially opportunistic vacillation between universalism and territorialism by capping priority recovery to a territorialist distribution, claiming (somewhat cryptically) that because priority claims are “almost always” jurisdictionally specific, they “cannot claim an entitlement to preferential treatment beyond what would be available in a territorialist distribution.” ALI TIP, *supra* note 49, at 117.

56. 303 B.R. 1 (Bankr. S.D.N.Y. 2003).

lowed to eat to their fill first. Alternatively, local constituents in ACR-deficit jurisdictions might equally seek territorialism to entrench uniquely domestic legal rules that confer privileged distributional status, even at the cost of forfeiting the higher ACR offered by universalist pooling. ACR and legal entitlements may pull local creditors in different and sometimes opposite directions.

a. *Facially Explicit Discriminatory Priorities:*
Fixed Local Creditor Constituency

The content-based effect of local bankruptcy law on local creditors' amenability to universalism itself varies as a function of what I call both "facially explicit" and "facially neutral" discriminatory bankruptcy provisions. These rules distinguish themselves by the differing local constituencies to which they apply. Facially explicit discriminatory preferences are uniformly supported by local creditors and hence easy to analyze, whereas the support for facially neutral discriminatory preferences is shifting and more difficult to predict from an *ex ante* perspective of insolvency system design.

The most straightforward way in which local creditors might be privileged by local bankruptcy law is by overt, direct legal discrimination. That is, a country's bankruptcy law could elevate claims filed by domestically domiciled creditors above claims filed by foreign-domiciled creditors.⁵⁷ Reformers almost routinely condemn this practice and urge "national treatment" of foreign creditors in bankruptcy, according to which domicile is treated as *de jure* irrelevant (notwithstanding its inescapable *de facto* practical consequence).⁵⁸ While many well developed legal systems now accord national treatment,⁵⁹ it remains the case that at least certain matters, such as tax claims, remain subject to express discrimination, by being either disallowed wholesale or precluded from enjoying the special priority distribution that may attend domestic tax claims.⁶⁰ Controlling for ACR, under such facially discriminatory legal rules, local creditors in ancillary jurisdictions would systematically and predictably prefer territorialism to preserve the legal favoritism that arises by their nationality alone. Accordingly, in an ancillary jurisdiction with facially discriminatory bankruptcy provisions, a local judge confronted with a request for asset turnover to a controlling jurisdiction under universalism will likely face unified opposition by domestic creditors seeking to preserve their discriminatory advantage under domestic law. Under these circumstances, the interests of "local creditors" will be clear, predictable from the *ex ante* perspective of bankruptcy system design,

57. See 11 U.S.C. § 507(a)(5)(B) (2000) (expressing a priority preference for "*United States fisherm[e]n*") (emphasis added).

58. See ALI TIP, *supra* note 49, General Princ. VI: National Treatment ("There should be no discrimination against claimants based on nationality, residence, or domicile."). On *de facto* consequences of creditor domicile, see LoPucki, *supra* note 23, at 713 n.85.

59. Westbrook, *supra* note 51, at 10–11.

60. Model Law, *supra* note 2, art. 13, para. 2; see also ALI TIP, *supra* note 49, at 41 (acknowledging that national treatment, while enjoying a "broad consensus," may remain "controversial in a few respects, notably with respect to priorities (preferences) in distribution and with respect to foreign public-law claims like taxes or social costs").

and uniform. Absent overwhelming ACR disparity, they will prefer territorialism.⁶¹

b. *Facially Neutral Priorities: Shifting
Local Creditor Constituencies*

Domestic legal rules may also accord legal privilege to local creditors less crudely. There may be privileged legal positions that stem not from direct discrimination against foreign claimants per se, but simply from the priority provisions of local bankruptcy law—the “prickly” redistributive norms discussed above. For example, if American bankruptcy law has a special priority preference for employee-creditors, then employee-creditors may prefer territorialist distribution under American law to universalism’s risk of foreign law that has no such protection. A judge trying to divine the interests of “local creditors” in making a decision whether to turn assets over to a universalist home jurisdiction accordingly faces a more difficult question. Only local *employees* would unequivocally prefer territorialism, whereas local *creditors* as a whole (employees and the other creditors, en masse) may have more conflicted preferences that depend upon ACR and other factors. Indeed, in the cutthroat world of bankruptcy creditor competition, especially in the liquidation context, nonpriority rank-and-file local creditors might actually prefer foreign law to kill off the priority advantage enjoyed by the employee-creditors under local law. In an ancillary jurisdiction, these creditors would become staunch universalists, supporting the application of a foreign law that would drag the employees down to join the dross. Can a judge in such a situation meaningfully conclude whether domestic or foreign bankruptcy law better protects the interests of “local creditors”?

This potential ambivalence of local creditors, when they are viewed as a whole, toward local law may hold at the initial theoretical level. But after stepping back and considering public-choice pressures, the situation may be less ambiguous than hypothesized. This is because one can reasonably assume that many of the priority payout provisions under local bankruptcy law are likely to have gone to the “victors in domestic rent seeking contests.”⁶² Priority provisions may well have found their way into local bankruptcy laws by powerful domestic lobbying interests. Moreover, these provisions might have jurisdictional sensitivity. By this I mean that it is unlikely that a landlocked country would have a special priority payout for fishermen-creditors under its bankruptcy code, as does the tricoastal United States.⁶³ International “priority-ranking schemes often result[] from the preferences of domestic interest groups for the distributive choices made by

61. They could conceivably be won over by the arguments of the transactional gains of universalism, but that fights cognitive biases that tend to favor instant, vivid losses over distant, diffuse gains. Extreme ACR deviation from the global norm could presumably offset the favoritism of domestic law sufficiently to make an impoverished-ACR local creditor seek out universalism.

62. Tung, *supra* note 22, at 55.

63. See 11 U.S.C. § 507(a)(5)(B) (2000). An earlier draft of this paper containing “bicoastal” was amended at the independent insistence of two reviewers from Texas, a state with which I am loath to mess. It creates a new problem, however, on the treatment of the Bering Sea (which I evade).

... local law.”⁶⁴ If this is so, then it seems defensible to predict that with variables such as ACR being unknown and likely unknowable from the ex ante perspective of international bankruptcy system design, important local creditors will, on balance, trend toward favoring local law. With strong voices of the legally privileged favoring local law and weaker voices either not caring or being too dispersed to be heard, the net effect may be that as a whole “local creditors,” at least as far as a policymaker can tell, prefer local bankruptcy law.

Preference for local law, however, cannot be automatically translated into a preference for territorialism. To be sure, I have suggested that absent offsetting benefit in ACR, local creditors, especially legally privileged ones, will seek to protect their legal advantages under domestic law and hence will fight turnover of assets to a foreign jurisdiction under universalism when they are in the ancillary position. But the converse holds true as well: when universalism’s choice of law rule finds these creditors to be in the home jurisdiction entitled to control the global bankruptcy dispute, such creditors will hungrily insist upon universalist application of (favorable) domestic law to as many worldwide assets as possible. Therefore these creditors’ fidelity to universalism or territorialism cannot crystallize until after they know which specific debtor (housed in which jurisdiction) has failed. This in turn means we cannot say with certainty whether the content of local law on its own inclines legally privileged creditors toward universalism or territorialism; we can only say with certainty that it inclines them toward the application of the most favorable law, which is likely to be local.⁶⁵

From the ex post bankruptcy perspective, as just mentioned, this translation is easy: local creditors will prefer universalism if their country is selected as the controlling jurisdiction and they will prefer territorialism if it is not. From the ex ante perspective, before a creditor knows who his debtor will be, a broader preference for territorialism or universalism is more nuanced. Conceivably, one paradigm or the other could be preferred if a systematic bias were predicted; creditors favored by local law who think their states will likely be “net exporters” of bankruptcy law under universalism’s choice of law rule would prefer universalism, and creditors anticipating their states to be “net importers” will favor territorialism.⁶⁶ But such ex ante predictability of a systematic bias might be difficult for many participants. Moreover, if risk aversion is injected into this uncertain ex ante perspective—which seems at least a plausible assumption in an environment dominated by lawyers—a default preference might gravitate toward the pessimistic end of the spectrum (i.e., universalism’s potential for a net loss of

64. Franken, *supra* note 10, at 246–47.

65. As Professor Rasmussen reminds us of one eternal truth in bankruptcy, “In short, the creditor will take the course of action which offers the highest payout.” *International Insolvencies*, *supra* note 7, at 10.

66. Cf. Tung, *supra* note 13, at 576 (doubting LDCs’ enthusiasm for universalism). Professor LoPucki writes that “American bankruptcy professionals are nearly all universalists, because they assume the reorganizations will all come to the US so [the debtors] can be debtors in possession. Canadian bankruptcy professionals are (mostly closet) territorialists because they make the same assumption.” Tung, *supra* note 22, at 60 n.111 (quoting e-mail from Lynn LoPucki, Security Pacific Bank Professor of Law, UCLA Law School, to Prof. Tung (Feb. 24, 2001) (on file with Prof. Tung) (alteration Prof. Tung’s)).

favorable local law for ancillary jurisdictions might overshadow its potential for a net expansion of favorable local law for home jurisdictions). Accordingly, locally privileged creditors, if pressed *ex ante*, might shade toward preferring a territorialist system out of anxiety and uncertainty, but this might be a weak and unstable preference at best.

C. *The Interests of Local Sovereigns*

1. *The Problem: Sovereignty and Territorialism's Allure*

The final level of complexity regarding “local interests” and the oft-assumed preference for local law by local stakeholders in transnational insolvencies builds upon the variation of domestic bankruptcy laws among jurisdictions. As discussed, one consequence of the application of domestic laws is the enforcement of the distributional preferences they accord to certain local constituents. But there is another related, but conceptually distinct, significance of domestic law: application of local law for local law’s sake—that is, the vindication of regulatory sovereignty that flows from the simple fact that the sovereign exercises her might to regulate bankruptcy assets over which she has a plausible jurisdictional claim.⁶⁷ And this interest in exercising jurisdiction has nothing to do, at least directly, with privileging local creditors or other individual stakeholders. Rather, it has to do with the desire of a state’s legal actors (legislators laying claim to and judges interpreting the extent of prescriptive jurisdiction) to see that their state’s laws are enforced.⁶⁸

Why might states want to see their own laws enforced, irrespective of conferring any tangible legal benefit to private local interests? There are several possible reasons, and although they are probably well known to international, comparative, and conflicts law scholars, they sometimes require repetition to those of a more commercial bent.⁶⁹ Bankruptcy scholars seem

67. See Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 Colum. J. Transnat’l L. 5, 12 n.22 (2003). (“Countries may object to having the law of another country apply within their territory as a matter of sovereignty, even if they agree with the policy of the law in question.”).

68. In differentiating these interests from the mere individual, private actor interests, the distinguished European insolvency scholar Professor Ian Fletcher characterizes bankruptcy laws as “public and regulatory.” Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions*, 33 Tex. Int’l L.J. 119, 123 (1998).

69. Accordingly, it is not my intention to re-invent the wheel of international law theory; I have little to add to the rich literature of that field today and propose no new model of sovereignty or of the role of public interest in the exercise of jurisdiction. I do note that it is interesting that certain commercial fields, such as antitrust, warrant special and specific treatment under the Restatement (Third) of Foreign Relations Law beyond the baseline principles of § 403. See Restatement (Third) of the Foreign Relations Law of the United States § 415 (1987). Section 415 supplements (or perhaps trumps) the general rules of § 403. See *id.* §§ 403, 415. These rules make clear that U.S. jurisdiction to prescribe is appropriate for trade-restraining agreements and conduct made within the United States or without the United States if there are substantial domestic effects, regardless of the nationality of the parties. *Id.* This would seem at odds with a universalist bankruptcy regime, which would require the effective yielding of jurisdiction to prescribe, notwithstanding domestic effects, by ancillary jurisdictions. Perhaps the quasi-criminal nature and consumer-protective focus of antitrust regimes, such as the U.S. one, explain the discomfort with constraining prescriptive jurisdiction. For judicial treatment of the scope of prescriptive jurisdiction more generally, a thorough discussion can be found in Justice Scalia’s opinion in *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000), which resurfaced recently in *Dodd v. United States*, 125 S. Ct. 2478 (2005). For a discussion of extraterritorial authority over

especially challenged in the international sphere because many start from the proposition that bankruptcy law serves no function other than as an omnibus procedural mechanism to resolve collection lawsuits.⁷⁰ (These are usually the same commentators who grumble about the thorny redistributive provisions that persist in bankruptcy laws.)⁷¹ If the law has no purpose other than to help individual creditors distribute a debtor's estate as efficiently as possible, then a state, as a discrete entity, should have no interest beyond maximizing the return of those creditors.⁷² If there is any sovereign friction in cross-border bankruptcy law, it would result from the desire of states to promote the maximum return for their respective ("local") constituents.⁷³

Nevertheless, states do emerge as sovereignty-conscious entities that want to see their own laws enforced regardless of the benefit brought to their citizens. In bankruptcy, this likely emanates from the fact that the normative rules within an insolvency regime reflect differing policy judgments regarding what to do and whom to pay in financial disaster. This extends beyond priority provisions; it has to do with value-laden conceptions of which stakeholders should control a debtor's affairs in reorganization proceedings, whether and for how long creditors must forgo or forfeit their pre-existing contractual rights to help stabilize the financial default of others, and myriad other efficiency- (and fairness-) animated issues of public policy. In short, "[n]ational bankruptcy laws express the policies and priorities of their enacting countries."⁷⁴ Needless to say, each country is likely to think that its regime makes the most sense and comports most closely with its conception of fairness. Accordingly, if we consider states as monolithic,

property interests (albeit expropriated ones) in a foreign country, see Professor Lowenfeld's article on the Libertad Act. Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 Am. J. Int'l L. 419 (1996). For a glimpse into academic treatment, see the discussion of *Hartford Fire* in Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 Am. J. Int'l L. 750 (1995), replying to Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 Am. J. Int'l L. 42 (1995), and Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 Am. J. Int'l L. 53 (1995). For a helpful overview of the United States case law and legislative history on the presumption against extraterritoriality, see William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 Berkeley J. Int'l L. 85 (1998). For the diehard, see generally Jeffrey L. Dunoff, Steven R. Ratner & David Wippman, *International Law: Norms, Actors, Process: A Problem-Oriented Approach* (2002).

