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Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory

HANNAH L. BUXBAUM*

I. INTRODUCTION

In a period marked by the development of numerous treaties, conventions and statutes designed to regulate international business, the field of international bankruptcy remains disturbingly resistant to reform. Most of the major initiatives proposed in past decades have failed completely; others, though adopted, have had only moderate impact. As a result, the bankruptcy of a multinational enterprise typically triggers diverse and uncoordinated legal proceedings in various countries connected to the affairs of that enterprise. This lack of coordination imposes substantial costs both on the bankruptcy process...
itself (for instance, by multiplying administrative expenses) and on inter-
national commerce generally (by preventing lenders from predicting accurately
the consequences of debtor insolvency). The need for a method of addressing
international insolvencies that is fair, predictable, and consistent therefore
remains pronounced.

The movement to reform international bankruptcy law has been cast
largely as a struggle between two opposing camps: universality and territorial-
ity. For the past few decades, universalists—who argue that international
bankruptcies should be administered by a single forum—have been winning
the battle. Universalists argue that the centralized administration of cross-
border bankruptcies will provide (1) equality of treatment for all creditors; (2)
maximization of the value of the bankruptcy estate; (3) expeditious and effi-
cient administration of the estate; and (4) predictability of outcome. Univer-
salist principles have shaped the discourse as well as the goals of the bank-
ruptcy reform movement.

Today, however, the consensus that has long existed in favor of universal-
ity seems to be weakening. Territoriality, which favors the simultaneous ad-
ministration of multiple local bankruptcies, is gaining currency among com-
mentators. On the legislative front, the international bankruptcy provisions of
the proposed Bankruptcy Reform Act of 1999, while purporting to foster uni-
versality, reveal only a partial commitment to the universality approach. Fi-
nally, recent cases evidence the increasing tendency of courts to abandon the
battlefield altogether by handling cross-border bankruptcies in an extraregula-
tory fashion.

These trends do not reflect an outright abandonment of the fundamental
goals of universality. Rather, they reveal frustration with the continuing failure of
reform efforts to achieve these goals, as well as a pragmatic acceptance of
the enduring vitality of territorialism. In the belief that the goals of universal-
ity remain relevant, I view this emerging dissatisfaction with international
bankruptcy theory as an invitation to reexamine that theory.

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2 See Jay Lawrence Westbrook, Theory and Pragmatism in Global Insolvencies: Choice of
Pragmatism].

3 See Lynn M. LoPucki, Cooperation in International Bankruptcy: A Post-Universalist Ap-

4 See Theory and Pragmatism, supra note 2, at 460–61; Robert K. Rasmussen, A New Ap-

5 In 1888, John Lowell observed that “in the present state of commerce and communication,
it would be better in nine cases out of ten that all settlements of insolvent debtors with their credi-
tors should be made in a single proceeding and generally at a single place.” John Lowell, Conflicts
of Law as Applied to Assignments for Creditors, 1 HARV. L. REV. 259, 264 (1888).

6 See LoPucki, supra note 3, at 700–701 (identifying the growing acceptance even among
universalists of solutions that incorporate territorial elements).


8 See infra Part II.B.2.b for a discussion of extraregulatory decisionmaking.

9 See Jay Lawrence Westbrook, Universal Priorities, 33 TEX. INT’L L.J. 27, 43 (1998) [hereina-
fter Universal Priorities].
The development of solutions to cross-border insolvency is patently a choice-of-law problem: How do we choose the law applicable to a transnational bankruptcy proceeding, or to a particular aspect of that proceeding? Interestingly, however, international bankruptcy law has not been analyzed against the backdrop of traditional conflict-of-laws thinking. Instead, the bankruptcy-specific doctrines of universality and territoriality have framed the discussion of choice-of-law issues. In this Article, I expand the analysis of international bankruptcy law beyond the confines of the sometimes unhelpful universality/territoriality dichotomy by examining the developments in cross-border bankruptcy law from a consciously conflicts-oriented perspective.

The current regime under which cross-border bankruptcies are administered in U.S. courts—a regime based on the universality model—includes no explicit choice-of-law rule. A close analysis of its operation, however, reveals the existence of a conflicts approach. Although this approach is theoretically well suited to achieve the goals of universality, it is imperfect. I believe that by viewing the international bankruptcy system through the lens of traditional conflicts principles, we can uncover unarticulated choice-of-law issues and suggest refinements to that regime. Rather than accept the current trend away from universality, in other words, this Article proposes to use a rigorous analysis of choice-of-law values in developing a better version of universality.

Part II of this Article presents the competing theories of international insolvency, universality and territoriality, and the modified universality approach chosen by the U.S. legislature. It then reviews the provisions of the United States Bankruptcy Code ("Bankruptcy Code") that implement the modified universality approach and analyzes the choice-of-law problems they present. Part III departs from the structure imposed by the universality/territoriality dichotomy and resituates the U.S. regulatory approach within the broader framework of choice-of-law methodology. It concludes that U.S. international bankruptcy law operates as a multilateralist system. Part IV then assesses whether multilateralism is in fact an appropriate method for resolving choice-of-law issues in international bankruptcy, concluding that it is. Finally, Part V analyzes possible refinements to the international bankruptcy approach of the United States based on its multilateral nature, suggesting that the adoption of a more deliberate multilateralism would serve the goals of this system. The Article concludes with some thoughts on the future of the universality approach.

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10 This is not to say that the choice-of-law implications of cross-border bankruptcies have been ignored. See, e.g., John D. Honsberger, Conflict of Laws and the Bankruptcy Reform Act of 1978, 30 CASE W. RES. L. REV. 631 (1980); Kurt Nadelmann, The Bankruptcy Reform Act and Conflict of Laws: Trial-and-Error, 29 HARV. INT’L L. J. 27 (1988); Theory and Pragmatism, supra note 2; Jay Lawrence Westbrook & Donald T. Trautman, Conflict of Laws Issues in International Insolvencies, in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW (Jacob S. Ziegel ed., 1994) [hereinafter CURRENT DEVELOPMENTS]. I point out only that such discussions use the language of universality and territoriality rather than that of traditional conflicts theory.
II. THE U.S. APPROACH TO INTERNATIONAL BANKRUPTCY

The discussion surrounding the resolution of international insolvencies has been framed by the opposing theories of universality and territoriality. Universality maintains that a single forum should administer the bankruptcy of an insolvent corporation. The bankruptcy proceeding would reach all assets of the debtor, wherever located, and would distribute those assets to all creditors, wherever located. In its purest form, sometimes referred to as "unity," this theory maintains that only one legitimate forum exists for the administration of any bankruptcy, and that the appropriate court has full jurisdiction to administer the assets and make distributions to creditors pursuant to its own law.11 Supporters of universality, particularly in its purest form, identify as its advantages both increased efficiency of the bankruptcy process itself and a reduction in the cost of international credit. In addition, they argue that it is a fairer approach in that it secures equality in the treatment of all creditors, wherever located.12

Territoriality, on the other hand, adheres to the "grab rule." Each country in which assets of the debtor are located distributes those assets to its own creditors pursuant to its own bankruptcy law. Territoriality is defended as both easier to administer and fairer to local creditors: They need not submit claims in a foreign proceeding, and will not be disadvantaged by the application of foreign bankruptcy law.13

Universality and territoriality represent the poles of international insolvency theory; in practice, most jurisdictions have adopted approaches that fall

11 See PHILIP R. WOOD, PRINCIPLES OF INTERNATIONAL INSOLVENCY 228 (1995) ("The bankruptcy applies to all the debtor's assets globally and not just local assets.").
12 In a less pure incarnation of universality, the forum court would require the assistance of courts in other countries at the enforcement stage. Commentators have defined the terms "unity" and "universality" somewhat flexibly. See, e.g., Ian F. Fletcher, The European Union Convention on Insolvency Proceedings: Choice-of-Law Proceedings, 33 TEX. INT'L L.J. 119, 121 (1998); Hans Hanisch, "Universality" Versus Secondary Bankruptcy: A European Debate, 2 INT'L INSOL. REV. 151, 151–53 (1993); and LoPucki, supra note 3, at 704. The Reporter's Notes to the American Law Institute's Transnational Insolvency Project describe "unity" as involving a choice of forum, where "universality" involves the choice of a single legal regime. See AMERICAN LAW INSTITUTE, TRANSNATIONAL INSOLVENCY PROJECT: INTERNATIONAL STATEMENT OF UNITED STATES BANKRUPTCY LAW: TENTATIVE DRAFT 139, n.226 (1997). Professor Dalhuisen, however, suggests that universality assumes the full international effect of local bankruptcy adjudications on the basis of unity of the debtor's estate and unity of the creditor group. J.H. DALHUISEN, DALHUISEN ON INTERNATIONAL INSOLVENCY AND BANKRUPTCY 2.03[3] (1986).
13 A single bankruptcy administration would avoid the costs of multiple simultaneous proceedings. In addition, the value of the debtor corporation, both in liquidation and in reorganization, would be better preserved if all assets were under the control of a single court. See WOOD, supra note 11, at 228; Theory and Pragmatism, supra note 2, at 461.
14 See Theory and Pragmatism, supra note 2, at 466; see also LUCIAN ARYE BEBCHUK & ANDREW T. GUZMAN, AN ECONOMIC ANALYSIS OF TRANSNATIONAL BANKRUPTCIES (1998) (arguing that universality also promotes a more efficient allocation of capital).
15 See WOOD, supra note 11, at 228.
16 See id.
between them. In a form more moderate than absolute unity, the doctrine of universality can still favor a single bankruptcy proceeding while acknowledging that in certain circumstances a local proceeding might be necessary. This lesser form of universalism is usually described as "modified universality." In systems using this approach, parties may open proceedings in additional jurisdictions that are ancillary to the main bankruptcy proceeding. These ancillary proceedings are intended primarily to assist the main proceeding—and therefore further the basic goals of universality—but also protect the right of the forum to apply its own law in certain situations. Farther yet from pure unity lie systems that contemplate a series of "secondary bankruptcies" in which local assets are distributed pursuant to local law for the benefit of local creditors, with any remaining assets remitted to the foreign bankruptcy proceeding.

A. International Bankruptcy in the United States: Modified Universality

The provisions that U.S. courts currently apply to international insolvencies were adopted as part of the 1978 Bankruptcy Reform Act. In drafting those provisions, Congress embraced the modified universality approach. The provisions governing international aspects of bankruptcy assume the desirability of collecting and distributing the assets of the debtor on a worldwide basis, even when the distribution will be administered by a foreign court. At the same time, however, they acknowledge the need to protect local creditors from prejudice or other unfairness in the foreign proceeding. The system chosen is thus committed to the goals of universality, but modified to protect territorial interests when necessary.

1. Provisions Concerning the Effect of U.S. Bankruptcy Proceedings in Other Countries

Pursuant to Bankruptcy Code Section 541, a bankruptcy proceeding initiated in the United States extends to all property of the debtor, wherever located.
Global treatment is also afforded to all claimholders, wherever located. The claims of foreign creditors are admissible on equal footing with the claims of domestic creditors, and foreign creditors are able to share equally in the proceeds of the bankruptcy estate.

2. Provisions Concerning the Effect of Foreign Bankruptcy Proceedings in the United States

The initiation of foreign bankruptcy proceedings has no immediate effect in the United States. The Bankruptcy Code establishes a two-step process for considering pendent foreign proceedings. First, the foreign representative must establish that he was duly appointed in a proceeding opened for the purpose of liquidating or reorganizing the debtor's estate. Once recognized, the foreign representative may pursue one or more of three routes. He may initiate a full-blown involuntary bankruptcy proceeding against the debtor; seek the dismissal of a pending bankruptcy proceeding initiated in a U.S. court by local creditors or by the debtor itself; or initiate an ancillary proceeding under Section 304.

Section 304 proceedings constitute the core of U.S. international bankruptcy law and embody Congressional endorsement of modified universality. Section 304 permits the representative of a foreign bankruptcy to institute a proceeding ancillary to a liquidation, reorganization or similar proceeding already underway abroad. A Section 304 filing does not initiate a full bankruptcy proceeding under U.S. law, and therefore neither creates a bankruptcy estate nor imposes an automatic stay on collection activities by creditors. It merely establishes a mechanism permitting the representative of a foreign proceeding to recover or administer property of the debtor located in the United States. Courts have broad discretion to order various types of relief in favor of foreign representatives, including the issuance of injunctions preventing local creditors from levying on assets of the debtor, the suspension or dismissal

25 See 11 U.S.C. § 541(a) (1994). Of course, the effect of this provision outside the United States depends on whether the law of the country in which the property is located recognizes the authority of the U.S. bankruptcy court to administer the assets.


28 See 11 U.S.C. § 303(b)(4) (1994). Such a proceeding would then be conducted concurrent with the proceeding pending abroad.


30 Any proceeding brought pursuant to Section 303, 304 or 305 of the Bankruptcy Code is commonly referred to as a "Section 304" proceeding, and this Article adopts that convention.

31 See Thomas C. Given & Victor A. Vilaplana, Comity Revisited: Multinational Bankruptcy Cases Under Section 304 of the Bankruptcy Code, 1983 ARIZ. ST. L. J. 325, 330 (1983). By seeking the injunctive relief permitted by Section 304(b)(1), however, a foreign representative can achieve substantially the same relief with respect to property of the bankruptcy estate located in the United States as that provided by Section 362(a) of the Bankruptcy Code.

32 See id. at 328.
of local actions relating to property of the estate, and the turnover of assets (or control over assets) to the foreign representative.\textsuperscript{33}

The legislative history of Section 304 indicates clearly that the function of the ancillary proceeding is to assist the foreign proceeding by protecting assets located in the United States from attachment or dismemberment by individual creditors, thereby preserving their value for distribution with the rest of the bankruptcy estate.\textsuperscript{34} Such assistance, however, is not automatic. While courts have discretion to help the foreign representative, they also have discretion to protect the interests of local creditors. Section 304(c) provides that:

\begin{enumerate}
\item In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with
\item just treatment of all holders of claims against or interests in such estate;
\item protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
\item prevention of preferential or fraudulent dispositions of property of such estate;
\item distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
\item comity; and
\end{enumerate}

\textsuperscript{33} Section 304(b) provides that a court may:
\begin{enumerate}
\item enjoin the commencement or continuation of—
\item any action against—
\item a debtor with respect to property involved in such foreign proceeding; or
\item such property; or
\item the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
\item order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
\item order other appropriate relief.
\end{enumerate}


\textsuperscript{34} The legislative history clarifies the intent of Congress in this regard: Section 304 was enacted to enhance the efficiency of foreign bankruptcy representatives in marshaling and distributing the assets of the debtor. See Stuart A. Krause et al., \textit{Relief Under Section 304 of the Bankruptcy Code: Clarifying the Principal Role of Comity in Transnational Insolvencies}, 64 \textit{Ford. L. Rev.} 2591, 2594–95 (1996) (characterizing Congressional intent as “encouraging courts to lean toward a universality approach by giving greater deference to the foreign proceeding”). There is no intention that the local proceeding would \textit{compete} with the foreign one.
(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.\textsuperscript{35}

Thus, under certain circumstances, domestic courts may choose not to afford the foreign representative the sorts of relief contemplated by Section 304(b). Instead, they may permit local creditors to attach the assets with a view to exercising collection remedies pursuant to state law, or take other measures preventing such creditors from being subjected to the foreign proceeding. While the ancillary proceeding therefore aims to facilitate the recognition of, and encourage deferral to, bankruptcy proceedings initiated in other jurisdictions, that universalist inclination is tempered by concern for the rights of local creditors.

B. The Choice-of-Law Problematic

Modified universality, while attractive on a theoretical basis, has proved difficult to apply fairly, consistently or predictably. Because Section 304 incorporates both universal and territorial elements, it permits courts to decide cases in a rather unsystematic way. Its very flexibility allows a court to reach whichever result it desires, be it universal or territorial in nature. Although the fair resolution of any individual case is of course desirable, unpredictability of outcome is not. This is especially true in international bankruptcy, where uncertainty as to the possible consequences of a debtor's bankruptcy renders creditor planning difficult and cross-border lending unduly risky.\textsuperscript{36} Unfortunately, Section 304 contains no choice-of-law rule to guide judicial decision-making.

1. Choice of Law in Current International Bankruptcy Law

The focus of international bankruptcy jurisprudence has long been on the choice of forum. Universality and territoriality, in other words, are theories developed to answer the question whether a cross-border insolvency should be administered in a single forum or multiple fora. No court, however, will conduct bankruptcy proceedings pursuant to the bankruptcy laws of another jurisdiction; a bankruptcy proceeding administered in a particular forum will necessarily be administered pursuant to the bankruptcy law of that forum.\textsuperscript{37} For this

\textsuperscript{35} 11 U.S.C. § 304(c) (1994).
\textsuperscript{36} See infra Part IV.B for a description of the effect of unpredictablility on commercial lending. See also LoPucki, supra note 3, at 728 (suggesting that this flexibility therefore sacrifices the advantages claimed by the universality approach).
\textsuperscript{37} See DALHUISEN, supra note 12, at § 1.07[2], 3-96.14 ("[T]here is usually no freedom for the rendering court but to apply its own bankruptcy law in its entirety . . . "). Courts may, of course, choose to apply the law of another jurisdiction to particular aspects of the bankruptcy administration. They may, for instance, apply foreign law to determine whether a creditor has secured status. But the law applied to the core issues of priority among creditors and distribution of assets will be forum law. See LoPucki, supra note 3, at 12.
reason, choice of forum and choice of law are intertwined in the area of international bankruptcy. Under unity, once a bankruptcy proceeding commences in the debtor's home jurisdiction, courts in other countries will accept that court's authority to administer all assets and satisfy all creditor claims pursuant to its bankruptcy law. Similarly, under territoriality, courts in each country in which assets of the debtor are located will exercise their respective rights to conduct separate proceedings pursuant to their own bankruptcy law. By providing a fixed rule for the selection of forum, unity and territoriality thus also determine the selection of applicable law.

The choice-of-law result is less clear in systems that adopt a position between the poles of unity and territoriality simply because in such systems the choice of forum is not automatic. Once a bankruptcy proceeding has been initiated in a certain country—assume, for example, the home jurisdiction of the debtor—the courts in other jurisdictions must decide whether to defer to that proceeding or to conduct a local one. Because the court administering the proceeding will apply its own bankruptcy law, that choice of forum serves the secondary function of a choice of law.

Two examples of common situations facing U.S. courts, each implicating the distribution of assets of an insolvent debtor, will illustrate the choice-of-law questions embedded in decisions relating to jurisdiction. In the first, a U.S. court has pending before it a proceeding initiated by a local creditor to attach certain assets, located in the United States, of a foreign debtor. An action is then brought by a foreign representative under Sections 304 and 305, seeking to have the attachment proceedings dismissed and the assets turned over for distribution in a bankruptcy proceeding initiated against the debtor in its home jurisdiction. In a second common situation, the action pending before the U.S. court is an involuntary bankruptcy proceeding against the debtor, initiated by local creditors. An action is then brought by a foreign representative seeking to have the entire U.S. bankruptcy proceeding dismissed in favor of a proceeding already underway in the debtor's home jurisdiction. The resolution of these actions under either a unity system or a territoriality system would re-

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38 See Theory and Pragmatism, supra note 2, at 471 (identifying the general failure to distinguish between the two and then arguing that the forum court should apply its own bankruptcy law to the greatest extent possible); see also Westbrook & Trautman, supra note 10, at 668 (“Because it is traditional that the bankruptcy court applies its local law, there is no choice of law process as such to deal with important issues that vary from country to country.”).

39 See text accompanying supra note 12 for a description of unity.

40 See text accompanying supra note 16 for a discussion of territoriality.

41 While Section 304 only provides for an injunction against the commencement or continuation of a case, Section 305 provides that such a case may be dismissed. Another alternative open to the foreign representative would be to petition the court for a local concurrent bankruptcy proceeding pursuant to Section 303(b)(4). See Honsberger, supra note 10, at 653.


quire no choice at all: In the case of unity, the authority of the foreign court would be recognized; in the case of territoriality, it would not.

In a modified universality system, however, the U.S. court must choose. In the first case, the court may either dismiss the attachment action and turn the assets over to the foreign bankruptcy proceeding, or ignore the claims of the foreign representative and permit the local creditor to attach the assets. Although this decision is cast as a choice of the forum in which the assets will be administered, it amounts to a choice of law relating to the distribution of the estate. If the assets are turned over, they will be distributed according to the bankruptcy rules of the foreign court (which may or may not favor the local creditor). If they are not, the creditor will be able to attach the assets and exercise any appropriate remedies available to it under U.S. state law. In the second case, too, the court makes an implicit choice-of-law decision. If the local bankruptcy action is dismissed, the local creditors will submit their claims to administration under foreign bankruptcy law; if the local bankruptcy proceeding goes forward, the Bankruptcy Code will apply. In deciding whether or not to defer to the foreign representative—in choosing a forum—the court is thus engaging simultaneously in a choice of law.

Unfortunately, Section 304 does not incorporate a principled choice-of-law approach. There are two distinct areas in which the absence of a conflicts method is apparent. First, Section 304 does not instruct courts to consider the interests, relative or absolute, of the United States and any foreign jurisdiction in the application of their respective laws to the bankruptcy proceeding. In other words, a local proceeding initiated by a small local creditor when the debtor and all other creditors are located in a single foreign jurisdiction is not distinguished from a local proceeding brought by a large group of U.S. creditors when the debtor has major local operations and other substantial contacts with the United States. Subject only to the general guidelines set forth in Section 304(c), supplemented by the instruction that the court should strive to ensure an “economical and expeditious administration” of the bankruptcy estate, the decision whether or not to defer is left entirely to the discretion of the court. Second, the Section 304(c) factors themselves do not reveal an underlying choice-of-law approach. The various elements listed in Section 304(c) point in different directions: Some justify a territorialist protection of domestic creditors, while others promote a cooperative, universalist approach. In ad-

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44 A court might also dismiss a competing local bankruptcy proceeding under Section 305, which provides that the U.S. court may dismiss a bankruptcy proceeding if a foreign proceeding is pending and the Section 304(c) factors warrant dismissal. See 11 U.S.C. § 305(a).


46 Most notably Section 304(c)(4), which provides that the distribution of proceeds under foreign law should be “substantially in accordance” with the order of distribution dictated by the Bankruptcy Code. 11 U.S.C. § 304(c)(4) (1994). See infra Part V.B.2 for a discussion of cases in which Section 304(c)(4) has been applied in a protectionist fashion.
dition, there is no indication of the weight to be assigned to any given factor or, more generally, whether the factors are meant to be balanced against one another at all.48 Thus, each case decided under Section 304 necessitates the development and application of an ad-hoc choice-of-law analysis.49

In this respect, then, the modified universality approach lacks even the subtextual choice-of-law orientation of the unity and territoriality approaches. Cases decided under Section 304 reflect this absence. With few exceptions,50 U.S. courts do not frame their analysis in terms of typical conflicts considerations, and they refrain from traditional choice-of-law analysis such as a consideration of contacts within a particular jurisdiction.