70. See, e.g., Jackson, *supra* note 12. For more details on the "creditors' bargain" theory, see Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857, 862 (1982), and Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. Legal Stud. 127, 133 (1986).

71. See, e.g., Baird, *supra* note 14 (outlining the disagreement between "traditional" and "procedural" bankruptcy scholars).

72. See, e.g., Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 Stan. L. Rev. 1667, 1677-78 (2003) ("The dominant purpose of any State is to create a community of mutual benefit for citizens and other members . . . [and to] enhance the welfare of compatriots. . . . In this sense, a liberal democracy is more like IBM than Medecins Sans Frontières . . ."). For a recent critique, see K.A.D. Camara, *Costs of Sovereignty*, 107 W. Va. L. Rev. 385 (2005).

73. For application of this reasoning to the private international law context in particular, see Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. Chi. L. Rev. 1151, 1171 (2000). For a theoretical example, see generally Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 Stan. L. Rev. 1901, 1907-08 (2003) (arguing that states incur legal obligations on behalf of individuals, but do so as mere vehicles analogous to a corporation, because "states do not have utility").

74. *Antwerp Bulkcarriers N.V. v. Holt Cargo Sys., Inc.*, [2001] S.C.R. 951, 964 (Can.).

preference-holding entities,⁷⁵ then we can draw the intuitive conclusion that states perceive themselves to “win” in international choice of law showdowns when they apply and export their own bankruptcy laws in cross-border disputes, much as individual creditors “win” when they get more money.⁷⁶

Even under a seemingly cooperative regime such as universalism, therefore, we would still expect states to assert home country jurisdiction as aggressively as possible. We would similarly expect ancillary states to be hesitant to relinquish jurisdiction by deferring to the home country’s turnover requests under the universalist choice of law rule. In other words, we would expect pressure at the choice of law margin: expansive assertion and restricted deference.⁷⁷ Some scholars have characterized the preference matrix as giving rise to a prisoner’s dilemma, whereby “properly” jurisdiction-deferring states lose when defected on by “improperly” jurisdiction-asserting states, even though both might be better off if they routinely cooperated properly.⁷⁸ As with any prisoner’s dilemma, the suspicious actors are driven to the suboptimal equilibrium of mutual defection. In the cross-border insolvency setting, this equates to withholding deference to a requesting universalist jurisdiction over fears of disproportionate suppression of regulatory sovereignty: a backslide into territorialism and a forfeiture of the theorized transactional gains from universalism. This leads a game-theoretic scholar of international bankruptcy to conclude that universalism is conceptually impossible or at best unlikely.⁷⁹

Sadly, this prediction is sometimes borne out in practice. Consider for example the recent squabble between an Italian and an Irish court over which was the main jurisdiction and which was the ancillary one in the insolvency of one of Parmalat’s subsidiaries, Eurofood. Each court’s claim to house Eurofood’s “center of main interests” (and meta-claim of who should defer to the other’s finding of those facts) required resolution by the European Court of Justice.⁸⁰ This even occurred under the recently enacted EU Insolvency Regulation, an intra-Union attempt to coordinate cross-border insolvency proceedings that has been charitably described as reflecting “co-ordinated universalism.”⁸¹

75. See, e.g., Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. Chi. L. Rev. 1113, 1168 (1999). Tung also uses this assumption in the bankruptcy context. See Tung, *supra* note 22, at 55.

76. See Tung, *supra* note 22, at 55 (“In general, a state’s preference for its own bankruptcy law and reluctance to recognize foreign bankruptcy proceedings may arise from the desire of domestic political actors to defend the policies implicit in their domestic laws.”). For a discussion of state utility, see sources cited *supra* notes 72, 73.

77. “[O]ne may note the dual approach in many countries: own bankruptcies are generally favored and their effect extended abroad as far as possible, while the effects of foreign bankruptcies are subjected to scrutiny and curtailment.” Tung, *supra* note 22, at 46 n.60 (quoting 1 J.H. Dalhuisen, Dalhuisen on International Insolvency and Bankruptcy pt. 3, § 2.02[3], at 46 n.60 (1986)).

78. See Tung, *supra* note 22, at 60–63.

79. See *id.* at 100–01 (“Universalism presents [states] with a prisoners’ dilemma that is not easily resolved, either through the standard prescription of repeat play or more elaborate devices.”).

80. See Case C-341/04, Eurofood IFSC Ltd (May 2, 2006), available at <http://www.curia.eu.int/en/content/juris/index.htm> (follow “Cases lodged before the Court of Justice since 1989”, then click “C-341/04,” and then click the “C-341/04” next to “Judgment”). Ireland won.

81. See Wessels, *supra* note 8, at 494, 499.

In sum, isolating local sovereign regulatory preference from local creditor preference reveals a discrete set of challenges to universalism from both *ex ante* and *ex post* perspectives. *Ex post* (i.e., in any given bankruptcy proceeding) sovereigns will want to shade claims to home country status generously and to minimize deference as ancillary countries, which is in and of itself an ominous portent for a cooperation-based regime such as universalism. *Ex ante* (i.e., when asked to subscribe to a regime of universalism or territorialism up front), if they anticipate being deferring countries more than home countries under whatever proves to be universalism's choice of law rule—and hence to be systematically suppressing their own normatively rich bankruptcy laws more often than they are permitted to exert those laws extraterritorially—then they face a temptation to abandon universalism altogether and advocate retention of territorialism.⁸²

Alternatively, or additionally, a state may not even know with confidence whether it will be a net “exporter” or “importer” of bankruptcy law to international disputes under universalism's choice of law rule (such as center of main interests). If it has even a modicum of risk-aversion, it may gravitate toward the pessimistic perspective in a high-uncertainty environment such as bankruptcy. Such a state would favor territorialism, which guarantees limited regulatory sovereignty over domestically situated assets, even though it foregoes the chance to export regulatory sovereignty worldwide. Thus, territorialism retains a strong allure because states are generally sensitive about their sovereignty and the vindication of their prickly bankruptcy norms. This is especially so with states that are skeptical or nervous about their prospects for being chosen as the controlling jurisdiction.⁸³ It is this phenomenon, or cluster of phenomena, that I roughly refer to as “pride.” The label is not intended to be pejorative; it is simply to capture the idea that there are non-monetary, sovereignty-specific bankruptcy interests that states have that are distinct from the return-maximization of their respective creditors.

2. Semi-Solutions: Universalism's Olive Branch to Sovereignty

How do universalists confront such an anticipated negative disposition from local states toward universalism, wholly apart from the resistance universalism might face from local creditors? There are several ways, most of which are pragmatic limitations on the universalist paradigm, such as restricting the scope of universalism to certain types of large-scale

82. On why this might be so, and on LDCs' likely justified hesitance, see Tung, *supra* note 13, at 576–77.

83. An additional “sovereignty” concern with unequal distribution of home country jurisdiction under universalism is the potentially hegemonic effect of a net exportation of certain states' bankruptcy norms. Some scholars think this would be a good thing if the best norms rose to the top. *E.g.*, Charles W. Mooney, Jr., *Extraterritorial Impact of Choice of Law Rules for Non-United States Debtors Under Revised Uniform Commercial Code Article 9 and a New Proposal for International Harmonization*, in *Cross Border Security and Insolvency* 187, 195 (Michael Bridge & Robert Stevens eds., 2001) (supporting such a harmonizing potential in secured transactions reform that will encourage minority view states to “wake up, smell the coffee, and reach some of the [superior] conclusions that lawmakers reached in [majority view states] many years ago”). Others exhibit less enthusiasm. *See* Tung, *supra* note 13, at 577 (citing potential “social policy concerns” for LDCs under universalism).

bankruptcies.⁸⁴ But there are two recurrent arguments universalists fall back on to counter the potential sovereign disinclination to their model, one that is mostly operational and one that is more conceptual.

a. Modified Universalism and Escape Clauses

The first response is the refinement of universalism to “modified universalism.” Modified universalism replaces the “must” of deference to the home country’s bankruptcy laws under the choice of law protocol with a “may.” Universalists who recognize the necessity of overcoming the sovereign anxieties just discussed advocate an international norm favoring universalism but allowing the case-by-case withholding of cooperation in the event that domestic policy is intolerably compromised.⁸⁵ For example, consider the failure of an international enterprise situated in a country subscribing to an apartheid regime wherein distributional priorities took cognizance of race. Under strict universalism, an American bankruptcy judge presented with a turnover request from the insolvency representative of such a country should defer to the foreign jurisdiction and turn over the American-located assets for administration and distribution under the race-conscious bankruptcy laws.

The modified universalist approach grants the United States the right to revert to territorialism in such circumstances if the judge deems (as one would hope in this case) that the foreign law conflicts with fundamental U.S. policies. Note that this is actually borrowing from the well settled construct of the escape clause from choice of law jurisprudence; it is not a unique innovation of international bankruptcy.⁸⁶ Needless to say, universalists counsel narrow interpretation of such an escape clause, fearing the rule-swallowing potential of such an exception.⁸⁷ Building upon the previous example, the United States judge should be uninterested in whether the American creditors, based on the racial profile of participants in a given bankruptcy, would do better under the apartheid bankruptcy rules; the judge

84. See Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 Mich. L. Rev. 2276, 2298–99 (2000).

85. See Westbrook, *supra* note 9, at 517. The treatment of 11 U.S.C. § 304 in *In re Culmer*, 25 B.R. 621, 629 (Bankr. S.D.N.Y. 1982) (American deference to Bahamian bankruptcy), is seen as quintessential modified universalism.

86. See Symeon C. Symeonides, *Exception Clauses in American Conflicts Law*, 42 Am. J. Comp. L. 813, 815–18 (Supp. 1994); see also Arthur Taylor von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 Harv. L. Rev. 347 (1974). Dutch law distinguishes between “domestic” public policy and less restrictive “international” public policy. See Berends, *supra* note 5, at 336. This suggests, for example, that a foreign contract that would be void under Dutch law might nevertheless be enforced in a Dutch court out of international comity. See *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, 6 Tul. J. Int’l & Comp. L. 415, 420, 421, 444 (1998) [hereinafter *Enactment Guide*] (recognizing this trend of distinguishing “domestic” and “international” standards of public policy in a “growing number of jurisdictions”).

87. See Berends, *supra* note 5, at 373–74 (advocating the use of an escape clause in UNCITRAL’s Model Law for instances in which a country is “plagued with corruption, or where one must fear that the court is not independent from the government”); see also *Enactment Guide*, *supra* note 86, at 444 (emphasizing that the clause should be “interpreted restrictively” and used only in “exceptional circumstances” of “fundamental importance”).

should find American fundamental policy offended irrespective of the financial payout to American claimants.⁸⁸

This theoretical coherence is abandoned in the implementation of many modified universalist regimes, such as (at least until very recently) in the United States. That is, some modified universalist regimes, when articulating standards by which local judges should determine whether to defer to universalist cooperation or to insist upon territorialist resolution, expressly *do* consider the distributional payout accorded local creditors under the foreign bankruptcy laws as a legitimate criterion to gauge the propriety of cooperation.⁸⁹ Thus, the “local creditor” problem becomes confused and conflated once again: in statutory provisions that should be directed at solving policy-clash problems at the sovereign-state level, decisionmakers are commanded to conduct analyses at the individual-participant level.⁹⁰ Nevertheless, escape clauses, at least in theory, are one way universalism “modifies” itself to address differences in local policy.

b. *Secondary Rough Wash*

The second, more abstract manner by which universalists press their theory onto sovereignty-conscious states is through extension of the “rough wash” they use to assuage reluctant individual creditors. Recall that that argument is premised upon the transactional gain of universalism: a net increase of efficiency flowing from one predictable law controlling an international insolvency dispute. To accrue the benefits of such transactional gain, creditors must focus long term rather than short term and accept that ACR will vary from case to case.⁹¹ Ratio of pie slice is a rough wash over the long haul, and universalism’s transactional gain creates a larger pie.

This argument is theoretically extendible to the sovereign level. Although Country *A* must defer to Country *B*’s bankruptcy laws in today’s proceeding, it may well enjoy deference from Country *B* in tomorrow’s proceeding, when it gets to have its substantive bankruptcy laws govern. “In a universalist regime, one country’s laws will govern, but other countries have

88. For a current example of this, consider the 2006 claims of Yukos’s Russian equity owners that the United States should not cooperate as an ancillary proceeding to assist a Russian main bankruptcy because the Russian government illegally expropriated a corporate subsidiary of Yukos on dubiously and retroactively assessed taxes without just compensation or due process of law.

89. See 11 U.S.C. § 304(c)(4) (2000), *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23 (new 11 U.S.C. ch. 15) (effective October 2005).

90. Beyond the scope of this discussion is the EU Insolvency Regulation, which almost gives up on universalism altogether and modifies it into territorialism by allowing the opening of “secondary” proceedings to deal with local assets remotely situated from a main proceeding. Although the secondary proceedings are supposed to follow the law of the main proceedings à la universalism, there are so many exceptions that defer to local law that it causes some commentators to call it a “territorialist” proceeding. See Tung, *supra* note 22, at 77 (disparaging the EU Regulation as “essentially a territorial system with universalist pretensions”). Even the recitals acknowledge “the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community.” EU Insolvency Regulation, *supra* note 41; see also *id.* para. 24, at 3 (stating that “[t]o protect legitimate expectations and the certainty of transactions in [other] Member States . . . provisions should be made for a number of exceptions to the general rule [of application of home jurisdiction law]”).