2. Choice of Law and Recent Developments

Viewed solely from the perspective of results, the U.S. international bankruptcy system seems to be functioning as intended. Despite a handful of oft criticized cases that use a territorialist approach at odds with the goals of Section 304,51 the majority of decisions in cross-border bankruptcy cases favor the claims of the foreign representative.52 Two recent developments, however, herald changes in the orientation of U.S. international insolvency law. First, the proposed Bankruptcy Reform Act of 1999 ("Reform Act")53 in certain re-

47 Section 304(c)(1) suggests a universal approach, pursuant to which all creditors—wherever located—would be treated equally. See 11 U.S. C. § 304(c)(1) (1994); Trautman, supra note 45, at 52.

48 There is also nothing to prevent courts from considering additional factors. See Honsberger, supra note 10, at 655. Some courts, far from attempting to balance the factors, have viewed at least one of the guidelines (Section 304(c)(4)) as an individual test that must be passed in order for a foreign proceeding to be recognized. See Melissa S. Rimel, American Recognition of International Insolvency Proceedings: Deciphering Section 304(c), 9 BANKR. DEV. L. J. 453, 481 (1992); see also In re Toga Manufacturing, 28 B.R. 165, 168 (Bankr. E.D. Mich. 1983) (finding that since distribution would not take place substantially in accordance with U.S. distribution rules, the court need not defer to the foreign proceeding). Similarly, the many decisions relying on considerations of comity often turn on that single factor alone. The use of the comity guideline is discussed more extensively infra Part III.B.1.

49 Given & Vilaplana, supra note 31, at 331.

50 See, e.g., In re Culmer, 25 B.R. 621, 628–629 (Bankr. S.D.N.Y. 1982) (noting that the Bahamas had a greater interest in the liquidation of the debtor, since "neither the United States nor the State of New York has any governmental or public interest in [its] liquidation"); In re Maxwell Communication Corporation, 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994) (examining the contacts each jurisdiction involved has with the controversy); In re Koreag, 961 F.2d 341, 350 (2d Cir. 1992) ("The goal of this analysis is to evaluate the various contacts each jurisdiction has with the controversy, and determine which jurisdiction’s laws and policies are implicated to the greatest extent.").


53 H.R. 833, 106th Cong. (1999) [hereinafter "Reform Act"]. H.R. 833 was passed by the House of Representatives on May 5, 1999; a parallel bill, S. 625, is pending in the Senate.
spects undermines the goals of universality by confirming the privileged status of local proceedings. Second, the growing tendency of courts to seek extraregulatory solutions to international insolvencies suggests the increasing irrelevance of the current framework to the decisionmaking process.

a. The Reform Act

The Model Law incorporated in the Reform Act, whose goal is to facilitate the administration of unified international bankruptcy proceedings, embodies a modified universalist approach.\(^5\) It does not, however, set forth a complete framework for the resolution of cross-border bankruptcies; instead, it creates a set of procedural rules to be integrated into the substantive bankruptcy law of each state that adopts the Model Law. Rather than attempting to harmonize substantive bankruptcy principles, the Model Law seeks merely to make the process by which foreign bankruptcy representatives gain recognition in and assistance of courts in other jurisdictions simpler and less discretionary.\(^5\)

Under the Reform Act, a court must recognize the foreign representative of a bankruptcy initiated in another jurisdiction if that representative provides certain required documents.\(^5\) Because recognition is not discretionary, the process will be completed quickly and dissipation of the assets in the forum jurisdiction will be rendered less likely.\(^5\) The Reform Act also creates a mechanism for the imposition of an automatic stay.\(^5\) A stay on actions against the debtor or property of the debtor located within the United States will be imposed automatically upon recognition of the foreign representative in a proceeding initiated in the debtor's home jurisdiction. Upon recognition of the

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54 That is, it embraces the goals of universality, but provides for local proceedings in certain circumstances. See supra Part II.A.1 for a discussion of modified universality.

55 See Guide to Enactment, supra note 53, at 419.

56 See Reform Act, supra note 53, § 1515(b), (c). The documents required amount to proof from a foreign court that the representative has been duly appointed. Section 1516(b) provides further that the court to which those documents are submitted is entitled to rely on their authenticity. Reform Act, supra note 52, § 1516(b).

57 See Reform Act, supra note 53, § 1517(a) (providing that "an order recognizing a foreign proceeding shall be entered" if the procedural requirements are met) (emphasis added). Section 1517(c) indicates that the application for recognition must be considered as quickly as possible. Id. § 1517(c).

58 In this respect, the Reform Act is more generous to foreign representatives than the existing provisions of the Bankruptcy Code, as the initiation of a Section 304 proceeding does not result in the creation of an automatic stay. See Given & Vilaplana, supra note 31, at 330.
foreign representative in a proceeding initiated elsewhere, the court may, in its discretion, order such a stay.\textsuperscript{59} In streamlining these procedural aspects of the bankruptcy process, the Reform Act thus serves the goals of universality by preserving local assets for administration in the foreign bankruptcy proceeding.

Additional provisions of the Reform Act, however, undermine this result by recognizing the continuing pull of territoriality. A court need not leave the automatic stay in place. It may choose to do so, and may also order further relief to the foreign representative.\textsuperscript{60} Alternatively, however, the court may choose in the interest of local creditors to modify or even terminate the stay and any other provisional relief that it has granted.\textsuperscript{61} At this point, then, the court must make a choice of law. It may choose foreign bankruptcy law, by allowing the relief to stand, or it may choose U.S. law, by terminating that relief and permitting a local action to proceed. The Reform Act provides scant guidance for this decision, noting merely that “the interests of creditors in the United States [must be] sufficiently protected.”\textsuperscript{62} Because the Reform Act does not define “sufficient protection,” a U.S. court must at this stage consult pre-Reform Act law in considering whether to protect local creditors or to assist the foreign representative.\textsuperscript{63} Presumably, the factors previously included in Section 304(c)—together with the choice-of-law problems they present\textsuperscript{64}—will at this stage be drawn into the analysis. In addition to importing territorial factors in this way, the Reform Act also clearly recognizes the precedence of a local proceeding over a foreign one when concurrent bankruptcy proceedings have been filed.\textsuperscript{65} Thus, in explicitly recognizing and deferring to a court’s

\textsuperscript{59} See Reform Act, supra note 53, § 1520(a) (stay in “main” proceedings) and § 1521(a) (stay in “non-main” proceedings). Additionally, Section 1519 provides that a temporary stay may be imposed, pending recognition, upon successful petition by the foreign representative. \textit{Id.} § 1519. See infra Part III.B.1.b for a discussion of the distinction between “main” and “non-main” proceedings.

\textsuperscript{60} See Reform Act, supra note 53, § 1521. Section 1521 permits the court, for instance, to order the turnover of assets located in the United States to the foreign representative.

\textsuperscript{61} See Reform Act, supra note 53, § 1522. Section 1522 speaks directly to relief granted in the discretion of the court, under Section 1519 and Section 1521, and not to the relief granted automatically under Section 1520 to foreign main proceedings. But see Reform Act Section 1520(b), whose counterpart in the Model Law was intended to provide that even the automatic relief granted upon recognition of a foreign main proceeding could be modified by the local court. See Berends, supra note 53, at 374.

\textsuperscript{62} This provision applies in connection with the turnover of assets to the foreign representative. Reform Act, supra note 53, § 1521(b). See also Reform Act, supra note 53, § 1522(a) (providing that “the interests of the creditors . . . [must be] sufficiently protected” for relief to be granted under Sections 1519 or 1521).

\textsuperscript{63} This referral to preexisting bankruptcy analysis limits the scope of the Reform Act, rendering it more procedural than substantive.

\textsuperscript{64} See discussion supra Part II.B.1.

\textsuperscript{65} See, e.g., Reform Act, supra note 53, § 1529(2) (providing that if a local proceeding is commenced after recognition of the foreign representative, any stay imposed pursuant to Section 1519, 1520 or 1521 “shall be modified or terminated if inconsistent with” the local proceeding); see also Berends, supra note 53, at 388 (“the basic rule of [Model Law] Article 29 is that there is a pre-eminence of the local proceeding over the foreign proceeding”).
ability to implement a territorial approach, the Reform Act not only falls short of its promise of universality but gives new vitality to territoriality.66

b. Extraregulatory Decisionmaking

It is indisputable that U.S. courts tend to defer to foreign bankruptcy proceedings.67 Many of the most successful recent cross-border insolvency proceedings, however, have been resolved by means of procedures outside the regulatory framework. Ad-hoc agreements crafted by the courts and the parties have formed the basis of reorganizations and asset distributions in these international bankruptcies.

The judges in these proceedings view their role as that of creative planners responsible for facilitating resolutions satisfactory to the bankruptcy participants.68 The widely publicized bankruptcy of Maxwell Communication Corporation provides an excellent illustration of how such proceedings are conducted. In that case, the Justice presiding over a full insolvency proceeding in England and the U.S. judge hearing Chapter 11 proceedings in the United States, with the assistance of the administrators and examiner they respectively appointed, formulated a Protocol intended to guide the bankruptcy administration.69 The Protocol provided the framework for a plan of reorganization—ultimately adopted—that harmonized inconsistent provisions of domestic and foreign bankruptcy law.70 This judicial agreement thus relied on ad-hoc harmonization rather than on systematic choice-of-law analysis. Several other cross-border bankruptcies, involving both the United States and countries including Canada, Israel, and Japan, have adopted a similar approach.71

On the one hand, these cases reveal salutary cooperation and coordination between courts, enabling them to reach fact-specific solutions in difficult
cases. On the other hand, however, they reinforce the failure of the existing regulatory framework to provide a useful choice-of-law system and thereby the certainty for creditors that is an important goal of international bankruptcy rules.

C. Conclusion

Although courts have by and large complied with the stated preference of the legislature for a universality-based approach, the regulatory structure fails to ensure consistent and predictable results. While this failure may be cast as a failure of the universality approach itself, this Article suggests instead that it reflects the neglected role of choice-of-law analysis in this field. Neither the current provisions regulating international insolvency nor the provisions of the Reform Act, although they require courts to make what amounts to a choice-of-law decision, guide that analysis in a meaningful way. Rather than accept the shift away from universality suggested by the developments described above, it would be appropriate first to use conflict-of-laws analysis to examine the regulatory scheme more closely. In doing so, it is not enough to observe that Section 304 does not contain an explicit choice-of-law mechanism. Rather, since decisions regarding whether to defer to foreign proceedings operate as a choice of law, it is necessary to analyze that operation. How do courts apply Section 304, and what form of conflicts methodology can be seen emerging from that application?

72 They also take full advantage of technological advances and arguably simply adjust the level of cooperation to what is now technically feasible. See E. Bruce Leonard, The Way Ahead: Protocols in International Insolvency Cases, 17 AM. BANKR. INST. J. 12 (1999).

73 Interestingly, Section 304 itself was adopted partially in response to exactly such a situation: the 1975 failure of the Herstatt bank, which revealed the insufficiency of the existing regulations. See Honsberger, supra note 10, at 674 (“The settlement that ended the Herstatt litigation was characterized as a cry of despair for the lack of any rational procedure.”). See generally Kurt H. Nadelmann, Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company, 52 N.Y.U. L. REV. 1 (1977).

That the participants in cross-border bankruptcy adjudications perceive the current regulatory framework as inadequate is in itself troubling. Furthermore, it seems possible that ad-hoc methods of resolution do not protect all participants in a bankruptcy to the same extent that the regulatory regime might. In addition, these proceedings raise some concerns regarding the source of authority for U.S. courts to modify their jurisdiction over property of the debtor. See Robert B. Chapman, Judicial Abstention in Cross-Border Insolvency Proceedings: Recent Protocols in Simultaneous Plenary Cases, 7 INT’L INSOLVENCY REV. 1 (1998).

74 See LoPucki, supra note 3, at 742.
III. U.S. INTERNATIONAL BANKRUPTCY LAW AS A MULTILATERAL SYSTEM

A. The Theory of Multilateralism

Although other theories have been proposed to guide choice-of-law thinking, the field of conflict of laws has been shaped largely by the opposing schools of unilateralism and multilateralism. While multilateralism is generally considered the successor of unilateralism in early choice-of-law development, the tension between the two approaches has remained relatively constant. Each theory has its adherents, and today's conflicts law includes elements of both approaches.

Unilateralism focuses on the scope of application of a particular rule. Faced with a dispute involving an international component, the forum court inquires simply whether the law of the forum is applicable. If the court concludes, based on its analysis of the particular rule and its underlying purpose, that the law of the forum properly applies to the dispute, then it will generally apply forum law. A unilateralist approach thus terminates the choice-of-law analysis upon finding that forum law is applicable, regardless of whether the law of other jurisdictions may also apply to the dispute.

Multilateralism, on the other hand, does not analyze the reach of a particular rule. Faced with an international dispute, the forum court will assess

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75 In addition to unilateralism and multilateralism, prevailing approaches to conflicts theory include substantivism and party expectations. See Gene R. Shreve, Choice of Law and the Forgiving Constitution, 71 IND. L. J. 271, 271 (1996). As discussed below, the relationship between universality and territoriality in bankruptcy correlates loosely with the larger conflicts systems of multilateralism and unilateralism.


77 The Restatement (Second) of Conflict of Laws, for instance, has been described as adopting an eclectic approach, incorporating both unilateralist and multilateralist elements. See generally Willis L. M. Reese, The Second Restatement of Conflict of Laws Revisited, 34 MERCER L. REV. 501 (1983).

78 See Juenger, supra note 76, at 427 (describing the unilateralist approach as “divining the spatial reach of substantive rules”).

79 Many unilateralists, including Brainerd Currie and Albert Ehrenzweig, adhered to this notion of forum preference. See generally Albert A. Ehrenzweig, Treatise on the Conflict of Laws 326 (1962). Other unilateralists have attempted to make the approach less forum preferring. See, e.g., Russell J. Weintraub, A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability, 46 OHIO ST. L. J. 493, 501–02 (1985); Robert A. Sedlar, Reflections on Conflict-of-Laws Methodology, 32 HASTINGS L. J. 1628, 1630–31 (1981). But see Lea Brilmayer, Conflict of Laws 18 (1995) (suggesting that forum preference is the inevitable outcome of the unilateral approach) and Reimann, supra note 76, at 108 (reaching the same conclusion).

80 Another way of viewing the approach is to note that unilateralism recognizes the concept of “concurrent legislative jurisdiction,” since it is not concerned by the possibility that another forum may simultaneously choose to apply its law to the same dispute. William S. Dodge, Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism, 39 HARV. INT’L L. J. 101, 107 (1998).
the parties and the transaction in an attempt to assign the entire relationship to a particular place. The law of the jurisdiction to which the relationship is assigned will then be applied to the dispute. Savigny, one of the fathers of the multilateralist school, described the goal of conflicts analysis as “discover[ing] for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat).” Therefore, unlike the unilateral approach described above, this analysis does not stop with a finding that forum law may apply: It inquires further whether the relationship in question has closer ties to another jurisdiction. Because a choice must eventually be made between two or more competing jurisdictions, the multilateral approach is often described as jurisdiction-selecting.

The primary goals of the multilateralist approach are uniformity of choice-of-law result and predictability of outcome. In other words, this approach seeks to prevent forum shopping by ensuring that any court addressing a particular dispute will assign it to the same jurisdiction. It intends further that the jurisdiction of assignment will be knowable in advance. To achieve these goals, multilateralists have developed rules in various areas of the law that are intended both to shortcut and to make more predictable the jurisdiction selection analysis conducted by the forum court. For example, a torts dispute would be assigned to the jurisdiction in which the tort occurred. Such seemingly straightforward rules simplified the choice-of-law process, increasing the uniformity and predictability of the choice-of-law determination.

Because the goal of multilateralism is simply to select the jurisdiction with which the dispute is most closely linked, the approach is necessarily neutral as to the substance of the competing laws. Occasionally, then, a law will be chosen whose application would generate an unjust result in a particular case. In such a situation, while the procedural goals of choice-of-law analysis may be served by the selection of the proper law, substantive justice would not be achieved in the particular case. Such an event would necessitate an adjust-

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81 See REIMANN, supra note 76, at 106.
83 See REIMANN, supra note 76, at 106.
84 See David F. Cavers, A Critique of the Choice-Of-Law Problem, 47 HARV. L. REV. 173, 177 (1933).
85 See MULTISTATE JUSTICE, supra note 82, at 36–40.
86 Lex loci delicti was one of the most enduring multilateral rules. See id. at 37 (noting the rule’s history).
87 See REIMANN, supra note 76, at 110–11 for a discussion of substantive neutrality.
88 This distinction is often characterized as the difference between “conflicts justice” and “substantive justice.” See REIMANN, supra note 76, at 160. See also MULTISTATE JUSTICE, supra note 82, at 69.
ment to the choice-of-law result.\textsuperscript{89} The multilateralist approach deals with such situations primarily through the use of an escape clause mechanism in the form of a public policy exception. That exception provides that if application of the law chosen by the relevant conflicts rule would violate the public policy of the forum state, the court can choose to apply forum law instead.\textsuperscript{90}

Interestingly, unilateralism and multilateralism share an important characteristic: They are both territorial approaches in that the choice-of-law decision depends on locating the appropriate sovereignty under whose laws the dispute will be resolved.\textsuperscript{91} In other words, each utilizes an analysis that does not take into account the substance of the competing laws, but seeks merely to identify the appropriate source of law.\textsuperscript{92} For this reason alone these theories provide a good lens through which to examine international bankruptcy law, which has itself remained grounded in concepts of sovereignty and (in the jurisdictional sense) territoriality.

B. Multilateralism in U.S. International Bankruptcy Law

A multilateral methodology has not been expressly adopted in the area of international bankruptcy.\textsuperscript{93} However, the theoretical orientation of the U.S. approach to international bankruptcies, combined with the doctrine that has developed under the relevant sections of the Bankruptcy Code, reveals the emergence of a multilateralist approach to cross-border insolvency. This Subpart sets forth the framework within which international bankruptcies are considered and then discusses the multilateralist nature of that approach. It argues that the fundamental structure of U.S. international bankruptcy law, as applied, fits squarely within the multilateralist tradition. First, the utilization of comity in Section 304 analysis reveals an assumption that one jurisdiction’s claim to adjudicate the bankruptcy of a given debtor may be superior to another’s. Sec-

\textsuperscript{89} Even Savigny, for instance, recognized that the application of foreign law could not be used to avoid the application of mandatory law of the forum. See \textit{SAVIGNY}, supra note 82, at 38.

\textsuperscript{90} See infra Part IV.B.2 for a discussion of the public policy exception. Critics of multilateralism note the development of other devices used by courts to manipulate the choice-of-law decision. Such devices include characterization (which ensures the application of local law by characterizing a particular issue as procedural rather than substantive) and \textit{renvoi} (which permits the forum to apply foreign conflicts law—rather than substantive law—when that conflicts law would in turn lead back to the choice of the substantive law of the forum). See Cavers, supra note 84, at 182–187.

\textsuperscript{91} “Territorial” in this context is not to be confused with “territoriality” as a theory of international bankruptcy law, under which a forum court will automatically apply the law of its own jurisdiction.

\textsuperscript{92} Interest analysis, a unilateralist method, considers the content of potentially applicable law in that it seeks to locate underlying policies in connection with the choice-of-law decision. But that analysis is undertaken to decide whether the law is in fact applicable to the particular case, not to determine what the result of that application will be. See Shreve, supra note 75, at 284.

\textsuperscript{93} Indeed, as discussed supra at text accompanying notes 45–59, international bankruptcy law seems to have developed without explicit adoption of any particular choice-of-law method.
ond, the Section 304 process incorporates a public policy escape clause mechanism that is used to avoid unfairness in individual cases.

1. The Role of Comity in Choice of Bankruptcy Law

Comity plays little or no role in unilateral analysis, since that approach does not require courts to choose between forum and foreign law. Comity is in many ways, however, the foundation of multilateralism. In its traditional incarnation, though, comity is not itself a method for choosing applicable law; rather, it provides a justification for implementing that choice once made.

The classic definition of comity in U.S. jurisprudence defines it as:

neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

This definition reveals a tension between international considerations (international duty and convenience) and domestic ones (the rights of local citizens). It is primarily this internal conflict that limits the role of comity in its traditional form. Comity does not itself guide the choice-of-law decision; that is, it creates no mechanism for balancing the international considerations against the domestic ones and arriving at a choice between them. But once a choice-of-law rule has been applied and has pointed to foreign law, comity provides a justification for courts implementing that result. Thus, in the face of applicable domestic law, a court may cite international convenience in applying chosen foreign law to the disadvantage of a local claimant. As a basis for assessing and applying the results of a conflicts method, then, comity supports multilateralist rules governing conflicts of law.

94 Justice Joseph Story, whose 1834 treatise initiated the multilateralist movement in the United States, justified the assignment of a dispute to a foreign jurisdiction by reference to principles of comity—the notion that although a nation has no obligation to recognize within its own borders the laws or judgments of another, it might nonetheless choose to offer such recognition on the basis of the mutual interest of nations in an effective international system. See Joseph Story, Commentaries on the Conflict of Laws 7–8 (reprinted 1972) [hereinafter Story].


97 Conversely, the court may cite protection of citizens in justifying its exercise of one of the escape mechanisms to apply forum law when the choice-of-law rule has led to foreign law.

98 See Paul, supra note 96, at 2–5.

99 Although the traditional formulations of comity contain within them both reasons to defer to foreign courts and reasons not to defer, the doctrine has been construed largely as an obligation to defer. See Paul, supra note 96, at 44.
a. Centrality of Comity in Section 304 Analysis

Even though comity appears in Section 304 merely as one of six guidelines for domestic courts to consider in deciding whether to defer to a foreign proceeding, it has become the focal point in determining the law applied in international bankruptcies. Far from merely justifying the outcome of a conflict-of-laws analysis, comity now plays the role of a full-fledged choice-of-law method.

The legislative history describing the inclusion of comity in the list of Section 304 guidelines provides an early indication of the uncertainty that surrounds its role in Section 304 analysis. Neither early drafts of the Section nor the original House and Senate bills included comity as one of the factors for courts to consider in resolving cross-border bankruptcies. After debate and immediately prior to adoption, however, Section 304(c) was modified to include subsection (5) "to indicate that the court shall be guided by considerations of comity in addition to the other factors specified" in Section 304(c).