91. This may require some heavy lifting in light of traditional cognitive biases favoring vivid short-term losses over diffuse long-term gains.

no basis for complaining—their law will govern in other situations”⁹² Thus, there is a secondary rough wash, directed not at the creditors but at the states themselves, positing that the content-neutral choice of law rule is likely to find home-jurisdiction location evenly distributed throughout the world.

The accuracy of the rough wash assumption, especially this “secondary” rough wash, is deservedly subject to some pressing scrutiny.⁹³ Among other issues, if the choice of law rule that determines the controlling jurisdiction is built upon the center of the debtor’s main interests, then it seems debatable whether businesses will find themselves equally headquartered in less developed countries (LDCs) as in more economically developed nations. This potential divergence is likely exacerbated regarding “transnational” businesses that cross international borders.⁹⁴ If that is so, then it may be harder to expect LDCs to embrace the universalist paradigm. To be sure, this depends in part upon what universalism’s choice of law rule proves to be, and it invites empirical investigation based on that rule that is beyond the scope of this analysis.⁹⁵ Nevertheless, it remains a troublesome concern for this argument that all countries may not share equal corporate headquartering or other such proxies of center-of-main-interestedness.⁹⁶ Accordingly, the possible tenuousness of the secondary rough wash may explain why other concessions to skittish sovereigns—such as modified universalism’s escape clause—are necessary to the viability of the universalism project.⁹⁷

3. *Pride in Action*

The sovereign state’s interest in enforcing its own bankruptcy laws irrespective of local creditor benefit is what I call “pride.” As mentioned, this label is crude; it really is an aggregation of all the non-individual interests a state has in enforcing its own laws, and it is used as a mnemonic to contrast it with the maximization of individual creditors’ profits (which I call “greed”). It does have the benefit of showing that it is animated by considerations that are non-monetary but nevertheless “self-interested.” While some skeptics persist,⁹⁸ they should take pause at the striking example of

92. *Resolving Transnational Insolvencies*, *supra* note 7, at 2274. Universalists have not always disaggregated this secondary rough wash argument and made it as clear as the primary rough wash argument, possibly because until recently there was no specific choice of law rule selected to anchor a universalist regime. *See* Pottow, *supra* note 28, at 949 n.64.

93. *See* Tung, *supra* note 13, at 576–78.

94. *See id.* Nor, for similar reasons, is the primary rough wash immune from challenge: it could also be that there are systematically predictable surplus-ACR countries that are likely to find their ACRs routinely high. Such might be the case for a friendly nation that houses bank accounts of unencumbered cash without offsetting lender claims. *Cf. id.* (citing concerns of systemic bias under universalism from the individual creditor perspective).

95. *See* Tyler Diacon & Thomas H. Klier, *Where the Headquarters Are—Evidence from Large Public Companies 1990–2000* (Fed. Reserve Bank of Chi., Working Paper No. 2003–35, 2003), available at <http://www.chicagofed.org/publications/workingpapers/papers/wp2003-35.pdf>.

96. Corporate headquarters (or, more precisely, registered offices) are rebuttably presumed to house the center of the debtor’s main interests under the Model Law. Model Law, *supra* note 2, art. 16(3); *see also* EU Insolvency Regulation, *supra* note 41, art. 3(1).

97. The weakness of the theoretical claim when pushed empirically may also explain why pragmatic proposals, such as liens and circumscription, have been offered. *See infra* part III.B.

98. *See supra* note 76 and accompanying text.

the Canadian Supreme Court's position in *Antwerp Bulkcarriers N.V. v. Holt Cargo Systems, Inc.*⁹⁹ This decision provides a helpful control case for disaggregating the individual creditor (greed) and sovereign actor (pride) dimensions of "local interests" because there were actually no Canadian creditors involved; Canada found herself dragged into the proceedings as a third-party jurisdiction, so only pride was on the line.¹⁰⁰

The facts were as follows. An international shipping company based in Belgium foundered financially.¹⁰¹ The principal assets of such companies are ships. One such vessel, the *M/V Brussels*, was plying international waters and found herself in the United States, where local stevedores, pursuant to U.S. maritime law, attached a lien for uncompensated services rendered.¹⁰² The *Brussels* then sailed to Halifax, where the U.S. stevedores caught up with her and brought an arrest against the ship and opened a Canadian admiralty proceeding. (It is unclear why the arrest was not done in the United States; it could be that the stevedores were waiting some time for payment, or it could be that the debtor's financial affairs worsened in a death spiral, or it could simply be that the master slipped the boat out of port.)¹⁰³ In the meantime, however, the company had already filed for bankruptcy in Belgium, and the Belgian bankruptcy administrator began to corral the assets.¹⁰⁴ He went after the *Brussels*, which by this point had been detained in Halifax.¹⁰⁵ Likely due to some venue gamesmanship, the Belgian representative did not want to lay his claim to the *Brussels* by objecting in the Canadian admiralty proceeding opened by the U.S. stevedores.¹⁰⁶ He instead opened a new action in a Canadian court (sitting in bankruptcy) and sought turnover of the *Brussels* to the Belgian bankruptcy court for administration under Belgian bankruptcy law.¹⁰⁷ Everyone agreed that Belgium was the home of the debtor, which under universalism's center-of-main-interests rule would be deemed the controlling jurisdiction; Canada would have been the ancillary one.¹⁰⁸

The American stevedores, however, showed up in the Canadian bankruptcy proceeding and opposed the Belgian motion for turnover.¹⁰⁹ They did so because Belgian law would invalidate their lien, meaning that the ship would be available for general distribution to the unsecured creditors in Belgium (a group the stevedores would have to join for recovery).¹¹⁰ As such, they very much preferred Canadian, lien-recognizing law to apply and hence urged the Canadian bankruptcy court to adopt a territorialist approach to the international bankruptcy and to deny the Belgian trustee's universalist

99. [2001] S.C.R. 951 (Can.).

100. *Id.* at para. 7.

101. *Id.* at para. 6.

102. *Id.* This was, in the most literal sense, a floating lien.

103. *Id.* at para. 12.

104. *Id.* at para. 8.

105. *Id.*

106. *Id.* at para. 18.

107. *Id.*

108. *Id.* at para. 25.

109. *Id.* at para. 23.

110. *Id.*

request for turnover. The reason this case provides such an excellent example to probe pride versus greed is that the Canadians truly did not have a stake in the proceeding. There were no local Canadian creditors participating in the fight.¹¹¹ Thus, insistence on territorial jurisdiction could not possibly have advanced Canadian local creditor interest; local creditor greed was not in the picture. The only benefit to Canada would have been pride: insistence upon the sovereign right of Canada to regulate, under her laws and in accordance with her norms, the disposition of a foreign bankrupt's property located within Canada.¹¹²

Pride won. Canada did not defer to the Belgian request for turnover. In an extended discussion of the universalism versus territorialism debate, the Canadian Supreme Court did offer some lip service toward universalism but ultimately bristled at the idea of relinquished sovereignty: "[A Canadian court's] function is not merely to rubber stamp commands issuing from the foreign court of the primary bankruptcy."¹¹³ Elaborating its decision to deny comity, the Court admonished that "[t]he desirability of international coordination is an important consideration. In some cases, it may be the controlling consideration. The courts nevertheless have to exercise their discretion to stay or not to stay domestic proceedings according to all of the relevant facts of a particular case."¹¹⁴ The nebulous catch-all of "all the relevant facts" included such vagaries as the "public interest" and the "public mandate to bring order out of financial disorder."¹¹⁵

Canada's insistence on territorialist resolution is striking in light of the absence of benefit to any Canadian creditors: the decision seems to snub comity for the sake of pride alone. To be sure, an alternative interpretation of the case is as a "loss leader" in which the Canadian court was looking out for Canadians in the future, perhaps thinking of other such cases down the road involving *Canadian* stevedores that would require a beneficial precedent. The problem with this reasoning (as with suggesting Canada was advancing a broader "pro-stevedore" policy) is that no lien could have arisen in the first place for Canadian stevedores under Canadian maritime law; that is, had the stevedoring been conducted in Canada, no lien against the vessel would have been created.¹¹⁶ The vindication of a lien that could

111. *Id.*

112. This is of course an overstatement and underscores the imperfection of "pride" as a label. For example, Canada could have wanted to promote other values than straight "pride," such as fostering international investment, a point which is discussed below.

113. *Holt Cargo Sys., Inc. v. ABC Containerline N.V.*, [2001] S.C.R. 907, para. 33 (Can.) (companion appeal to *Antwerp Bulkcarriers N.V. v. Holt Cargo Sys., Inc.*, [2001] S.C.R. 951 (Can.)). There is always the "half full" spin. Namely, one could say that Canada was actually engaging in modified universalism: arguably, Canada was starting with a presumption that she should defer to Belgium but then found Canadian policy violated by the nonrecognition under Belgian law of the American-created security interest. This characterization is logically coherent but hard to square with Canada's attenuated interest in the dispute.

114. *Id.* at para. 87.

115. *Id.* at para. 86.

116. A better illustration of this kind of "loss leader" case might be the U.S. Supreme Court's decision in *Weltover*, in which the Court ruled in favor of a Swiss bank and two Panamanian corporations in their claim that Argentina had waived her immunity from suit (under U.S. law) regarding a New York-based bond issuance. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). The challenge was not brought by U.S. creditors, so presumably the Supreme Court did not need to protect local bond creditors, but its ruling for the plaintiffs may have been cognizant of the real likelihood of future cases in which there could be U.S. creditors of foreign sovereign debtors. (It

not have even existed under Canadian law, for the benefit of an American lienholder, in the face of a Belgian request for assistance, is a curious policy for Canada to insist upon protecting in denying comity, but territorialism carried the day nevertheless.¹¹⁷

Thus, the lesson from *Antwerp Bulkcarriers* is unmistakable: pride matters in international bankruptcy, and states, especially smaller ones dwarfed by neighboring juggernauts, take their regulatory sovereignty very seriously, even when they have no private constituent interest to protect. This result plays directly into the hands of territorialists who contend that universalism is destined for failure due to the “prickly rights of sovereignty” that only seem heightened in the bankruptcy arena.¹¹⁸

D. Summary

“Greed” of local creditors, both content-neutral (ACR) and content-based (legal endowment under substantive bankruptcy law), and “pride” of sovereign states both contribute to the overarching problem of “local interests” in cross-border bankruptcy proceedings. Sometimes, of course, they overlap.¹¹⁹ But sometimes they do not. The Canadian case in particular drives home the point that sovereign pride operates as a stand-alone problem that must be considered independently, above and beyond a legislature or court simply trying to look out for its citizen-creditors’ bankruptcy dividends. Accordingly, universalism proponents must recognize that their mollification targets are not just greedy local creditors but also proud sovereign states. What noted European commercial comparativist Professor Fletcher calls the “basic, national instincts” of sovereignty exist in bankruptcy and they must, he correctly notes, be “appease[d].”¹²⁰

Furthermore, the traits of greed and pride vary both in their predictability and their dependence upon the content of local bankruptcy law. The pride of local states is obviously law-dependent (they prefer their own) and this preference is predictable from the ex ante systems-design perspective (they always prefer their own). Translating this local law preference of sovereigns into a broader preference for universalism versus territorialism is, once again, easier from the ex post perspective than the ex ante. Ex post, when selected as the home jurisdiction in a given bankruptcy under the choice of law rule, states prefer universalism, just as when in the ancillary

also could have been thinking more generally about New York’s reputation as a center of sovereign bond issuances, a reputation which might have been compromised had Argentina hidden behind immunity). *Id.*

117. One could take it up to a sufficient level of abstraction to find agreement. For example, perhaps Canada was trying to send a broad “pro-creditor” signal to the international commercial community. Reading the case along such lines, however, undercuts the idea that creditors as a whole would actually prefer universalism.

118. 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)); *see also* LoPucki, *supra* note 24, at 2237–38.

119. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

120. Fletcher, *supra* note 68, at 124; *see also* Charles W. Mooney, Jr., *Insolvency Law as Credit Enhancement: The Insolvency Related Provisions of the Cape Town Convention and the Aircraft Protocol*, 13 *Int’l Insolvency Rev.* 24, 39 n.106 (2004) (noting that in drafting the aircraft financing convention “the *only* reason for the objections to including the substance of Alternative A . . . is that Alternative A follows closely United States law”).

position (as was Canada in *Antwerp Bulkcarriers*) they prefer territorialism. The ex ante translation is harder. A state must be able to predict that it is likely to be a “net exporter” of its bankruptcy law on account of systemic bias in the choice of law rule to prefer universalism and a “net importer” to favor territorialism. At best, this would be an uncertain proposition based upon empirical assumptions. If such predictions are difficult, as is likely, and states have at least some degree of risk aversion regarding the suppression of local sovereignty, then such risk aversion would tilt the balance toward territorialism at the margin (and uncertainty makes that margin wide). On balance, therefore, pride likely translates into an ex ante favoring of territorialism that universalists need to overcome.¹²¹

By contrast, the greed of local creditors is only partially, albeit importantly, dependent upon the content of local bankruptcy laws. It is also much more difficult to predict for ex ante system design than the pride of local states. As such, greed is more of a moving target, difficult to address with ex ante reforms. Related to this is the problem of repeat play. While states are, *a fortiori*, always implicated in international bankruptcies that affect their jurisdictions, the identities of local creditors change from case to case. Moreover, even when local creditors can be ascertained, their preferences are only partially law-dependent. Indeed, the axis of greed determined by ACR is a largely inscrutable black box from the policymaker’s ex ante vantage point.¹²² Accordingly, when the component parts of greed and pride in the local interests problem are broken out, it follows that policy prescriptions of legal design are more fruitfully directed to the pride problem than the greed one. While the shiftiness of greed makes it more elusive of targeted reform, the relatively predictable local law preference of pride is something that makes it easier to address. It is for this reason that the next Part of this Article, which proposes policy recommendations to confront the local interests problem and enhance the appeal of universalism, deliberately targets the issue of local sovereign pride.