Courts and commentators have advanced various interpretations of this last-minute modification. Some have posited that the status of comity as merely one of a list of relevant factors indicates that it was not intended to be the focal point of Section 304(c) analysis, arguing in effect that it had been demoted from a guiding principle to a single consideration. Most, however, believe that the legislators intended to emphasize the role of comity by ensuring that comity would be considered not merely as a single factor, but rather as an overarching policy in any decision whether or not to defer to a foreign proceeding.

The view of comity as the fundamental underpinning of Section 304 analysis is consistent not only with the universalist focus of that section on international efficiency and economy, but also with pre-1978 treatment of international bankruptcies. Prior to the enactment of Section 304, courts framed the question of whether to defer to a foreign proceeding entirely in terms of com-

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103 See, e.g., In re Papeleras Reunidas, S.A., 92 B.R. 584, 594 (Bankr. E.D.N.Y. 1988) ("[I]t is best to equally consider all of the variables of § 304(c) in determining the appropriate relief in an ancillary proceeding."); Morales & Deutch, supra note 101, at 1588 ("[C]omity is to be considered in addition to the other section 304 factors on a coequal basis at most.").
104 See Krause et al., supra note 34, at 2594-95; see also In re Axona International Credit & Commerce, 88 B.R. 597, 608 (Bankr. S.D.N.Y. 1988).
105 This focus is reflected in the preamble's focus on "economical and expeditious administration of the bankruptcy estate." 11 U.S.C. preamble.
ity. In one of the earliest instances of deference to foreign bankruptcy proceedings, the Supreme Court held that "the true spirit of international comity requires that schemes of this character, legalized at home, be recognized in other countries."  

Decisions not to defer were formulated similarly: "what property may be removed from a state and subjected to the claims of creditors of other states is a matter of comity between nations and states." Whatever the uncertainties surrounding the inclusion of comity in Section 304(c), there is no indication that the legislature intended to abandon it as a fundamental principle guiding analysis in this area.

Indeed, the adoption of Section 304 seems not to have affected the view of the majority of courts that comity is the foundation of analysis in international bankruptcy cases. Many post-1978 decisions have in fact turned on the comity issue alone. Some courts note that the other guidelines stated in Section 304 illustrate some of the factors previously considered under the rubric of comity, and therefore apply them as a kind of formalized comity test. Other courts either continue to view comity as a general mandate rather than a specific guideline or simply ignore the Section 304 guidelines altogether in favor of a pre-1978 style comity analysis. Even courts that purport to conduct a factor-by-factor analysis often fail to separate the comity guideline from the other considerations, thus blending notions of comity with their analysis of the other factors. In sum, the majority of courts view the question posed by Section 304 as a means to implement comity, noting that "principles of international comity... suggest that the court be permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules." 

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108 See Cunard S.S. v. Salen Reefer Servs., 773 F.2d 452, 456 (2d Cir. 1985) ("It is clear that the drafters... did not intend to overrule in foreign bankruptcies well-established principles based on considerations of international comity."). The Commentary to the Bankruptcy Reform Act of 1978 seems instead to consider the specific provisions of Section 304 as a means to implement comity, noting that "principles of international comity... suggest that the court be permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules." H.R. REP. No. 95-595, at 325 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6281.
109 See Krause et al., supra note 34, at 2609–10.
110 See, e.g., In re Culmer, 25 B.R. 621, 629 (Bankr. S.D.N.Y. 1982) (noting that comity is to be granted "as long as the laws and public policy of the forum state are not violated," and then stating that "[t]his Court will look to the other relevant factors enumerated in Section 304(c) to determine whether [application of foreign law] would be wicked, immoral, or violate American law and public policy"). See Morales & Deutch, supra note 101, at 1593, for a critical review of this decision.
111 See, e.g., Victrix S.S. Co. v. Salen Dry Cargo A.B., 825 F.2d 709, 714 (2d Cir. 1987) ("Under general principles of comity as well as the specific provisions of section 304, federal courts will recognize foreign bankruptcy proceedings provided the foreign laws comport with due process and fairly treat claims of local creditors.").
113 One court, in comparing the distribution schemes pursuant to the Section 304(c)(4) guideline, noted that "deference to foreign proceedings is warranted under principles of comity when they... provide... a sure scheme for differentiation between secured and unsecured creditors." In re Hourani, 180 B.R. 58, 69 (Bankr. S.D.N.Y. 1995). See also Allstate Life Insurance v. Linter Group, Ltd., 994 F.2d 996, 999 (2d Cir. 1993), in which the court folded into its comity analysis a consideration of such factors as whether creditors of the same class were treated equally.
304(c) to be simply whether or not comity should be granted to a foreign bankruptcy proceeding.114

b. Evolution of Comity into a Choice-of-Law Rule

As described in Part II.B above, a domestic court in a typical international bankruptcy case must resolve a contest between a foreign bankruptcy representative and a local claimant for assets of the debtor located in the United States. In such a situation, U.S. law will be applicable,115 and the local creditor will seek to apply it in exercising its rights against assets located in the United States. Assuming, as is generally the case, that foreign bankruptcy law purports to reach all assets of the debtor, foreign bankruptcy law will also be applicable. Thus, the foreign representative will seek to apply that law in administering the bankruptcy estate that includes those assets.116 Faced with this conflict—and lacking actual choice-of-law rules—the majority of courts use comity as a rule of decision. They hold that comity dictates deferral to a pending foreign proceeding (in which foreign law will be applied) unless there is some pressing reason to apply U.S. law instead.117 It is in this application that the expanded role of comity manifests itself. Comity serves not as a justification for accepting the law chosen by a conflicts rule, but as a conflicts rule in itself.

This use of comity reveals the multilateralist orientation of the U.S. approach to international bankruptcies. Although that approach deviates from traditional multilateralism in using comity as a choice principle rather than as a basis for accepting the result of application of a choice rule, it is fundamentally multilateralist in that it seeks to assign the dispute to the proper jurisdiction. In reading comity as a mandate to defer absent special circumstances, courts assume that comity establishes a presumption in favor of the foreign bankruptcy proceeding. This, in turn, reveals the fundamental assumption that although domestic law might apply to issues connected with the insolvency of a foreign debtor, that insolvency might be more closely linked to another jurisdiction than it is to the United States. In other words, it reflects the multilateralist understanding that another jurisdiction might be the more appropriate seat of the legal relationships constitutive of the bankruptcy case.

Interestingly, although it ultimately permits a territorialist response, the Reform Act refines the multilateralist assumption revealed in such cases. Un-

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115 This is because the property is located in the United States and a U.S. creditor is involved.

116 See BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 119 (1963). In Currie's terminology, this is a "true conflict."

117 See supra Part II.B.1 for a discussion of the connection between choice of forum and choice of law. See also Given & Vilaplana, supra note 31, at 339 (stating that Section 304 "require[s] recognition of the foreign law absent a demonstration to the contrary").
like the current provisions regulating international bankruptcies, the Reform Act explicitly differentiates between a “foreign main proceeding” and a “foreign non-main proceeding.” It defines the former as “a foreign proceeding taking place in the country where the debtor has the center of its main interests.” While a U.S. court may provide certain relief upon recognition of either type of proceeding, the relief that follows recognition of a foreign main proceeding—including the imposition of the automatic stay provided in Bankruptcy Code Section 362—is automatic. This disparity in treatment reflects the Reform Act's underlying presumption that bankruptcy proceedings initiated in the debtor's home jurisdiction are entitled to a greater degree of deference than proceedings initiated elsewhere. In explicitly acknowledging, rather than merely assuming, that there is only one most appropriate forum in which to adjudicate issues surrounding the bankruptcy of a foreign debtor, the Reform Act thereby addresses one of the major gaps in the comity-based multilateralism that has developed under Section 304. Its deference to foreign main proceedings sketches the outlines of a true jurisdiction-selecting rule based on a notion of the “proper seat” of the insolvency proceeding.

2. Use of Escape Clauses

As discussed above, multilateral analysis is generally conducted through the application of fairly strict jurisdiction-selecting rules. Occasionally, the relevant rule will lead to the selection of a law whose application is simply un-

118 Under the Bankruptcy Code, “foreign proceeding” includes proceedings initiated in the country in which the debtor's domicile, residence, principal place of business, or principal assets are located. See 11 U.S.C. § 101(23) (1994). Because Section 304 does not reserve relief for specific categories of proceedings falling within that definition, the representative of any such proceeding—whether a “full” proceeding opened in the home jurisdiction of the debtor or some sort of secondary or ancillary proceeding opened, for instance, in the home jurisdiction of a creditor—is entitled to the same treatment in a U.S. court. See 11 U.S.C. § 304 (1994).

119 Reform Act, supra note 53, § 1502(4). Section 1516(c) establishes the presumption that the state of the debtor's incorporation is the center of its main interests. See id. § 1516(c). These definitions were also adopted in the European Union Convention on Insolvency Proceedings of 1995, which has been ratified by all members of the European Union other than Great Britain. Article 3 of that Convention provides that the “principal case” may be opened by “courts of the Contracting State within the territory in which the centre of a debtor's main interests is situated.” See Schollmeyer, supra note 1, at 425.

120 See Reform Act, supra note 53, § 1521.

121 See id. § 1520(a)(1).

122 C.f. Trautman, supra note 45, at 55. The Reform Act also creates a disincentive to the initiation of multiple proceedings regarding the same debtor, since most of those (all that are opened in jurisdictions other than that in which the debtor has its center of main interests) will be entitled only to the reduced relief afforded to “non-main” proceedings. See Gaa & Garzon, supra note 53, at 276.

123 Again, additional provisions of the Reform Act permit a territorial result despite this universalist inclination. Section 1520(c) goes on to provide that local bankruptcy proceedings can be initiated against a foreign debtor even following the recognition of a foreign main proceeding. While this arrangement does operate as a concession to territoriality, though, it does not undermine the impact of the initial recognition. See Reform Act, supra note 53, § 1520(c).
fair in the particular case. Faced with an unfair result, a court will search for
ways to deviate from the chosen law and apply local law in its place. Traditional multilateral analysis employs the public policy exception to accomplish this task.\textsuperscript{124}

Public policy takes many forms. In Savigny’s formulation, foreign law
cannot be applied to derogate “strictly positive, imperative laws” of the forum
country.\textsuperscript{125} Likewise, Story maintained that foreign law would not be applied
when “repugnant to [the] policy” of the forum state.\textsuperscript{126} The Restatement of
the Law (Second) of Conflict of Laws refers to the “strong public policy of the
forum.”\textsuperscript{127} However defined, public policy appears in all incarnations of mul-
tilateral rules, in recognition of the need to protect certain interests of the fo-
rum state.\textsuperscript{128} In a sense, public policy is merely the flip side of comity: Where
comity is viewed as a reason to accept a choice leading to the application of
the laws of another nation, public policy is viewed as a reason to refuse that
choice, preferring instead to apply the laws of one’s own.

As these formulations of the public policy exception indicate, it is at this
stage that a level of substantive review is introduced into the conflicts process.
Once the court locates the “proper seat” for a legal relationship, it will exam-
ine the law of that jurisdiction for potential policy implications. If application
of the law chosen by the conflicts rule would violate the public policy of the
state deferring to it, the court can opt out of that application.\textsuperscript{129}

For good and for ill, a multilateralist escape mechanism has become an
important part of U.S. international bankruptcy jurisprudence. Although pub-
lic policy is not mentioned by name in Section 304, it has been imported into
Section 304 analysis as a corollary of the comity guideline and has assumed a
level of importance in decisionmaking parallel to that of comity. Just as courts
that choose to defer to foreign proceedings often cite comity alone as the rea-
son for their decisions,\textsuperscript{130} courts that choose not to defer to these proceedings

\textsuperscript{124} Note that in other jurisdictions the view of these exceptions might be slightly different.
In civil code countries, for instance, a somewhat more mechanistic approach is favored. Even
there, however, the concept of \textit{ordre public} serves a similar function. See Paul, supra note 96, at
30–35.

\textsuperscript{125} \textsc{Savigny}, supra note 82, at 77.

\textsuperscript{126} \textsc{Story}, supra note 94, at 37.

\textsuperscript{127} \textsc{Restatement of the Law (Second) of Conflict of Laws} \textsection 90 (1971) [hereinafter \textsc{Restatement (Second)}].

\textsuperscript{128} Consequently, comity has not traditionally functioned as a choice-of-law rule. It provides
courts with a reason either for applying foreign law or for denying such an application in favor of
local law, but it contains no mechanism that aids courts in making the decision.

\textsuperscript{129} It bears repeating, though, that it is only at this stage that the substance of the chosen law
is reviewed; the first step remains a pure jurisdictional analysis. See \textsc{Multistate Justice}, supra
note 82, at 79–80 (noting that with few exceptions, scholars have viewed public policy as an ex-
ception to the choice-of-law rule rather than as part of the choice-of-law process itself).

\textsuperscript{130} See supra text accompanying notes 109–114.
often cite public policy interests alone. That is, they justify their refusal to defer by pointing to a violation of public policy rather than by referring to an analysis of the Section 304(c) factors. The public policy escape device—a hallmark of multilateral analysis—has thus become an important element of the U.S. approach to resolving cross-border bankruptcies. The importance of the escape valve is underscored by its explicit adoption in the Reform Act.

Courts in the United States in this way employ a multilateralist approach in resolving international insolvencies. They acknowledge the applicability of local law, but through the comity analysis apply a jurisdiction-selecting rule that recognizes the superior claim of a foreign forum. If the content of the bankruptcy law that will be applied by that forum is such that its application seems unjust in the particular case, then domestic courts will search for an exception that permits them to apply local law instead.

IV. THE SUITABILITY OF MULTILATERALISM

Although Congress and the courts may not have consciously structured the U.S. approach to cross-border bankruptcies as a multilateralist system, multilateralist principles are embedded in Section 304 jurisprudence. But is multilateralism the best choice-of-law methodology to apply to international insolvency? This is an important question to ask especially now, when legislative and judicial developments suggest the beginnings of a shift in the orientation of our international insolvency approach. The answer depends in turn on two inquiries: (1) whether the advantages of multilateralism are consonant

131 See, e.g., Remington Rand Corp. v. Business Sys. Inc., 830 F.2d 1260, 1267 (3d Cir. 1987) ("Comity should be withheld only when its acceptance would be prejudicial to the interest of the nation called upon to give it effect."); Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, 44 F.3d 187, 191 (3d Cir. 1994) ("[A] court may, within its discretion, deny comity to a foreign judicial act if it finds that the extension of comity 'would be contrary or prejudicial to the interest of the United States.'"). Interestingly, courts never adopt the opposite assumption, saying that comity will only be granted if international convenience so requires.

132 This is the case even when one of the specific Section 304(c) guidelines relates directly to the particular concern. In Interpool v. M/V Venture Star, 102 B.R. 373, 380 (Bankr. D.N.J. 1988), for instance, the court noted that the foreign bankruptcy law did not recognize the doctrine of equitable subordination or provide adequate procedural protections. Rather than resting its decision not to defer on Section 304(c)(4), however, it went on to conclude that applying foreign law would therefore violate "[b]oth the laws and the public policy of the United States." Id. Other cases have involved local policies that do seem important enough to outweigh international interests. In Overseas Inns v. United States, the "inexpugnable public policy that favors payment of lawfully owed federal income taxes" was served by a refusal to defer to foreign law. Overseas Inns v. United States, 911 F.2d 1146, 1149 (5th Cir. 1990). In another case, the court refused to defer to certain debt negotiations in order to protect "the strong interest [of the United States] in ensuring the enforceability of valid debts under the principles of contract law." Pravin Banker Assocs. v. Banco Popular del Peru, 895 F. Supp. 660, 665 (S.D.N.Y. 1995) (internal citation omitted).

133 See Reform Act, supra note 53, § 1506 ("Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.").

134 See infra Part V.B.2 where I make the argument that the one (improper) exception to this analytical approach is the preemptive use of Section 304(c)(4).

135 See supra Part II.B.2 for a discussion of these developments.
with the goals of international bankruptcy reform; and (2) whether the particular weaknesses of multilateralism are especially pronounced as that method is applied to bankruptcy choice of law.

One of the primary justifications for adopting a multilateralist system—a system that contemplates application of foreign law in situations in which forum law might also be applied—is that the approach yields uniformity of result and predictability of outcome. In other words, any court considering which law to apply to a particular case should reach the same result, and that result should be predictable. These advantages are particularly relevant to the resolution of international bankruptcy proceedings. If domestic creditors know that a local action (whether a local bankruptcy proceeding or an action to attach a debtor’s assets) will be subordinated to the bankruptcy proceeding initiated in the debtor’s home jurisdiction, they will be less likely to initiate such actions, thereby increasing the likelihood that the estate will remain intact. In addition, if creditors are aware in advance of the jurisdiction to which any future bankruptcy proceeding concerning the debtor will be assigned, they will be able to enter into their financing arrangements with an appreciation of the likely results of debtor insolvency. Thus, the goals of multilateralism overlap well with the goals of international bankruptcy resolution.

The rest of this Part turns to the second aspect of our inquiry, examining the weaknesses of multilateralism and analyzing whether they are particularly pronounced when multilateralism is applied to international bankruptcy problems.

A. The Sacrifice of State Interests in Pursuit of Uniformity

In order to obtain the advantages offered by predictable multilateral rules, a court must necessarily decide not to apply the law that would further the interests of the state in which it is located—that is, forum law. One of the major criticisms of the multilateral approach takes exception to this orientation, arguing instead that important state interests should never be sacrificed in the pursuit of uniformity. This argument contends that an existing and relevant state policy should simply be effectuated rather than weighed against the international policy of uniformity. In the area of international bankruptcy, however, certain aspects of the state interests involved detract from this criticism.

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136 See supra Part III.A for a description of multilateralism.

137 Preventing dismemberment of the estate is, of course, one of the goals of Section 304 and the case law thereunder. Many courts have recognized the need to prevent a race to the (local) courthouse by local creditors seeking an advantage over their foreign counterparts who have been subjected to a stay. See, e.g., In re Rukavina, 227 B.R. 234, 242 (Bankr. S.D.N.Y. 1998); Victrix S.S. v. Salen Dry Cargo, 825 F.2d 709, 714 (2d Cir. 1987).


139 Id.
1. The Weight of the State Interest Involved

The contention that multilateralism inappropriately diminishes the importance of state interests has particular currency in the area of extraterritorial regulation. Certain commentators discussing extraterritoriality, particularly in the context of antitrust law and securities regulation, argue that the multilateralist approach is ill-suited to disputes arising in those regulatory areas.\(^{140}\) They suggest that in the regulatory context, the interest of the state "is of a different order than the 'interest,' meaning the social policy, underlying the rules of torts and contracts."\(^{141}\) They perceive the state as more directly invested in the outcome of the case, regardless of whether it is actually a party to the dispute, noting that private plaintiffs act not only on their own behalf but as private attorneys general vindicating the interests of the state.\(^{142}\) This argument suggests that the existence of a regulatory interest should trigger a unilateral approach.\(^{143}\) Once a regulatory interest of the forum state has been identified, possible claims to adjudication of the dispute by foreign countries should not be considered.\(^{144}\) On this view, then, the state interest trumps the competing goals of comity and international efficiency served by multilateral analysis.

This argument does not apply directly to the field of international bankruptcy. State interests are properly viewed as stronger in regulatory cases because those cases involve and sometimes determine the rights of the respective governments themselves.\(^{145}\) International insolvency proceedings, however, do not generally implicate the rights of the United States as a sovereign entity.\(^{146}\) Rather, they determine the rights of individual debtors and creditors.\(^{147}\) The rules implemented by the Bankruptcy Code establish a framework for the determination of private rights, but do not establish the rights of the sovereign

\(^{140}\) See, e.g., Dodge, supra note 80.


\(^{143}\) See text accompanying supra notes 78–80 for a discussion of unilateralism and the applicability of forum law.

\(^{144}\) See Dodge, supra note 80, at 151.

\(^{145}\) See Maier, supra note 142, at 289 ("[T]ransnational regulatory cases always decide the correlative rights of governments.").

\(^{146}\) There are, of course, exceptional cases in which the United States is a party to the bankruptcy proceeding or related litigation. See, e.g., Overseas Inns v. United States, 685 F. Supp. 968, 975 (N.D. Tex. 1988) (declining to recognize a foreign bankruptcy decree that adversely affected the tax claims of the U.S. government).

\(^{147}\) See Maier, supra note 142, at 289 ("[I]n nonregulatory cases the issue is which of two or more conflicting governmental policies shall be applied to private persons, none of whom functionally serves as a government surrogate.").
Multilateralist methodology is therefore better suited to the area of international insolvency proceedings than it may be in the context of antitrust and securities regulation.

Although this regulatory argument does not apply directly in the case of bankruptcy, however, it raises the larger question of whether the public law aspects of bankruptcy necessitate unilateral analysis. As a system with foundations in both private rights and public law, bankruptcy has historically been considered more than simply a means to resolve private relationships. In decisions regarding international bankruptcies in particular, U.S. courts have remarked on the public character of bankruptcy. Those courts that have considered the relationship between the policy of enforcing contractual provisions and the policies served by our bankruptcy system, for example, have generally concluded that the public aspect of bankruptcy proceedings limits the freedom to choose law in contract. Others have referred in more general terms to the "public" nature of the bankruptcy proceeding. In the recent litigation involving the bankruptcy of Maxwell Communication Corporation, the court turned not to the Restatement (Second) of Conflicts but to the Restatement

148 [T]he body of case law developed in regulatory areas, particularly regarding antitrust law, is inapposite to international insolvency analysis. Laws regulating conduct enforced by government agencies are the expression of sovereign policies. Conflicts among such bodies of regulatory law are governed by Section 403 of the Restatement of Foreign Relations . . . . The private disputes that characterize most insolvency cases do not revolve around compliance legislation, and conflicts of law in this area are governed by private international law.

6A Norton on Bankruptcy 152:14.

149 The argument for unilateralism in the regulatory arena is based on the public nature of the state interest involved. If public interests are implicated even in a nonregulatory area, then the argument favoring unilateralism might be extended to that field.

150 In the landmark case addressing whether Article III of the U.S. Constitution bars Congress from establishing legislative courts to resolve bankruptcy issues, the Supreme Court considered the distinction between private rights and public rights in bankruptcy. The Court suggested that many rights to be adjudicated by bankruptcy judges were private rights, noting that "a matter of public rights must at a minimum arise 'between the government and others'" and that "the liability of one individual to another under the law as defined" is a matter of private rights." Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69-70 (1982). The Court recognized, however, the possibility that the general "restructuring of debtor-creditor relations" might be a public right. Id. at 71. In a later case, the Court retreated somewhat from this suggestion, citing criticism of the notion that public rights might be implicated. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 56 (1989).