Part III—Proposed Solutions to Protect Local Interests under Universalism

This Part first outlines the most theoretically focused “first best” solution to the problem of pride, but because pragmatism rules in the international insolvency realm, it then presents and critiques some current, more pragmatic alternatives. It finally advances a new proposal, explaining its believed desirability.

121. Cf. *Resolving Transnational Insolvencies*, *supra* note 7, at 2256 (“Because territorialism has been the de facto approach to transnational insolvencies for years, each system starts with that baseline and attempts to demonstrate that a shift away from territorialism holds the promise of gains.”).

122. To be sure, we could engage in assumptions regarding the dispersal of assets around the world, potential concentration in havens, and so forth, but that discussion is for another paper.

A. *First-Best: Recharacterizing the Debate*1. *Diffuse Reciprocity*

The traditional understanding of pride builds upon a zero-sum model. Countries are perceived to “lose” when, as ancillary jurisdictions, they suppress their norm-laden domestic bankruptcy laws in deference to a home country’s under universalism and to “win” when they get to govern. This conventional understanding has been reflected in the literature.¹²³ This traditional conception may be incomplete, however, because (in the parlance of game theory) it grafts a unidimensional payoff matrix onto what may be multidimensional conditions of play.

Taking a step back, the reason a state is thought to lose when it defers under universalism, and hence why it should rebuff the universalist agenda if it thinks itself likely to be repeatedly in the deferring (non-home country) position, is that the state fails to vindicate its prickly national policies as reflected in its bankruptcy laws. For example, when Mexico defers to a universalist American bankruptcy proceeding, the security-trumping priority of employee claims accorded to workers under Mexican law is displaced with the more security-solicitous norm of American law.¹²⁴ Mexico loses.

But is it really that simple? Is it not also consistent for Mexico to have a distinct policy interest in fostering international trade and investment, accruing the benefits—to the extent and degree Mexico values them—of attracting foreign capital to Mexico? If this is so, then this preference must be examined in light of one of the main economic arguments for universalism: that its predictability will reduce capital costs.¹²⁵ If this theorized benefit is real, then Mexico gains some “international-commerce enhancing” benefit by supporting universalism. (Empirical scholarship already explores the relationship between “business-friendly” law and foreign investment.)¹²⁶ Mexico’s gain holds true even when she must suppress the application of Mexican insolvency norms when in the ancillary position of a transnational bankruptcy under universalism. In other words, the gains of enhanced utility by promoting investment-capital friendly universalism may or may not offset Mexico’s lost utility from suppressing her employee protection priority provisions of bankruptcy law.¹²⁷

Measuring comparative utility of the vindication of state policies is difficult at best (like comparing a preference for apples to oranges in an entity

123. See, e.g., Guzman, *supra* note 6, at 2206 (“The choice-of-law problem is, as a result, also zero sum—where the values of two countries conflict, one must be chosen at the expense of the other.”).

124. See ALI TIP, *supra* note 49, at 85 (discussing Mexican law).

125. See generally Schwartz, *supra* note 44, at 1200 (maintaining that the function of all bankruptcy systems is to lower cost of capital for commercial parties).

126. See, e.g., Benjamin C. Esty, When Do Foreign Banks Finance Domestic Projects? New Evidence on the Importance of Legal and Financial Systems (Sept. 22, 2004) (unpublished manuscript, on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=594526.

127. One reader of this Article worries that universalism would be a tough sell to Mexican maquiladora workers, who presumably will more likely than not be in an ancillary jurisdiction, have priority under Mexican law, and have more hard assets than claims to a multinational debtor’s estate than the global average. One hopeful response to this worry is to note that Eritrea, which is unlikely to house many transnational headquarters and hence is likely to be a “net ancillary jurisdiction,” has adopted UNCITRAL’s Model Law. Indeed, so did Mexico herself (albeit with modifications).

that may not even be able to eat fruit).¹²⁸ It also opens the entire debate about the benefits and tradeoffs of globalization more generally, an important discussion involving hegemony and other concerns well beyond the scope of this Article.¹²⁹ But the idea behind probing Mexico's pride more exactly is to reveal an instance of what Robert Keohane discusses as "diffuse reciprocity."¹³⁰ Sometimes the aggregate policy of a state can be promoted by the seeming suppression of its domestic law on a specific matter in favor of another state's. Indeed, using this theory Dean Larry Kramer posits international trade as one such area where this *renvoi*-esque utility calculation is likely to apply.¹³¹ Although Mexico seems to be relinquishing sovereignty on the one hand, she is actually doing so to vindicate her plausible interest in fostering economic activity on the other.¹³² Conceivably, a "more predictable asset distribution serves national policies of both the home country and the nonhome country."¹³³ This may be why states do not necessarily balk at the application of foreign law in their jurisdictions in commercial matters such as securities regulation.¹³⁴ Thus, shining a light on seeming losses of sovereignty to see that they may actually be gains—or, at worst, draws—re-orientates a major premise about whether sovereign states' pride is even in serious jeopardy when they are in the ancillary position in a universalist bankruptcy.¹³⁵

128. See *supra* notes 72, 73 for citations to sources confronting some of the theoretical issues raised.

129. For a tip of the iceberg, note for example the facially neutral mutual-recognition scheme of the U.S.-Canadian Multijurisdictional Disclosure System that some observe "hardly effects mutual recognition but instead institutionalizes the Americanization of Canadian securities law." Frederick Tung, *Passports, Private Choice, and Private Interests: Regulatory Competition and Cooperation in Corporate, Securities, and Bankruptcy Law*, 3 Chi. J. Int'l L. 369, 382 n.43 (2002) (citations omitted). This is a complex discussion beyond the scope of this Article. For a recent example in insolvency, consider *Satmex*, in which the bankruptcy judge worried about subjecting a debtor that controlled sensitive space-satellite technology of Mexico to distribution of assets under U.S. law. See Press Release, PR Newswire, *Satmex Creditors Reach Agreement With Company Resolving Involuntary Chapter 11 Petition*, available at http://www.hispanicbusiness.com/news/news_print.asp?id=24566 (last visited Mar. 25, 2006).

130. See Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. Rev. 979, 1026–27 (1991) (discussing the term "diffuse reciprocity").

131. See *id.* at 1024.

132. Cf. Goldsmith, *supra* note 72, at 1668–69 (maintaining that purportedly internationalist projects are legitimate when furthering states' national self-interests, which in turn are coterminous with citizens' welfare, but not when animated by altruistic "cosmopolitan" duties).

133. Bang-Pedersen, *supra* note 50, at 429.

134. Michael Schroeder & Silvia Schroeder, *New Role for SEC: Policing Companies Beyond U.S. Borders*, Wall St. J., July 30, 2004, at A1 (detailing foreign securities agencies' enthusiasm over the extraterritorial application of U.S. securities laws and deployment of SEC enforcement resources).

135. Reanalyzing state policy interests to eliminate false conflicts necessarily demands a more nuanced examination of the purported interests. Another dimension along which this scrutiny can be sharpened involves the distinction between "domestic" public policies and "international" public policies. International law scholars have noticed differences in policy overrides (usually more lenient treatment) toward international transactions. See von Mehren, *supra* note 86; see also Berends, *supra* note 5, at 336 ("In some States, such as the Netherlands, a distinction is made between domestic public policy and international public policy. International public policy is less restrictive than domestic public policy. Courts observing international public policy may be inclined to say, 'Okay, it is not the way we would do it, but we can accept it.' This is because international cooperation would be hampered if every country demanded that foreign countries have the same proceeding and the same rules as they have themselves.").

2. *Bankruptcy Meta-Norms*

Recognizing the benefits of diffuse reciprocity is one method of recharacterizing the imposition on sovereign pride purportedly inflicted by universalism. But there is another, more aggressive way to confront the pride of sovereignty-ceding states: the detection and use of what I call “meta-norms” in bankruptcy.

Bankruptcy “meta-norm” refers to a norm that is a step removed from the baseline content of a specific statutory provision.¹³⁶ Consider the priority that unpaid employee wages receive under Canadian and American bankruptcy law. In Canada, employees receive \$1,800 (USD) of priority,¹³⁷ and in the United States, they have historically received \$4,000.¹³⁸ The laws are admittedly different. Do they actually reflect different normative content, such that Canada loses if her employees are subjected to the higher employee priority of the American rule? That depends upon the interest sought to be achieved by the Canadian law. If it is “employee protection,” then Canada’s norm is actually *better* enforced by the application of American law. But if it is more finely calibrated than that—the norm is “*proper* employee protection, no less and no more”—then Canada does conceivably lose because the largesse of the American priority rule over-protects the Canadian worker and frustrates Canadian policy.¹³⁹

In this example, “employee protection” would be a bankruptcy meta-norm. It is less specific than the finely calibrated dollar level of each of the respective domestic priority provisions (proper employee protection), but its removal to a higher level of abstraction accords it the advantage of allowing two states to find themselves in agreement rather than conflict. Both states share the same meta-norm. Such meta-norms are not simply devolutions to the lowest common denominator that run roughshod over carefully drafted commercial laws. On the contrary, bankruptcy laws are already loosely drafted creatures, replete with internal inconsistencies,¹⁴⁰ and they contain numerous arbitrary limits.¹⁴¹ Accordingly, it is much more likely that a meta-norm such as “employee protection” will accurately capture a generalized bankruptcy policy than that it will overshoot and undermine a strict, dollar-specific policy of “proper employee protection, no less and no more.”

136. I therefore differ in my use of the term from some jurisprudential authors who describe a “meta-norm” as one that affects the legal decisionmaking process. *See generally* Jon Bing & Trygve Harvold, *Legal Decisions and Information Systems* (1977).

137. Converted from \$2,000 (CDN). Bankruptcy and Insolvency Act, R.S.C., ch. B-3 § 67(1) (1985). The Americans have recently revised their dollar amounts as part of the 2005 overhaul of the Bankruptcy Code; the employee priority threshold is now \$10,000. 11 U.S.C. § 507(a)(4) (2005). The Canadians are in the process of revising their threshold, but that process has not yet concluded.

138. 11 U.S.C. § 507(a)(4) (2005) (recently amended to \$10,000).

139. Pride and greed misalign in this instance (or, more accurately, the more salient greed of the Canadian employees, as opposed to the residual greed of the unsecured Canadian creditors, conflicts with pride). Canada, the sovereign, is offended by the application of coddling American bankruptcy law, but actual Canadian employees (controlling for ACR) are delighted by their legal windfall. *Cf.* ALI TIP, *supra* note 49, at 117.

140. For the proposition that the U.S. Bankruptcy Code is inartfully drafted, see *Patterson v. Shumate*, 504 U.S. 753, 766–67 (1992) (Scalia, J., concurring) (describing the U.S. Supreme Court’s difficult “search for a neutral and rational interpretive methodology” to interpret the Bankruptcy Code).

141. *See, e.g.*, 11 U.S.C. § 547(b) (2000) (preference lookback period).

Bankruptcy laws, perhaps in contrast to others,¹⁴² are just not that finely tuned.¹⁴³

Further pursuing the idea of bankruptcy meta-norms, there are at least two ways one could approach their deployment: rough wash or unidirectional. The rough wash approach is probably most consistent with the imprecise nature of bankruptcy law. Under this approach, both Canadian and American employee priority provisions could be said to vindicate adequately the shared bankruptcy meta-norm of “employee protection.” As such, states would (or at least should) be indifferent to the suppression of sovereignty occasionally required by universalism if their normative goals, as recharacterized through the meta-norm lens, can be met under either state’s laws. We care less about the actual dollar amount than we do about the fact that employees, as a protected class, are accorded privileged ranking over general unsecured creditors. A critical threshold of protection has been assured, and the difference between the two provisions is characterized as functionally immaterial—“close enough.”¹⁴⁴

Alternatively, one could insist upon even greater directionality and conceive the meta-norm as “employee solicitude.” Under this more scrutinizing approach, we would rank the laws’ success at vindicating the implicated meta-norm rather than just saying, as a rough approximation, that both advance the meta-norm sufficiently. We would therefore pick which law better protects employees—in this case, American law. This more precise unidirectional approach leads to asymmetry: the meta-norm would find itself protected by the application of American law in a Canadian-centered international bankruptcy but not by the application of Canadian law in an American-centered international bankruptcy. (We presumably would have to

142. In *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), the Supreme Court received and cited amicus briefs from several foreign governments complaining that application of U.S. antitrust law to conduct within their jurisdictions “would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody.” *Id.* at 167 (citing Brief for Federal Republic of Germany et al. as amici curiae). In terms of bankruptcy law’s difference (or sameness) from other types of laws likely to result in cross-border proceedings, it is worth considering that tax law seems to have found great success in the United States with bilateral treaties. It could be that bankruptcy is more litigation-focused than other, more administratively enforced types of laws. Or it could be that bankruptcy’s “large *n*” of multiple participants makes group resolution all the more complicated. Or it could simply be that bankruptcy is one of the more chaotic types of law—fast-paced resolution of a business meltdown that tries to salvage quickly dissipating firm value. My thoughts on this topic are still evolving.

143. The “passport” approach of certain multijurisdictional regulatory systems arguably adopts a similar normative perspective. Under such cross-border regimes, regulators accord comity to foreign companies’ compliance with foreign laws (the passport analogy) provided those foreign laws comport with some minimum degree of substantive acceptability (the countries have, by analogy, diplomatic relations). See Tung, *supra* note 129, at 379. The passport metaphor has been used by others. See *id.* at 370 n.4 (citing Howell E. Jackson & Eric Z. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe in 1999—Part I*, 56 Bus. L. 653, 662 (2001)); see also U.C.C. § 9-307(c) (2001) (choice of law rule that depends upon whether foreign jurisdiction has a public notice system for registering security interests).

144. The meta-norm concept might be seen as related to the “rough similarity” of bankruptcy laws that Professor Westbrook argues is “very important” to the adoption of universalism. Westbrook, *supra* note 84, at 2291. Rough similarity (at least as I interpret it) takes a more system-wide approach to a country’s bankruptcy law *as a whole*; with meta-norms I am looking more narrowly at the conceptualization and delineation of *specific* bankruptcy norms within a given country’s law (such as, e.g., the employee priority rules) that are said to be implicated, vindicated, or offended by the extraterritorial application of a foreign country’s bankruptcy laws that is required under universalism.

maintain, to prevent absurdity, that application of Canadian law in a Canadian-centered international bankruptcy protects the meta-norm acceptably.) The benefit of this more directional approach is that it might accord heightened accuracy in delineating the content of the meta-norm in question.¹⁴⁵ But the benefit would be weighed against the cost of the heightened friction over comparing the effectiveness of two countries' efforts at promoting a purportedly shared policy, even leaving aside the complexity of dealing with the asymmetry.¹⁴⁶

However one decided to implement the construct of a bankruptcy meta-norm, the process would necessarily wrestle with the issue of characterization—how does one choose to identify the meta-norm at issue? Clearly there must be constraints. The Canadian-American example from above arguably creates an easy case. But what if the employee preference under Canadian law is \$20,000? Unlimited?¹⁴⁷ A trump priority that is elevated over the rights of secured creditors?¹⁴⁸ These delineation challenges are real and important but by no means insurmountable.¹⁴⁹ Judges are called upon to make these determinations all the time in international bankruptcy cases. For example, under U.S. law as embodied in former 11 U.S.C. § 304(c)(4), a judge was required to assess whether distributions of assets under foreign law would be “substantially” in accordance with the provisions of the U.S. Bankruptcy Code.¹⁵⁰ This substantive review of foreign bankruptcy law, qualified by the important modifier of “substantially,” means that there is already some degree of loose approximation countenanced in according comity to foreign bankruptcy laws. Thus, the answer to the characterization

145. This is troubling if one has concerns regarding the domestic priority provisions in the first place. Perhaps rent-seeking is exacerbated.

146. The task of identifying meta-norms is complex, but some tentative first steps have been taken. For example, in UNCITRAL's just-approved Draft Legislative Guide, a discussion of avoidance laws occurs in the choice of law sections (paragraphs 652(j) and 652(k)). In those sections, the Guide acknowledges the possibility of different avoidance norms and the different jurisdictions that could supply avoidance laws (e.g., the jurisdiction of the initial transaction or the jurisdiction of the bankruptcy proceeding in which avoidance is sought). It notes that several approaches could be taken, such as avoidance if either system would avoid, or only if both systems would avoid, or—capturing the concept of a unidirectional meta-norm (in my opinion)—avoidance if “the stricter” avoidance law would avoid. *Draft Legislative Guide, supra* note 4, ¶ 652(j) (noting that at least one country's bankruptcy law follows the unidirectional approach for avoidance of cross-border pre-bankruptcy transactions).

147. Note that French law requires notifying employees of a restructuring, Dutch law requires court approval to dismiss staff, and Swedish law requires the government to pay employee salaries for a month following employer bankruptcy. International Insolvency Institute Fifth Annual International Insolvency Conference at Fordham Law School (June 6–7, 2005).

148. For example, Brazil's recent overhaul to its bankruptcy laws seems to acknowledge that secured credit is threatened by the unlimited and trumping priority of employee claims, which, under the revised law, will for the first time have a cap. See Christopher Andrew Jarvinen et al., *The International Scene: Bankruptcy Reform Coming to Brazil*, 23–10 Am. Bankr. Inst. J. 32 (2004).

149. On the contrary, recent comparative scholarship by Professor Guzman notes that bankruptcy employee provisions may not actually be that different from country to country. See Guzman, *supra* note 6, at 2197–98 (canvassing different countries' employee priority laws). *But cf.* Tung, *supra* note 129, at 375–76 (noting that labor seems to have heightened lobbying power—and thus heightened bankruptcy priority—in countries such as Germany, France, Mexico, and South Korea).

150. 11 U.S.C. § 304(c)(4) (2000); see, e.g., *In re Treco*, 240 F.3d 148 (2d Cir. 2001). *Treco* is an interesting case because on a cursory analysis, it could be interpreted as holding that the elevation of administrative expenses above a security lien was “too dissimilar” from U.S. law to permit accommodation. A closer reading of the case, however, links the elevation of the administrative claims with the fact that the claims had been fraudulently (or at least profligately) incurred so as to put into question their procedural fairness.

question of how much leeway to grant in the delineation of a bankruptcy meta-norm before conceding that there is no legally meaningful common ground could be, “At least as much leeway as would be accorded under 304(c)(4).” If the putatively conflicting norms are “substantially” similar, they should be said to fulfill the same meta-norm, at least under a rough wash approach, because they are close enough.¹⁵¹

Presumably we would want theoretical principles to guide the determination of meta-norms, and that secondary task could draw upon conflicts literature and other related areas.¹⁵² Comparative analysis would also be welcome. One helpful starting point in that regard would be the “Principles of European Insolvency Law” that were assembled and disseminated by a group of European bankruptcy scholars and practitioners who tried to cull together various common themes (and local variations) of the several domestic insolvency regimes within the continent. These common principles could be developed into meta-norms.¹⁵³ Similarly, the ALI’s TIP has a Restatement-like analysis of laws of the three NAFTA countries. Thus, far from being insurmountable, the job of identifying bankruptcy meta-norms may already be underway.¹⁵⁴

While acknowledging the difficulty in detecting and defining these meta-norms, I contend that they reflect the best theoretical conceptualization to promote a regime of universalism and deal with the pride problem. Meta-norms are the best approach because they dissolve apparent conflicts of laws into false ones.¹⁵⁵ They follow a similar route as the emphasis on diffuse reciprocity: the exposure of actual international agreement in areas of seeming divergence. Recharacterizing purportedly different laws as serving the same broader principles should ideally lower the defensive (and territorialist) disposition of states inclined to equate application of “different” foreign law with the undesirable suppression of sovereignty. It should also foster a sense of pluralism; if two different state laws can be said to vindicate the same meta-norm, albeit in slightly different manners, that should help domestic judges recognize that deference to foreign law does not subject the litigants to a different end, but merely a different path to a mutual goal.¹⁵⁶

151. In fact, this is the comparison that already takes place with “passport” regulatory regimes. See Tung, *supra* note 129. Modified universalism itself could be seen as such a passport system.

152. A related but tangential idea of conflicts has to do with the very definition of a “true” conflict. For example, does a conflict arise merely because two competing laws are inconsistent or does a conflict require it be “impossible” to comply with both laws? See *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168–172 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797–99 (1993). Even more interesting in this regard is the Third Circuit’s choice of law analysis in *Lernout & Hauspie*, which requires a qualitative, contextual analysis into how a chosen rule of bankruptcy law would “enhance or detract” from the country’s bankruptcy system as a whole. *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118 (3d Cir. 2002).

153. See Bob Wessels, *Principles of European Insolvency Law*, http://www.iiiglobal.org/country/european_union/PEILABIjournal_appended.pdf (last visited Feb. 21, 2006).

154. *Id.*

155. Indeed, in a more recent article, Professor Westbrook expresses optimism that a meta-norm of employee protection might be internationally created as a sort of customary norm of bankruptcy. See Westbrook, *supra* note 84, at 2312.

156. This would be an example of the principle of “legitimate difference” discussed by Dean Anne-Marie Slaughter. It is one of five principles that, in her estimation, will “ensure an inclusive,

This all sounds quite lofty, but how might it get translated into practice? One way (although there are others)¹⁵⁷ to operationalize the bankruptcy meta-norm approach is the reduction of actual differences in norms—in other words, substantive harmonization. Consider again the priority payout provisions as exemplars of the international diversity in the redistributive norms in bankruptcy laws. To the extent domestic laws reduce their inclusion of these prickly and idiosyncratic priority provisions, there will be fewer friction points in the application of foreign bankruptcy law by deferring universalist courts. If a bankruptcy code has seventeen priority provisions, the difficulty of shoehorning each provision into seventeen meta-norms is considerable.¹⁵⁸ If there are only three, then that task becomes considerably easier. (For example, Professor Westbrook has referred to the “Big Three” priorities.)¹⁵⁹ If there are no priorities, then the problem vanishes. Thus, the reduction or outright elimination of domestic priority provisions altogether is a policy that will greatly facilitate the identification of bankruptcy meta-norms. And this diminution of priorities seems to be starting in the wave of domestic bankruptcy reform around the world,¹⁶⁰ encouraged and reinforced by UNCITRAL’s most recent efforts.¹⁶¹

B. *Second-Bests: Current and New Pragmatic Proposals*

The previous Section outlined a principled manner in which pride over sovereign differences in bankruptcy laws can be accommodated from both a legislative (substantive harmonization and reduction of priority provisions) and judicial (identification of meta-norms and diffuse reciprocity in exercising discretion to cooperate) perspective. This Section discusses various alternative, more pragmatically animated proposals, including my own.

tolerant, respectful, and decentralized world order.” Anne-Marie Slaughter, *A New World Order* 29–30 (2004).

157. A fascinating analysis that I believe is trying to confront the same problem can be found in Westbrook, *supra* note 19, at 33–43. Professor Westbrook tries to control for the application of different priority laws by constraining the assets available for distribution by territorial location—a concession to some limited, cooperative territorialism in effect—but according universal application of priority entitlement to those assets, subject to a (to-be-determined) adjustment rule. Although he looks at the problem through the lens of individual creditors’ incentives to open local proceedings solely for the purpose of realizing local legal advantage, Westbrook ends up actually trying to apply a principled taxonomy to the various interests bankruptcy priority provisions seek to vindicate (e.g., empowerment of “unfairly” disadvantaged claimants, loss recoupment of the public fisc, certainty expectations from reliance on local law, etc.). This might be the first step to identifying and delineating bankruptcy meta-norms of priority.

158. See, e.g., 11 U.S.C. § 507 (2000).

159. Jay Lawrence Westbrook, *Bankruptcy Control of the Recovery Process*, 12 Am. Bankr. Inst. L. Rev. 245, 253 (2004) (referring to secured lenders, employees, and taxing authorities).

160. See E. Bruce Leonard, *The International Year in Review*, 22 Am. Bankr. Inst. J. 22, 22 (2004) (discussing abolition of priority for governmental claims in the revisions to the United Kingdom’s Enterprise Act). *But cf. In re Treco*, 240 F.3d 148 (2d. Cir. 2001) (enhancing, arguably, the role of the priority accorded security). The International Insolvency Institute is in the process of preparing a report on the various priorities in different regimes around the world. The Finns reported that their recent revisions to their insolvency laws scrapped priority provisions altogether.

161. See *Draft Legislative Guide*, *supra* note 4, ¶ 628 (“The provision of priority rights has the potential to foster unproductive debate on the assessment of which creditors should be afforded priority and the justifications for doing so.”).

1. Liens

Other scholars have suggested that one way for sovereigns to enforce truly important redistributive norms in bankruptcy law is to elevate them into property rights by way of statutory liens charged on the debtor's property.¹⁶² Under a statutory lien, the lienholder enjoys first dibs (to the extent of the lien) on the encumbered property as a property right. The bankruptcy estate, effectively,¹⁶³ only gets to divide the remainder of the asset after the lien is satisfied. In a cross-border situation, this means that an ancillary state's local policy preferences will be protected to the extent of the lien, because only the unencumbered, "post-lien" property would even be subject to turnover to a foreign proceeding as an asset available for general distribution. (This of course assumes that foreign law will respect statutory property liens, as many laws do.)¹⁶⁴ Proponents of this approach note that American law, which sets distributional bankruptcy priorities at the federal level, accords respect and recognition for various liens created under the laws of the several states and only enforces federal bankruptcy priorities on the liquidation of "post-lien" property.¹⁶⁵ This means, at least to the extent of the value of the encumbered property, that states get to dictate the priority (and guarantee the payment) of certain favored creditors.

The lien approach has some theoretical appeal but is beset by problems. The first is that comparison to American bankruptcy law is a little too easy. In fact, American law actually *abrogates* many state law liens, such as a landlord's lien for distress or rent.¹⁶⁶ Thus, far from endorsing the thousand flowers of state liens and the redistributive norms they represent, federal bankruptcy law in the United States insists on its pre-emptive superiority and exercises normative might by disallowing many state law liens. (Indeed, this is as it should be, given the market-symmetric aspirations of bankruptcy law.)¹⁶⁷ Thus, the U.S. example actually bodes quite ill for the international setting, which currently enjoys neither a Supremacy Clause nor a Bankruptcy Clause—nor even a Constitution for that matter.

162. See, e.g., *Resolving Transnational Insolvencies*, *supra* note 7, at 2275.

163. For simplicity I am glossing over the corralling of those assets into the bankruptcy estate in regimes such as the United States that require leave of the court to enforce those liens by lifting an automatic stay.

164. See Franken, *supra* note 10, at 239 (foreign liens); see also John C. McCoid, II, *Statutory Liens In Bankruptcy* 68 Am. Bankr. L.J. 269 (1994) (U.S. liens). The EU Regulation makes great weight of protecting the property rights of third parties "in rem." See European Union: Convention on Insolvency Proceedings, Nov. 23, 1995, 35 I.L.M. 1223 (1996), *adopted in relevant part by* Council Regulation on Insolvency Proceedings 1346/2000, art. 11, 2000 O.J. (L 160) 1 (EC), *available at* <http://Europa.eu.int/eur-lex/> (exception from *lex concursus* under EU Regulation choice of law provision to protect rights "in rem").