151 For example, in Cunard the public policy behind an efficient distribution of assets worldwide is seen to outweigh the policy of freedom of contract. See Cunard S.S. v. Salen Reefer Servs., 773 F.2d 452, 459 (2d Cir. 1985). In another case, the court found that comity outweighed the choice of venue clause contained in a contract between the plaintiff and the debtor. See Kenner Prods. Co. v. Socitee Fonciere, 532 F. Supp. 478, 479-480 (S.D.N.Y. 1982) ("While such clauses are prima facie valid, they are not enforceable if such enforcement would be 'unreasonable.' Public policy [here, the policy of deferring to foreign bankruptcy proceedings] is a key factor in making a determination of 'reasonableness.'") (citations omitted). But see Rasmussen, supra note 4, at 29 (proposing that choice of insolvency law itself should be subject to contractual agreement).

152 See, e.g., Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 714 (2d Cir. 1987) ("[D]ifferent concerns beset on a case such as this one, which takes on a public character by virtue of [the debtor's] insolvency and the institution of the Swedish bankruptcy proceeding."); In re Rukavina, 227 B.R. 234, 243 (Bankr. S.D.N.Y. 1998).
(Third) of Foreign Relations Law, revealing an assumption that the international bankruptcy implicated public law rather than private law issues.\textsuperscript{153}

Despite this public law character, however, it remains the resolution of private rights that is at stake in a bankruptcy proceeding. The involvement of the United States as sovereign is simply not equivalent to its involvement in regulatory areas such as antitrust and securities regulation.\textsuperscript{154} Therefore, the arguments in favor of unilateralism developed in those fields should not be imported into the international insolvency context.

2. In Bankruptcy, Multilateralism Vindicates a State Interest

The argument that multilateralism improperly sacrifices U.S. interests implicitly assumes that the choice of law is an either/or sort of choice: Either the interests of the United States will be vindicated, or the interests of a foreign jurisdiction will be vindicated. The policies reflected in the Bankruptcy Code’s priority and distribution rules,\textsuperscript{155} however, are not the only U.S. policies implicated in the choice of bankruptcy law. In enacting Section 304, the legislature specifically noted the separate, “international” policy of deferring to foreign bankruptcy proceedings as often as possible. Similarly, Section 1501 of the Reform Act emphasizes the international policy of cooperating with foreign courts and facilitating the fair and efficient administration of cross-border bankruptcies.\textsuperscript{156} In other words, by deferring to a foreign proceeding, we serve a general U.S. policy while subordinating a different, “local” policy.\textsuperscript{157} For that reason, any suggestion that a multilateral rule choosing foreign law amounts to a decision not to effectuate applicable U.S. policies is misplaced.\textsuperscript{158}


\textsuperscript{154} See Timothy E. Powers, The Model International Insolvency Cooperation Act: A Twenty-First Century Proposal for International Insolvency Co-Operation, in CURRENT DEVELOPMENTS, supra note 10, at 689 (“Insolvency is perceived in most societies as substantially a private law matter, not one that requires governmental intervention beyond providing local proceedings to settle the affairs of a local debtor or creditor.”).

\textsuperscript{155} For instance, the policy of granting priority to fishermen. See 11 U.S.C. §507(a) (1994).

\textsuperscript{156} See Reform Act, supra note 53, §1501(a).

\textsuperscript{157} Some courts have recognized these two levels of policy, and have spoken of deferral as a realization of the international interest. See, e.g., Victrix S.S. Co. v. Salen Dry Cargo, 825 F.2d 709, 714 (2d Cir. 1987) (referring to “the public policy of ensuring equitable and orderly distribution of local assets of a foreign bankrupt”). See also Jay Lawrence Westbrook, Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business, 25 TEX. INT’L L. J. 71, 77 n. 20 (1990) (noting the importance of “viewing international values as an aspect of local self-interest”).

\textsuperscript{158} Interestingly, mechanisms used to resolve purely domestic bankruptcies suggest that the “local” policies that are described in cross-border cases as nearly sacrosanct may in fact be of a lesser order. In the course of a purely domestic reorganization proceeding, for instance, the interests of secured creditors can be impaired. The freedom to contract that the Bankruptcy Code protects by preserving the rights of secured creditors in bankruptcy is not complete: The terms of such contracts may be changed, through the cramdown process, equitable subordination, or otherwise. That is, those interests are susceptible of being weighed against another domestic interest, the facilitation of reorganizations. If that is true, it is difficult to construct an argument under which they
3. Convergence of Domestic Interest with Parallel International Interest

The overarching policies served by our domestic bankruptcy rules—securing equality of distribution to similarly situated creditors and affording the debtor an opportunity for a fresh start—are exactly the same as the policies that are served by a universalist approach, merely transposed to the international arena. This parallelism undermines the argument that the pursuit of uniformity and predictability necessitates sacrificing even the one state interest ("local" bankruptcy policy) that is not served by deferring to a foreign proceeding. If adhering to multilateral choice-of-law rules that lead to the application of foreign bankruptcy law facilitates equality of distribution to all creditors, then an important domestic policy has been effectuated.

The equation is of course not exactly the same. In a purely domestic proceeding, all creditors to be benefited by equal distribution are local creditors, whereas equality of distribution on the international scale may disadvantage certain local creditors in the course of benefiting the total pool. The question, then, is whether the fairness considerations that drive our commitment to equality of treatment are applicable only on the domestic front, or whether they should be extended to all creditors of the debtor. In a world of transnational financing and commercial activity, it would seem difficult to argue in favor of geographical discrimination. The basic concept of a domestic bankruptcy proceeding—that the rights of some individual creditors may be impaired in pursuit of the best resolution for all parties involved—would be adhered to on

cannot be weighed against the "international" policy of deferring to foreign proceedings. As the policy of reorganization can be effectuated over the policy of protecting secured creditors, so too can the policy reflected in Section 304.

See Given & Vilaplana, supra note 31, at 332 (characterizing these policies as the "twin foundations" of U.S. bankruptcy law). As discussed above, a universality approach is necessary both to secure equality of treatment of all creditors and to enable the reorganization of a corporate debtor, two of the underlying policies behind the Bankruptcy Code. This should not be confused with a different point, which is whether the law of a foreign jurisdiction that does not permit reorganization is consistent with U.S. public policy. This only means to state that, in general, a universal approach is necessary for reorganization to be a viable possibility.

See Theory and Pragmatism, supra note 2, at 466 ("[E]quality of distribution is a central principle of default management in every country . . . "). In Germany, this transposition of a domestic policy to the international arena has been made explicit. One commentator notes that "[t]he principle of crossborder equality of distribution is . . . part of the German public policy." Schollmeyer, supra note 1, at 428.

See In re Davis, 191 B.R. 577, 585 (Bankr. S.D.N.Y. 1996) ("[W]e will facilitate . . . an equitable distribution of assets to all creditors. That . . . is consistent with the underlying policy of equality of distribution of assets to similarly situated creditors, which is promoted in the Bankruptcy Code."). This principle is of course limited by the public policy exception discussed infra Part IV.B. If the foreign bankruptcy proceeding did not in fact serve this overarching goal of equality of distribution, it would not be recognized.

Professor Westbrook has also made what he calls the "Rough Wash" argument, noting that domestic creditors who are disadvantaged by application of foreign law in a particular case may gain in the next bankruptcy, when U.S. law is applied to all creditors. Theory and Pragmatism, supra note 2, at 465. Local creditors would in any event be protected against outright discrimination in the foreign proceeding. See discussion infra Part V.B.1.a.
an international scale in a multilateralist approach to international insolvencies.\footnote{163}{In Drexel Burnham Lambert Group v. Galadari, No. 84 CIV. 2602, 1987 U.S. Dist. LEXIS 5030, at *1 (S.D.N.Y. 1987), the court approved such a result. After noting that the “central theme of bankruptcy proceedings in the United States is ‘equality of distribution,’” it concluded that “[e]ven if provisions of [the foreign bankruptcy law] did modify the rights of some creditors . . . the adoption of provisions having such an effect would be entirely consistent with legislative and constitutional principles in the United States.” \textit{Id.} at 50, 53. It is also, of course, consistent with our approach to the outward effects of domestic bankruptcies. Under Sections 502 and 507 of the Bankruptcy Code, the equal distribution contemplated in the Code is extended to all creditors, wherever located. \textit{See discussion supra Part II.A.1.}}

\textbf{B. The Unpredictability Fostered by Multilateral Rules}

The second major argument leveled against multilateralism contends that the theory has proved unable to achieve its own goal of decisional uniformity.\footnote{164}{See \textit{MULTISTATE JUSTICE, supra note 82, at 73–74.}} Critics point to the escape device—considered by multilateralists to be a necessary tool permitting courts to apply local laws to avoid an unjust result under application of the chosen law—as evidence that the multilateral system fosters uncertainty and unpredictability.\footnote{165}{Ernest Lorenzen wrote that the presence of the public policy exception to comity “ought to have been a warning that there was something the matter with the reasoning upon which the rules to which it is the exception were supposed to be based.” \textit{Ernest G. Lorenzen, Selected Articles on the Conflict of Laws} 13–14 (1947).} These critics maintain that it is impossible to contain the application of such an exception, and that, more often than not, it is invoked simply as a means to further the interests of the forum.\footnote{166}{On this view, the exception is not a tool used to avoid a truly unjust outcome, but an excuse that courts can resort to in choosing forum law over the foreign law selected through application of the mechanical choice-of-law rules. \textit{See Cavers, supra note 84, at 183.}} In causing that result, the argument continues, the goals of uniformity and predictability that are so central to the multilateralist mission are undermined.\footnote{167}{This function of public policy as a reason not to abide by a multilateralist rule is one of the primary bases on which unilateralists and other conflicts theorists attack multilateralism. In discussing the escape devices that are part of multilateralist methodologies, Currie noted that “[t]he tensions that are induced by imposing such [devices] on a setting of conflict introduce a very serious element of uncertainty and unpredictability, even if there is fairly general agreement on the rules themselves.” \textit{Currie, supra note 116, at 181.} Other critics of multilateralism have voiced similar concerns regarding the existence of such fundamentally unregulatable exception clauses. \textit{See MULTISTATE JUSTICE, supra note 82, at 79–80.}}

If we accept multilateralism as an appropriate theoretical framework for the resolution of international bankruptcies,\footnote{168}{I argue at the beginning of this Part that it is an appropriate theoretical approach, given the primarily private-right aspect of bankruptcy and the particular goals of international bankruptcy law.} we must accept the existence of the public policy exception.\footnote{169}{In some sense, criticisms of the exception simply reveal the underlying difference in philosophy between unilateralists and multilateralists. As one commentator has pointed out, the multilateralist method cannot guarantee complete uniformity, but in aiming for uniformity is more likely to achieve it than the forum-preference approach. \textit{See Reimann, supra note 76, at 108.}} The question critics might raise is whether, in
the field of international bankruptcy in particular, the operation of the escape clause is particularly difficult to constrain. The greatest difficulties inherent in a multilateral approach to international bankruptcy arise here. First, bankruptcy questions are difficult to classify and therefore create a danger of unpredictable results stemming from the characterization analysis. Second, bankruptcy provisions inevitably involve policy issues and therefore invite overuse of the public policy exception. The following Subparts discuss these potential weaknesses of a multilateral approach to international bankruptcy.