165. See Westbrook, *supra* note 84, at 2298.

166. See 11 U.S.C. § 543(3), (4) (2000).

167. Professor Westbrook admits as much, although he suggests that these statutory abrogations are the exception rather than the rule. See Westbrook, *supra* note 84, at 2298 (referencing "limits" within which states can create bankruptcy-recognized liens). Moreover, even accepting Professor Westbrook's empirical claim that redistributive state law liens are for the most part recognized under federal bankruptcy law, the quintessential liens that are *not* recognized are those which are ascribed highest redistributive importance in general financial default, i.e., those which come into being only upon bankruptcy. See *HSBC Bank USA v. Branch (In re Bank of New England Corp.)*, 364 F.3d 355, 363 (1st Cir. 2004) (repeating prohibition of bankruptcy-specific state law liens). Thus, reliance on the American federal bankruptcy regime to demonstrate the power of state-created liens as vehicles to implement redistributive norms seems misplaced.

Second, the reification of a distributive entitlement into a property right certainly strengthens the likelihood of its receiving the desired favorable treatment, but it does not guarantee it. The voluntary lien of the security interest, for example, is trumped under some situations, such as by employee priority under Mexican bankruptcy law and certain types of post-petition financing under American law.¹⁶⁸ If Mexican worker claims can trump voluntary liens duly created and perfected under American law, there is no reason why they could not also trump statutory liens also created under American law. This uncertainty was brought home starkly in an important recent cross-border case, *In re Treco*, in which U.S. secured creditors were appalled to learn that the debtor's property on which they thought they had a first lien—which lien they thought should comfortably guarantee payment—was trumped under Bahamian bankruptcy law by the administrative expenses of running the insolvency proceedings. (They were doubtless even more disappointed when they learned those administrators had racked up \$8 million in fees.)¹⁶⁹ In other words, all a lien does is move the priority right higher up the distribution ladder—or perhaps, more accurately, reinforces the rung on which it rests. It enhances but does not guarantee priority.¹⁷⁰

A final problem with turning distributional priorities into liens is that it exacerbates the concept of “vested rights” that so infects discussion of the design of international bankruptcy systems.¹⁷¹ For example, one of the arguments that the Supreme Court of Canada used in the *Antwerp Bulkcarriers* case was that to defer to the universalist bankruptcy proceeding in Belgium would visit “juridical [dis]advantage” to the American creditor and insufficiently “protect the vested rights of what we regard as secured creditors under Canadian law.”¹⁷² In other words, it would be unfair for the creditor to think he was secured by a lien on a ship, but in actuality lose that security by having the lien stripped away in the Belgian bankruptcy. It visits a sort of confiscation or forfeiture of property.¹⁷³ But the conception of the “unfair” loss of a property right misses the point of what are fair and legitimate expectations in the international marketplace. As the U.S. Supreme Court explained over a century ago, international commercial actors subject themselves to the vagaries of differing laws.¹⁷⁴ When a credi-

168. See 11 U.S.C. § 363(c)(2).

169. *Bank of N.Y. v. Treco (In re Treco)*, 240 F.3d 148 (2d Cir. 2001). *Treco* resulted in the U.S. creditors blocking a turnover request in U.S. court to the Bahamian bankruptcy, contending (and convincing the Second Circuit) that the application of Bahamian law to kill their security interest would be unfair, especially in light of the gross excess of the administrative fees that seemed outrageously if not fraudulently incurred. *Id.* at 160–61.

170. Even full-fledged “property rights” are not immune from recharacterization in bankruptcy and other collection proceedings, as disavowal of self-settled trusts under tax haven laws illustrates. See Rev. Rul. 76–103, 1976-1 C.B. 293; *Outwin v. Comm’r*, 76 T.C. 153 (1981); *Estate of Paxton v. Comm’r*, 86 T.C. 785 (1986). Similarly, the Uniform Commercial Code treats purported retention of property ownership in certain lease transactions as actual transfers of property rights subject to security. See U.C.C. § 1-203 & cmt. (2001).

171. See EU Insolvency Regulation, *supra* note 41.

172. *Holt Cargo Sys., Inc. v. ABC Containerline N.V.*, [2001] S.C.R. 907, para. 79 (Can.) (companion appeal to *Antwerp Bulkcarriers N.V. v. Holt Cargo Sys., Inc.*, [2001] S.C.R. 951 (Can.)).

173. This reasoning is not unique to Canadian jurists. See *Treco*, 240 F.3d 148 (2d Cir. 2001).

174. *Can. S. Ry. Co. v. Gebhard*, 109 U.S. 527, 537 (1883) (“[E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the

tor extends credit to a foreign company, foreign law may apply. Indeed, how did the American stevedores know that Canada would even recognize their American-created lien? They did not. They took the risk that Canadian private international law would smile upon them (which it did). Why is it any more unreasonable for them to have risked the application of Belgian law, knowing in advance as they did that the *M/V Brussels* was subject to Belgian law?

Accordingly, “fairness” analyses premised upon vested expectations seem to focus on the expectations of property right holders to the exclusion of the expectations of their unsecured counterparts (a salience bias?). In *Antwerp Bulkcarriers*, the Canadian Supreme Court sympathized that it would be unfair to surprise the lienholder with the spontaneous invalidation of the lien under Belgian law. But why is it any more fair to surprise a Belgian unsecured creditor by the application of an illegal lien (under Belgian law) that will suck away a substantial asset of a Belgian debtor’s bankruptcy estate, an asset—if we are to accept the theoretical premise of vested rights fairness arguments, namely, reliance lending—he was entitled to rely upon to expect recovery in the event of insolvency?¹⁷⁵ The question-begging circularity of what are “legitimate” expectations and what rights should “vest” in the international commercial context presents a maddening task that perhaps is better avoided altogether.

Thus, advocating the solution to sovereign pride by the creation of statutory liens is simply telling proud states to become more vain. It is a step in the wrong direction and hides from what we should get out in the open if we are to effect meaningful international bankruptcy reform of “local interests.” Instead, we should confront honestly the fact that different states want different redistributive norms vindicated by their bankruptcy laws. Dressing up these norms as property rights does nothing more than escalate the rhetoric.¹⁷⁶

2. Circumscription

Another pragmatic argument to states who fear they will be “net deferrers” under universalism is circumscription. Its approach is to deal with the pride of these states by simply excluding them from the operation of a universalist system altogether, presumably permitting reliance on the

powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes.”)

175. The Canadian Supreme Court ignored this question when gauging “fairness” in *Antwerp Bulkcarriers*, [2001] S.C.R. 951, para. 79.

176. I blame part of this approach of property rights and statutory liens as a means to effect redistributive social policies on bankruptcy scholars who focus on preserving an equality of rights within and without bankruptcy, on the theory that minimized divergence between the two will maximize ex ante predictability and minimize ex post strategic conduct. See, e.g., Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. Chi. L. Rev. 97 (1984). These scholars advocate liens as a way to mete out distributive justice, liens which apply both within and without bankruptcy equally and therefore comport with their minimal divergence model. The model is seminal and of course fundamental in its broader point that payoff divergence within and without bankruptcy creates perverse incentives. But I have always questioned what may be an implicit premise: that a voluntary lienholder of, say, a car loan can accurately price the ex ante probability that a car will be subjected to a mechanic’s repair lien but not price with similar ease the probability that the car will enter its owner’s bankruptcy estate. Further exploration of this matter is best left for another day.

territorialist default rules of comity to fill the gap. For example, Professor Westbrook suggests that one way might be to limit the application of universalism to “large, international organizations,” perhaps above a certain asset size.¹⁷⁷ This is both a prescriptive recommendation for policy and a factual inference that many of the most sensitive redistributive bankruptcy policies, such as family-support-award priorities, are unlikely to arise in the prototypical cross-border case of the megacorporation. Yukos is unlikely to owe alimony.¹⁷⁸

This circumscription of universalism could work along both monetary and geographical dimensions. We could limit the operation of universalism to certain international enterprises of substantial size, thus minimizing the imposition of foreign bankruptcy law on deferring states to a discrete number of presumably infrequent megabankruptcies. Or we could similarly exclude countries from participating in the universalist system by making the same rough empirical approximations (i.e., Vanuatu is unlikely to be involved in all that many international bankruptcies). We could even limit the regime to the OECD states, or some other such proxy of nations that we think are likely to be meaningful players in the international financial community.

The problems with such an approach are in a sense the byproduct of what makes it appealing in the first place: that by limiting the scope of universalism to either certain entities or certain countries, the market-symmetric attempt to resolve financial distress with a uniform approach may be unwound. Limited universalism may be as sensible as limited pregnancy. If the benefit to be obtained from universalism in a corporate reorganization, for example, is that the home country can control and reallocate all the corporation’s integrated worldwide assets, then can that goal be achieved if only some of the assets can be so controlled? Furthermore, if exceptions are allowed on this basis, then is the mischievous potential for strategic behavior and “havenism”—parking bank accounts in Vanuatu—awakened (or exacerbated)? Relatedly, if we believe that there is invidious jurisdictional competition analogous to what Professor LoPucki documents on the domestic bankruptcy front, does limiting universalism to only the “big player” companies merely focus the competition where it is likely to be situated already?¹⁷⁹

3. *Carve-Outs*

I am sympathetic to the direction advocates of circumscription want to go: a pragmatic concession to the troubles of pride, and to a lesser extent greed, under a universalist regime. Circumscription has the effect of both

177. See Westbrook, *supra* note 84, at 2298–99. Note that circumscription assuages dubious creditors as well.

178. For a back and forth on whether large multinational enterprises engage many or few prickly norms, see Tung, *supra* note 13, at 576 n.82 (taking issue with Professor Westbrook’s position).

179. See Lynn M. LoPucki & Joseph W. Doherty, *Why Are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 Vand. L. Rev. 1933 (2002). For a theoretical discussion, see generally Marcus Cole, *Delaware is Not a State: Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 Vand. L. Rev. 1845 (2002). Of course, LoPucki’s concerns with jurisdictional jostling can become an indictment of a universalist regime altogether. See Lynn M. LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (2005).

blunting a potentially sharp edge to universalism and setting a footprint for subsequent incremental reform (e.g., later expanding the set of entities or states subject to inclusion, perhaps incrementally). My preferred approach, however, is to refocus that impetus not on narrowing the scope of those subject to the universalist regime at the outset and then expanding it at a later time, but on maximizing universalism's scope and then, as a second step, clawing back its impact as an interim concession.¹⁸⁰ This leads to the proposal of a carve-out,¹⁸¹ which has had limited outlet, albeit in different guises, in some jurisdictions already.¹⁸²

The carve-out idea is straightforward.¹⁸³ When an international company files for bankruptcy in a universalist regime, a small, fixed amount of the locally available assets should be subject to distribution in accordance with local bankruptcy law and carved out from turnover to the controlling jurisdiction. The amount can be small, say 5 percent. The point is that it has to be small enough not to frighten universalism advocates (especially banks seeking the ex ante predictability of one rule of law),¹⁸⁴ but big enough to assuage on some meaningful level the pride of local countries (and, for maximal effectiveness, the content-dependent greed of local creditors as well). How does one arrive at 5 percent? The same way one arrives at a ninety-day lookback period for voidable preferences. It is one of the many instances of arbitrary provisions necessary to make a bankruptcy code operate.

Because hard assets are difficult to divide, let alone repatriate (one cannot send home 95 percent of a drill press), the result of this would be the same as a priming lien on encumbered chattel. If the lien is sufficiently small, the secured creditor so primed will be unable to complain, any more than she can complain about paying the auctioneer's surcharge for liquidat-

180. In this regard, I take a page from the modified universalist's songbook.

181. I proceed with this proposal fully mindful that in other contexts, such as the revisions to Article 9, carve-outs "died for lack of a first" in committee. Lynn M. LoPucki & Elizabeth Warren, *Secured Credit: A Systems Approach* 676 (4th ed. 2003) (quoting Professor Charles W. Mooney, Jr.). I note that the United Kingdom's Enterprise Act of 2002 experiments for the first time with an express carve-out for unsecured creditors, so perhaps their time has come. In any event, even the most pessimistic will grant me that 5 percent seems much less frightening than 20 percent. Cf. Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 Wis. L. Rev. 729, 730 n.6 (citing Edward I. Altman, *A Further Empirical Investigation of the Bankruptcy Cost Question*, 39 J. Fin. 1067, 1077 (1984) (average of direct bankruptcy cost to value of the company ratio for publicly held companies was 6 percent)).

182. I am thinking chiefly here of the EU Insolvency Regulation, which permits "secondary proceedings" that, roughly, allow territorialist local proceedings (limited to local assets) to be conducted under local law. One European commentator has called the regulation "a weakened form of universalism that provides territorial carve-outs to the benefit of local interests and policies." Franken, *supra* note 10, at 247.

183. The concept of a carve-out in corporate reorganizations already exists and has to do with a secured creditor "carving out" a portion of his lien in favor of the administrative expenses over which he would ordinarily have priority. See Richard B. Levin, *Almost All You Ever Wanted to Know About Carve Out*, 76 Am. Bankr. L.J. 445 (2002) (providing excellent analysis of bankruptcy carve-outs).

184. The EU Regulation's "secondary proceeding" approach could be seen as having a 100 percent carve-out for certain priorities. See EU Insolvency Regulation, *supra* note 41. It is not surprising therefore that some European commentators seem generally amenable to the carve-out concept. See Bob Wessels, Address at INSOL Academic Conference: Current Positions and Future Trends in Comparative Insolvency Law from a Continental European Perspective (Mar. 12, 2005) (discussing, in English, recent works of Stephan Kolmann and Peter von Wilmsowsky).

ing repossessed collateral.¹⁸⁵ To be sure, there is some economic distortion inflicted by such a proposal (the lender's gauging of legal risk is made 5 percent "fuzzier"), but such risk pricing is probably sufficiently imprecise already that enhancing its noise by 5 percent is unlikely to wreak serious havoc.¹⁸⁶

The mechanics of the carve-out do not require the local funds to be ultimately administered by the local court. That is, the property could be turned over to the universalist home court, but with a trust fund of proceeds set aside to be distributed under the bankruptcy law of the carve-out jurisdiction.¹⁸⁷ In fact, at least one court has used a trust fund approach to administering assets within its bankruptcy jurisdiction under the laws of a different country in a cross-border case.¹⁸⁸ In general, implementation could consider the various issues raised by Professor Westbrook in his thoughtful analysis of the interaction between one court and several courts enforcing one law or several laws within a general universalist framework.¹⁸⁹ For example, either the deferring court or the home court could be charged with administering the carve-out property or its proceeds. These are second-order concerns.¹⁹⁰ The crux of the proposal is that distribution be done, wherever and by whomever, pursuant to the carve-out jurisdiction's substantive bankruptcy laws.¹⁹¹ More realistically, this allocation of assets and laws would be the backdrop against which an invitation to negotiate a consensual plan would be extended.¹⁹²

The carve-out's principal virtue is that it captures, albeit incompletely, the nettlesome problem of local sovereign pride that is so challenging to universalism. It also captures, again incompletely, the content-dependent aspect of local creditor greed, by assuring the favored local claimants at least 5 percent of their special priority under local law. But the pride axis is where a little flattery is most likely to go a long way. That is, individual

185. See U.C.C. § 9-615(a) & cmt. 2 (2001).

186. Indeed, any difficulties with such an interim approach might actually galvanize support around full-fledged universalism. See Westbrook, *supra* note 19, at 43-44. Viva the penalty default!

187. This would be important for courts that are concerned whether they have the authority under their respective domestic bankruptcy codes to approve a distribution that "violates" domestic law by being pursuant to foreign law. For a good discussion of why this concern ought not paralyze U.S. judges, see Jay Lawrence Westbrook, *Universalism and Choice of Law*, 23 Penn State Int'l L. Rev. 625 (2005).

188. See *Re Sefel Geophysical Ltd.*, [1988] 54 D.L.R.4th 117 (Alta. Ct. Queen's Bench) (distributing proceeds of American avoidance action pursuant to American law in Canadian proceeding); see also *Barr v. Charterhouse Group Int'l, Inc. (In re Everfresh Beverages, Inc.)*, 238 B.R. 558 (Bankr. S.D.N.Y. 1995) (ordering Canadian asset sale proceeds to be distributed in accordance with Canadian bankruptcy priority laws).

189. See generally Westbrook, *supra* note 19; Westbrook, *supra* note 84.

190. For a rigorous analysis of distribution rules, including the interactions of universalism vs. territorialism, cross-filing vs. local filing, and hotchpot vs. 100 percent dividends, including the effect of order of distribution, see Bang-Pedersen, *supra* note 50.

191. These laws may in and of themselves waive application of the 5 percent local law set aside. I would make this a discretionary option. In other words, one could envision a staunchly universalist state signaling its strong support of universalism by honoring the 5 percent carve-out of foreign assets when seeking turnover of the 95 percent residuum when in the primary jurisdiction position, but waiving insistence on its 5 percent carve-out rights when in the ancillary position.

192. For an example of a consensually negotiated carve-out, see *In re Artimm, S.r.L.*, 335 B.R. 149 (Bankr. C.D. Cal. 2005), in which a \$22,500 carve-out on local U.S. assets was negotiated to pay off a union pension lien before the remaining assets were sent to an Italian main proceeding.

creditors are presumably rationally selfish profit maximizers who will be at most 5 percent happier with a carve-out than with pure universalism, which has no carve-out.¹⁹³ The carve-out, while bringing something positive to the table, is unlikely to be a source of a major celebration.

By contrast, the more difficult-to-articulate concept of sovereign pride—whereby local policies are vindicated to some degree simply because they are recognized—does not necessarily translate into dollar-for-dollar proportionality. The mere act of recognizing the legitimate right of multiple sovereigns to claim (concurrently but hierarchically) regulatory entitlement over specific international debtor property may show sufficient deference to the pluralism of bankruptcy laws that the ancillary jurisdictions will be satisfied that their different laws are appropriately respected as “worthy,” just not controlling in today’s proceeding.¹⁹⁴ “Each must be prepared to recognize the validity of each other’s approach, as long as all accept a core of fundamental principles.”¹⁹⁵ Thus, smaller and less powerful states concerned about hegemony under strict universalism may feel much more than 5 percent happier with a guaranteed carve-out for local law.¹⁹⁶ Moreover, if they are sufficiently satisfied with 5 percent, then they may no longer fight universalism so strongly by inflating their claims to primary jurisdiction status or exercising their escape clause rights to deny turnover when in the ancillary position.¹⁹⁷ In sum, the carve-out is intended to be a gesture—real, not mere lip service—to the importance of the prickly rights of sovereignty. It is respectful, but limited, because it also recognizes that universalism’s core of increased transactional gain is built around the application of one law.¹⁹⁸

193. Note that this is leaving aside diminishing marginal returns.

194. Cf. Pottow, *supra* note 28, at 1002 n.250 (Draft Legislative Guide occasionally resorts to “minority” recommendations in areas in which there is a strong tradition of legal difference, presumably as an interim harmonization step to mollify minority-view jurisdictions). This is a manifestation of what Dean Anne-Marie Slaughter calls the principle of “legitimate difference,” which she sees as foundational for her disaggregated, decentralized, and network-like global governance regime. See Slaughter, *supra* note 156.

195. Slaughter, *supra* note 156, at 30.

196. The flip side of this is that the all-or-nothing nature of deference under strict universalism allows the deferring state to score “nobility points” for deferring, whereas the 5 percent holdback may simply sharpen the pain and come across as a pittance. The reason I stick to the carve-out is that any state interested in nobility can always waive its 5 percent holdback (perhaps to further foment universalism) and that there surely must be some cases of marginal pride that would be satisfied at 5 percent but unsatisfied at 0 percent. More grottilly, the carve-out proceeding also guarantees a sinecure for the local bar. See *infra* note 197.

197. The local bar, which would bring such fights, might also find attractive the guaranteed niche of local legal participation required. See Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 Va. J. Int’l L. 743, 787–88 (1999). Consider in this regard that when Mexico adopted the UNCITRAL Model Law, it inserted a requirement that when Mexico defers to a foreign main proceeding and conducts an ancillary proceeding in Mexico, a “verification visit” is still required under Mexican law (by a Mexican accountancy firm presumably) before recognition. On the role of the bankruptcy bar in shaping bankruptcy legislation generally, see David A. Skeel, Jr., *Debt’s Dominion: A History of Bankruptcy Law in America* (2001). See also Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 Mich. L. Rev. 47 (1997).

198. See Pottow, *supra* note 28 (advocating an incremental adoption of universalism). As mentioned, the carve-out is intended as a pragmatic, interim measure to allow states to desensitize themselves to universalism. Ideally, it will phase out.

C. Could It Ever Happen?

Are we stuck with an all-or-nothing jurisdictional model, or would a court (or policymaker) ever yield “partial” jurisdiction to another state’s substantive bankruptcy laws, in the sense of a local law carve-out? One of the most important American cross-border judicial decisions in recent years presented a complex example of exactly this sort of innovation. The case involved the infamous bankruptcy of Lernout & Hauspie Speech Products, N.V.—a colorful affair involving scandalous allegations of malfeasance (before corporate fraud became *de rigueur*) in which former directors and officers were jailed. The debtor, L&H, was a Belgian corporation that conducted substantial international business and was involved in speech-recognition products. Shortly before its fall, it bought the U.S. company Dictaphone in a mostly paper transaction (i.e., Dictaphone stockholders received shares of L&H, rather than cash, in exchange for tendering their Dictaphone shares to L&H). Thus, former stockholders of Dictaphone became stockholders of L&H after the sale. One such shareholder, Stonington Partners, was disappointed when massive fraud at L&H was revealed. Among other unhappy consequences, this meant that the price of the L&H shares it received for its Dictaphone stock was wildly inflated and hence nowhere close in actual value to the shares of Dictaphone it relinquished. Stonington resolved this disappointment by suing L&H and its principals for fraud. It was not alone.

For bankruptcy (whose clouds were already gathering), this put these shareholders-turned-litigants in an unusual posture. On the one hand, they were new shareholders of L&H, the soon-to-be bankrupt debtor. On the other hand, they were (at least for bankruptcy purposes) tort creditors suing L&H whose claims would be resolved in the bankruptcy. First principles of bankruptcy law dictate that creditors are treated differently from shareholders in the distribution of the estate. This is perhaps why U.S. bankruptcy law has a special rank for those hybrid equity-creditors who allege securities fraud in connection with the underlying acquisition of their equity stake in the debtor. Section 510(b) of the Code subordinates their claims (a “negative” priority) behind general unsecured creditors, but elevates them above regular equity claims.¹⁹⁹ Belgian law, however, makes no such distinction: they are tort creditors of the debtor with claims like any other creditor. That they own stock is irrelevant.

Stonington sued L&H in Delaware, per the Dictaphone merger agreement. L&H responded by filing for chapter 11 reorganization in U.S. bankruptcy court, invoking the automatic stay of U.S. bankruptcy law to halt the lawsuit. It also, as a Belgian company, with its center of main interests in Belgium, filed a Petition for Concordat in Belgian court. This created “dual” (or “duelling” as the Third Circuit called it)²⁰⁰ bankruptcy proceedings, with neither country acknowledging the other’s status as the main or ancillary jurisdiction. (This happens not infrequently in cross-border insolvencies when no party wants to push a choice of law showdown, especially in reorganizations; the parties in these restructurings pursue “parallel” pro-

199. 11 U.S.C. § 510(b) (2000).

200. *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 122 (3d Cir. 2002).

ceedings and design joint judicial protocols to harmonize the two courtrooms and elide the express determination of which is the main proceeding. It is an important and fascinating topic well beyond the scope of this Article.)²⁰¹

Seemingly staunch defenders of international comity, Stonington moved for dismissal of the U.S. proceedings, claiming that the insolvency of this Belgian debtor should proceed exclusively in Belgium under a Belgian Concordat—which just so happened to treat Stonington as a regular creditor, not a 510(b) subordinated creditor. They were opposed. The hotly contested L&H bankruptcy generated numerous published judicial opinions, dragged on for years, and eventually (consequently?) converted to a liquidation.

The specific issue that reached the Third Circuit was the U.S. bankruptcy judge's determination that Stonington had to take its lumps under U.S. law in a U.S. courtroom and, more controversially, the judge's issuance of an anti-suit injunction forbidding Stonington from pursuing its claims in the Belgian Concordat. "There is . . . relatively little equity to the contention of creditors located in the United States that they are unfairly prejudiced by the application of U.S. bankruptcy principles."²⁰² Meanwhile, the Belgian bankruptcy court for its turn *forbade* L&H from confirming a reorganization plan that would follow U.S. law and subordinate Stonington because to do so would "discriminate" against Stonington (treating it differently from all other creditors) and therefore violate Belgian law. Presented with this awkward conundrum, the Third Circuit dissolved the anti-suit injunction and issued a thoughtful opinion about the importance of comity in cross-border bankruptcy proceedings and the need in "dual" cases for courts to at least try to communicate as much as possible to resolve their differences—here, the starkly opposing commands of the two respective bankruptcy courts on Stonington's treatment, with one requiring and the other forbidding subordination. Nonbankruptcy readers should appreciate that much of corporate reorganization law is premised upon encouraging consensual restructuring of debt, so perhaps the Third Circuit was thinking, not without reason, that if the courts and parties tried a little harder to come to agreement the problem might go away.

Commentators applauded the cooperation-based admonitions of the Third Circuit,²⁰³ and on remand the U.S. bankruptcy judge tried to open

201. American Law Institute Transnational Insolvency Project, Court-to-Court Guidelines for Communications, http://www.iiiglobal.org/international/projects/English_package.pdf (last visited Feb. 21, 2006); see also *In re Aerovias Nacionales de Colombia S.A. Avianca*, 303 B.R. 1, 17–18 (Bankr. S.D.N.Y. 2003) (noting that "[i]n an ideal or even in an orderly world, governing law might require a filing in one jurisdiction," but in "our present world" these dual proceedings are allowed). A prominent Canadian scholar astutely opines:

Joint administration requires no formal finding that the [multinational corporate-group debtor] has more than one center of gravity. Rather it reflects the fact that both jurisdictions believe their creditors have a sufficiently high stake in the proper administration of the estates in each country that neither court should be expected to surrender its jurisdiction to the other.

Jacob S. Siegel, *Corporate Groups and Crossborder Insolvencies: A Canada-United States Perspective*, 7 Fordham J. Corp. & Fin. L. 367, 380 (2002).

202. *Avianca*, 303 B.R. at 14.

203. One prominent commentator actually would have preferred the court to have gone further by imposing an affirmative duty to cooperate on the lower courts, as the EU Insolvency Regulation does. See Jay Lawrence Westbrook, *The Duty to Seek Cooperation in Multinational Insolvency Cases*, 2004 Ann. Rev. Insolvency L. 187.

communication with his Belgian counterpart. But the problem, alas, did not go away. Cooperation and communication are salutary when there are overlapping claims to jurisdiction, to be sure, but sometimes when push comes to shove there eventually has to be a showdown. This inescapable reality is what makes the *L&H* case so important in light of the theory and the proposals of this Article. The natural end-game when consensus cannot be reached, in the absence of a universalist treaty or regime, is a retrenchment to territorialism. Unless persuaded to dismiss the case for reasons of comity,²⁰⁴ the U.S. court will hold onto the U.S. bankruptcy proceeding and apply U.S. law to the U.S. assets under its control, just as the Belgian court will hold onto the Belgian assets and apply Belgian law. This is territorialism.

The international standoff looked well on its way to happening, much to the disappointment of Stonington—disappointment stemming from the fact that only \$3.5 million of the estate’s \$57.6 million in assets was under the control of the Belgian curators (most of the assets of L&H were in the United States, ironically, due to the recently acquired Dictaphone resources). So the territorialist state of nature would have had \$54 million administered in the U.S. proceeding under U.S. law and only \$3 million in Belgium under Belgian law.

The U.S. bankruptcy judge (or the Creditor’s Committee, the record is unclear) did something very interesting, however. An investment banker was retained to come up with a fair allocation of the multinational corporation’s assets beyond the arbitrary situs of where they happened to fall on Bankruptcy Day. The expert submitted a report based on “among other metrics, the location of: (a) technology development; (b) product development; (c) business operations; and (d) sales generation.”²⁰⁵ The result of this was a proposed 77 percent to 23 percent split of the assets between the U.S. and Belgium. A quasi-consensual plan was then confirmed in U.S. court (only quasi-consensual because although the Belgian curators dropped opposition, the plan still had to be confirmed over Stonington’s death-throe objections). It had the U.S. trustee paying over \$14.8 million in cool, hard cash from the U.S. coffers to the Belgian curators to be distributed in the Belgian proceeding under Belgian law. In short, the U.S. court conceded to and ordered a carve-out.²⁰⁶

The adventure of the L&H cross-border proceedings is important to the viability of a carve-out proposal because it shows that countries will in fact be willing to cede some pride (not greed, because U.S. creditor Stonington was at odds with U.S. law) by relinquishing control over assets which they would otherwise get to distribute pursuant to their own laws under naked

204. Under the pre-2005 regime, the U.S. courts facing dual proceedings had two options. They could dismiss (or abstain from pursuing) the full-blown plenary U.S. bankruptcy proceeding under Section 305, or they could convert the case into a limited ancillary proceeding under Section 304, which allows turnover of property to the foreign proceeding under foreign law. But the latter route would require an acquiescence that the United States was not the rightful center of the dispute, a concession the court was unwilling to make in *L&H* in light of the significant U.S. asset base and the domestic occurrence of the Dictaphone-based fraud.

205. *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 655 (Bankr. D. Del. 2003).

206. Stonington fought again up to the Delaware District Court, lost, and eventually ran out of steam trying to go back to the Third Circuit in 2004. The plan consummated. *See Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods., N.V.* 310 F.3d 118 (3d Cir. 2002).

territorialism.²⁰⁷ In fact, *L&H* is even more encouraging because it shows a principled allocation animated by commercial fairness rather than the crude 5 percent carve-out offered in this Article.²⁰⁸ For now, I stand by the cruder approach as a pragmatic, bright-line proposal because it provides an inexpensive backdrop against which the parties can negotiate; I subscribe to bankruptcy's frequent preference for the quick over the just. (Note that with fewer years of litigation, perhaps *L&H* might have avoided liquidation.)

In any event, *L&H* surely stands as an example of how states might be willing to cede some, but not all, pride and countenance the concept of "partial jurisdiction" inherent in the carve-out. Moreover, *L&H* is not unique. Just this past year, the Rover Group insolvencies in the United Kingdom contained a discussion that the British insolvency administrator would have discretion to pay out a portion of the UK estate to French employee-creditors under the priority provisions accorded under French law.²⁰⁹ Indeed, the very idea of the carve-out itself is a model engrained in the revisions to the UK's Enterprise Act, with its 20 percent carve-out from secured lenders' liens for general unsecured creditors. In sum, while the carve-out proposal is certainly a novel one, it would not necessarily "die[] for lack of a first."²¹⁰

To be sure, a carve-out system is not without problems, such as, for example, conceivably higher administration costs.²¹¹ But it seems that it has the advantage of going after and capturing an impulse that is likely to be already permeating the international bankruptcy environment. Moreover, it has the further advantage of doing so from the *ex ante* perspective. That is, instead of relying on the *ex post* good graces and comity of a state to cooperate in an international bankruptcy (as does modified universalism), the carve-out seeks to bribe in part the greedy creditors, to the extent that they seek the content-dependent favors of local law. It more significantly seeks to flatter proud states *ex ante* by ensuring that in the highly chaotic cross-

207. In this regard, it is significant that the settled amount of payment to the Belgian curators was just enough, not by coincidence, to cover the Belgian priority claims. Presumably, Belgium cares more about realizing the recovery of priority claimants under Belgian law than it does about the payment of garden-variety creditors because it chose to create those priority preferences in the first place. Perhaps a variation on my carve-out proposal could be to have a floating carve-out that would equal the priority claims, a more principled but more uncertain (and thus expensive) alternative.

208. Actually, since Belgium was the home, the U.S. should have kept only 5 percent of the assets under the carve-out proposal, but the fact that any amount was willingly turned over absent compulsion is an impressive development.

209. *In re MG Rover*, [2005] BPIR 1162 (Ch.) (Eng.); see also *Barr v. Charterhouse Group Int'l, Inc.* (*In re Everfresh Beverages, Inc.*), 238 B.R. 558 (Bankr. S.D.N.Y. 1995); *In re Artimm, S.r.L.*, 335 B.R. 149 (Bankr. C.D. Cal. 2005) (carve-out for U.S. pension fund claim from U.S. assets being sent to Italy for Italian distribution).

210. LoPucki & Warren, *supra* note 181, at 675 (quoting Professor Charles W. Mooney, Jr.).

211. I raise this point as a precaution. I do not concede it. I think, for example, a clear regime in which actors inclined to rebel (systemically jurisdiction-ceding states) are corralled into support through the flattery of a carve-out may reduce the litigation costs of fighting over jurisdictional primacy. And anyone who doubts the contentiousness of jurisdictional primacy in transnational insolvencies need go no further than the initial precedents under our European friends' EU Regulation. See Case C-341/04, *Eurofood IFSC Ltd* (May 2, 2006), available at <http://www.curia.eu.int/en/content/juris/index.htm> (follow "Cases lodged before the Court of Justice since 1989", then click "C-341/04," and then click the "C-341/04" next to "Judgment") (competing Irish and Italian claims to center of main interests). I do admit that the proposal works neater for liquidation than reorganization, but proposals for better walking should precede those for better running.

border insolvency context, at least some part of *every* international estate will be administered under the specific norms of local bankruptcy law. It offers a guaranteed, albeit modest, bird in the hand to these sovereign and individual actors. Is 5 percent of a bird in the hand worth 100 percent of one in the bush? In an area with as much legal uncertainty as a cross-border financial default, the answer may often be “yes.”

Part IV—Summary, Further Comment, and Conclusion

Although almost everyone agrees that international bankruptcy proposals must be sensitive to the needs of “local interests,” universalist and territorialist commentators alike have been somewhat imprecise in their discussion of the problem. Do we mean locally domiciled creditors? Locally filing creditors? Creditors who enjoy legal privileges under local bankruptcy law? Creditors who enjoy a high ratio of domestic assets covering domestic claims? And if the answer depends upon the content of local law, do we look at local law only as it affects individual creditors, or do we look at local law as it affects public interests? This Article suggests that “local interests” in international bankruptcy involve a combination of concerns that implicate both local creditors *and* local states. Designing a universalist system of international bankruptcy law therefore requires appreciation of the two forces that correspond roughly to both of these constituencies. These forces are “greed” and “pride.”

Because greed is more difficult to predict than pride due to shifting creditor alignments and asset locations, policy prescriptions are more fruitfully directed to confronting the “prickly rights of sovereignty” that implicate state pride. The first-best solution is to minimize the events of conflict that give rise to pride infringements in the first place. In cross-border insolvencies, participants should weed out false conflicts to find how the interests of proud, autonomous states may actually be advanced by the occasional enforcement of foreign states’ laws. Relatedly, judges facing priority conflicts should strive to identify meta-norms; seemingly different redistributive bankruptcy values may in fact find common ground at a higher and more appropriate level of abstraction. This process will be facilitated by the concomitant reduction or outright elimination of priority payout provisions and other domestic bankruptcy law terms that invite such conflicts in the first place. The harmonizing effort of UNCITRAL’s Draft Legislative Guide is an important step along this path,²¹² and the legal reform trend of countries such as the United Kingdom that heed this recommendation is an encouraging development.²¹³

In addition to the first-best solution that is partially realized through substantive harmonization, there are a number of pragmatic, secondary policy prescriptions for how best to enhance the prospects of universalism and ease the transition. These include the elevation of statutory priorities into property liens and the circumscription of a universalist regime for certain big-ticket players or countries. These proposals have merit but are not without difficulty.

212. *Draft Legislative Guide*, *supra* note 4, ¶ 628.

213. *See supra* note 160.

A better idea, it is submitted, would be an express carve-out from universalist home-court distribution. Like any carve-out, it has the weakness of adding potential complexity to a system—universalism—that has simplicity and predictability to commend itself as its principal virtues. But it also has the strength of constraining the potentially destructive impulses of sovereign pride.

There is one point that warrants further comment. It pertains to the role of contractarian solutions to cross-border financial distress, as championed by Professor Rasmussen. Rasmussen starts with the premise that neither a regime of exclusive universalism nor a regime of exclusive territorialism is likely to be optimally efficient given the heterogeneous distribution of firms worldwide.²¹⁴ This point leads him to recommend the adoption of his domestic model of contractually selected insolvency rules to firms in the international arena.²¹⁵ Such an approach of course exacerbates concerns of havenism, but Rasmussen raises some retorts as to how strong those concerns actually are and the extent to which they can be kept in check by a punishing market.²¹⁶ Professor Rasmussen's contributions to the literature are thought-provoking and acknowledge candidly the distributive exploitation potential of those who are at the contracting table extracting rents from those who are not.

There is one thought in particular that Rasmussen considers that I wish to amplify pertaining to the pride issue. Drawing an analogy to the contractual forum-selection-clause cases, such as *Bremen v. Zapata Off-Shore Co.*,²¹⁷ Rasmussen posits that states are willing to accord some extra party autonomy in the international commercial arena when examining purported affronts to public policy in contracts.²¹⁸ Specifically, if the law of one party's jurisdiction would invalidate a suspect contract clause for public policy reasons but the law of the other's would not, then the first jurisdiction should find its public policy unoffended by the enforcement of a forum selection clause that leads to the application of the second jurisdiction's laws.²¹⁹ This is so even though a purely domestic dispute would invalidate the suspect clause.²²⁰ Perhaps this rule is so because states feel less of an affront to pride when they are deferring to the law of another state as the product of forum-selection by international contracting parties.²²¹ Accord-

214. See *Transnational Insolvencies*, *supra* note 7, at 32–33.

215. More precisely, he recommends selection from a “menu” of rules as a second-best approach to compensate for certain troublesome externalities and to reduce costs. See *id.* at 22–26.

216. See *id.* at 10–12.

217. 407 U.S. 1 (1972), discussed in *Transnational Insolvencies*, *supra* note 7, at 35.

218. I accept, *arguendo* only, that bankruptcy implicates only private rights.

219. See *Bremen*, 407 U.S. 1 at 9 (“We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”). Note that the New York Convention does allow states the escape-clause power to decline enforcement of a foreign arbitration award if the result is contrary to public policy. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I(1), June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38 (allowing for nonenforcement of arbitration awards barred by public policy of enforcing state). That still returns to the question whether such policy in turn might vary as a function of the nationality of the parties (or transaction) involved. An empirical investigation of this power under the Convention would be illuminating.

220. See Berends, *supra* note 5, at 336.

221. See von Mehren, *supra* note 86.

ingly, it may be that the “one law” of universalism is embraced better by states that must defer to that one law when it has been pre-selected by contract rather than by legal convention.²²² Relatedly, this may account for the mostly warm reception to protocols in cross-border proceedings, which are effectively ad hoc treaties that order resolution of an international debtor’s bankruptcy on a case-by-case basis. These protocols are prevalent in the case law, endorsed in the literature, and supported by international reform efforts.²²³ As such, whatever the strengths or weaknesses of contractarian bankruptcy domestically, perhaps the model deserves heightened consideration in the international realm.

Insolvency law is moving rapidly in the international commercial sphere, both with regard to ongoing reform of domestic insolvency laws and with regard to considerations of how best to resolve the thorny issues of multiple-jurisdiction proceedings. A mixture of analytic theory and rough pragmatism guides current proposals, which struggle to keep pace with new developments. This Article has criticized the imprecision with which commentators have sometimes confronted the hitherto monolithic “local interest” problem and has attempted to unpack the various overlapping concerns that are implicated. It has built upon this analysis by advocating universalist policy recommendations that confront what is possibly the most challenging but also the most predictable of these underlying local concerns: sovereign pride. While the policy of identifying joint interests such as diffuse reciprocity and shared meta-norms is likely the best solution from a theoretical standpoint to diminish intersovereign friction, the best pragmatic solution is to get this tension out into the open and carve out a small but fixed wildcard portion of an international bankruptcy estate. It is a necessary territorialist step backward to permit a greater universalist leap forward.

222. It is important not to overstate this impulse. *Bremen* was not a bankruptcy case. For a judicial opinion expressing the real struggle courts have balancing the “public interests” in bankruptcy against the private interests of the contracting parties, see *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] S.C.R. 978 (Can.).

223. See generally Jay Lawrence Westbrook, *International Judicial Negotiation*, 38 *Tex. Int’l L.J.* 567 (2003). Protocols are explored in many international reform efforts, such as the UNCITRAL Model Law and the ALI TIP, but are beyond the scope of this Article. The enthusiasm is far from unanimous, however. See Berends, *supra* note 5.