1. Characterization

Many of the obstacles preventing the use of traditional choice-of-law principles to resolve cross-border insolvencies are traceable to the peculiar character of bankruptcy law in general. Because bankruptcy law reorders rights previously created under and subject to nonbankruptcy law, it implicates diverse other legal systems including property law, contract law, and commercial law. In addressing bankruptcy law, early multilateralists grappled with this problem. Savigny, for example, believed that the priority of creditors should generally be determined in accordance with the law of the bankruptcy forum. Acknowledging the “mixed nature” of secured claims, however, he suggested that the law used to determine the priority of secured creditors be that of the location of the collateral. Story maintained that the law of the bankruptcy forum should be applied to the disposition of personal property. With respect to claims secured by real property, however, he argued that the in rem nature of the security dictated application of local law to the rights of the creditor.

Conflicts theories trade on a number of fixed oppositions (procedure versus substance, for example, or rights in personam versus rights in rem), and conflicts rules are most effective when applied to a dispute that can be neatly characterized. The impossibility both of placing bankruptcy proceedings
squarely within either the procedural or the substantive category, and of dis-
entangling "pure" bankruptcy issues from those involving other areas of law,
arguably renders traditional choice-of-law paradigms unsuitable for bankruptcy
analysis.\(^\text{174}\) That is, none of the traditional schemes of classification that have
worked to fit other legal problems into a conflicts framework can be success-
fully imposed on international insolvencies.

2. Public Policy Exception

As discussed above, bankruptcy law occupies a space between the realms
of public rights and private ones. That is, although our bankruptcy rules estab-
lish the rights of individual creditors, they also reflect public policy choices.
Therefore, in examining the application of the public policy exception, the
question arises whether it is possible to separate impairments of creditors' in-
terests that do not violate the public policy of the United States from impair-
ments that do. How might we identify those rights—though at base merely the
private rights of an individual—that represent policies of a more public orien-
tation, and that therefore merit a level of protection exceeding that afforded to
other rights?

Multilateralists have long concerned themselves with the delimitation
of public policy, attempting to develop systematic classifications of policy inter-
est.\(^\text{175}\) These attempts to circumscribe the category of policies that would
prevent the application of foreign law have failed, of course, to reduce the con-
cept of public policy to a fixed rule. Indeed, no fixed rule is desirable, since
the function of the exception is to save the forum from having to apply law that
would work an injustice in the particular case.\(^\text{176}\) But these efforts recognize
that the more predictable the approach, the greater the odds of achieving uni-
formity of result and therefore the more acceptable a multilateral methodology.

\(^ {174}\) See Westbrook & Trautman, supra note 10, at 669.

\(^ {175}\) Savigny posited two classes of "true" policies: positive, mandatory laws and legal insti-
tutions of a foreign state not recognized in the forum state. See Savigny, supra note 82, at 77–78.
The first class includes policies pertaining primarily to moral issues such as marital laws excluding
polygamy; the second includes policies relating to institutions, such as slavery, that will not be ac-
corded recognition in a foreign jurisdiction that does not observe similar practices. See id. Other
efforts include the attempt to separate *ordre public* into three categories: *ordre public interne, ordre
public international*, and *ordre public universel*. For a discussion of this taxonomy, see David Clif-
be reserved for fundamental social policies, excluding mere legislative policies reflected in statutes.

The *Guide to Enactment* notes the separation between "the notion of public policy as it ap-
plies to domestic affairs, and the notion of public policy as it is used in matters of international co-
operation." It suggests that the public policy exception is to be used more restrictively in the latter
context. See *Guide to Enactment*, supra note 53, at 444.

\(^ {176}\) See text accompanying supra notes 88–89.
Creditor ranking and the distribution of assets are excellent cases with which to examine this distinction between rights that implicate public policies and rights that do not. While one overall goal of domestic distribution rules is to secure equality of distribution to all creditors, the rules governing the order of distribution of assets permit departures from that goal based on domestic policy decisions. Under the Bankruptcy Code, for instance, assets are distributed first to secured creditors, then to priority unsecured claimants (including administrators of the bankruptcy estate, employees, grain producers and fishermen, alimony recipients, and governmental entities), then to non-priority unsecured creditors, and finally to equity claimants. This broad order in which assets are distributed to different classes of claims, and the decisions regarding what sort of claimants are put into each of the classes, reflect a judgment—informed by U.S. policies regarding the underlying claims—of the relative importance of different groups of claimants. The fact that secured creditors take ahead of priority and unsecured claimants, for instance, reveals a desire both to protect contractual arrangements and to foster an efficient financing system. How, then, should one view these underlying policies when faced with a foreign bankruptcy proceeding that does not share the same values?

A foreign bankruptcy system might compare with the U.S. system of distribution in a number of different ways.

1. It might not share the fundamental goals of the U.S. system,

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177 See Jacob S. Ziegel, Preferences and Priorities in Insolvency Law: Is There a Solution?, 39 St. Louis U. L.J. 793, 796 (1995); see also Theory and Pragmatism, supra note 2, at 466 (noting that "every country honors equality of distribution primarily in the breach").

178 See 11 U.S.C. § 725 (1994). Creditors hold secured claims if they have a valid security interest in particular property of the bankruptcy estate. They are entitled to recover the value of their allowed claims up to the value of the collateral. See 11 U.S.C. § 506(a) (1994).


182 See John K. Londot, Handling Priority Rules Conflicts in International Bankruptcy: Assessing the International Bar Association’s Concordat, 13 Bankr. Dev. J. 163, 168 (1996) ("[C]ountries tend to make the rules of distribution reflect public policy choices."); see also Ziegel, supra note 177, at 796. The bases on which these judgments as to relative importance are made may vary from case to case, as the decision to accord priority to a certain type of creditor can involve political support as well as independent value judgments. The provision for fishermen, for instance, has been described as "special interest legislation of the most naked kind." DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 1310 (2d ed. 1990).

183 See Ziegel, supra note 177, at 796.

184 The goal of securing equality of distribution to all creditors is common to virtually all bankruptcy systems. But the other fundamental goal of U.S. bankruptcy law—permitting the debtor a fresh start (in the case of a corporate debtor, reorganization)—is not shared by all systems. See Rasmussen, supra note 4, at 15 (noting that other countries do not share the U.S. "bias toward reorganization").
2. It might share the fundamental goals but classify creditor groups differently. For example, a system might not recognize secured creditors as a separate class.

3. It might have the same classes, and rank them in the same order, but include different claimants within each class. A system might grant priority to dairy farmers but not to fishermen, for instance, or might classify as unsecured the holder of a particular type of lien that in the United States would qualify for secured status.\textsuperscript{185}

The question, then, is how the treatment of domestic creditors under these different configurations would impact the public policies reflected in the corresponding U.S. rules.

Each country's bankruptcy code creates a mechanism intended to distribute the assets of the debtor in a manner that is fair and consistent with local policy.\textsuperscript{186} In this sense, all systems serve the same fundamental role that the U.S. system does. The overarching U.S. policy behind distribution rules (qualified equality of distribution to all creditors) might therefore be served by bankruptcy systems that do not in an individual case adopt the same distribution rules that are embodied in the Bankruptcy Code.\textsuperscript{187} If a foreign system has in place provisions intended to achieve those goals, one might argue, we should be unconcerned with the means it chooses to achieve them.\textsuperscript{188} Only if the application of a particular foreign law contravenes a public policy of the United States should a court refuse to effectuate the choice of law resulting from the selection of jurisdiction.\textsuperscript{189}

\textsuperscript{185} Under South African bankruptcy law, for example, as under U.S. bankruptcy law, secured claims are paid first, followed by "preferent" (priority) claims. However, the priority class is made up of different claimants: In South Africa, first priority goes to funeral expenses (a category not recognized in the United States), and certain categories of claimants granted priority in the United States (e.g., grain producers) are not recognized. See Richard A. Gitlin & Timothy B. DeSieno, \textit{Bankruptcy Laws of South Africa}, 17 N.Y.L. SCH. J. INT'L & COMP. L. 283, 293 (1997).

\textsuperscript{186} I do not address here systems that are procedurally flawed or that are arbitrary in their application even with respect to domestic creditors.

\textsuperscript{187} See \textit{supra} Part IV.A.3 for a discussion of this convergence of local and international policy goals.

\textsuperscript{188} One might consider, by way of analogy, the issue of preventing fraudulent or preferential transfers. Section 304(c)(3) provides that one of the factors to be considered by a domestic court in deciding whether or not to defer to a foreign proceeding is whether the bankruptcy law of the foreign jurisdiction prevents such transfers. 11 U.S.C. § 304(c)(3) (1994). Generally, however, it is sufficient that the foreign law includes provisions intending to accomplish that goal; it is not necessary that the provisions mirror the approach of the Bankruptcy Code. See, e.g., \textit{In re Gee}, 53 B.R. 891, 90-04 (Bankr. S.D.N.Y. 1985) (noting that the British Companies Act provides protections similar to those in the Bankruptcy Code); Ulrich Huber, \textit{Creditor Equality in Transnational Bankruptcies: The United States Position}, 19 VAND. J. TRANSNAT'L L. 741, 753 (1986) ("[T]he prerequisite of subsection (c)(3) is met if the law governing the main proceeding provides for the prevention of fraud and preference, even if those provisions do not reach as far as do their United States counterparts.").

\textsuperscript{189} See, e.g., Overseas Inns v. United States, 911 F.2d 1146 (5th Cir. 1990) (stating that the application of foreign law would have implicated the public policy, unrelated to bankruptcy, favoring payment of income taxes).
The difficulty lies in attempting to create a workable system for distinguishing between public policies of the United States and other, "ordinary" policies reflected in the bankruptcy rules. Consider, for example, a bankruptcy proceeding conducted under a system that fell into the second category above, in which the foreign bankruptcy law did not distinguish at all between secured and unsecured creditors. Application of such a law might be viewed as unacceptable because it violates the fundamental domestic policy choice of protecting freedom of contract. Because applying that law would require a local secured creditor to submit its claim for administration in such a system, a U.S. court might therefore legitimately refuse to defer on the basis of public policy. In contrast, the treatment of a U.S. secured creditor under a system falling under the third category would not rise to the level of requiring public policy protection. In that situation, the foreign law does recognize the need to protect secured creditors, but would simply classify the U.S. creditor differently than U.S. bankruptcy laws would. Thus, although the individual creditor would be disadvantaged, application of foreign law would not offend the public policy of the United States. But this distinction seems artificial. Whether classified as unsecured because foreign bankruptcy law does not recognize secured creditors as a separate class, or because that law does not recognize the particular claim in question as secured, the result for the creditor is the same. At any of these levels, then, public policies are arguably implicated. The impossibility of creating a useful taxonomy of interests presents the greatest challenge to a multilateral system.

V. USING MULTILATERALISM IN THE SERVICE OF UNIVERSALITY

Part IV set forth in the language of traditional conflicts methodology the particular challenges that international insolvency presents for multilateral analysis. In that our current regime for resolving cross-border bankruptcies is in fact a multilateral system, these are of course also the challenges that many argue have caused the failure of universality. But recasting these problems as explicit choice-of-law questions permits us to attack them from a new direction. We can sharpen the choice-of-law approach that is currently hidden in

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190 See In re Hourani, 180 B.R. 58, 69 (Bankr. S.D.N.Y. 1995) ("Deference to foreign proceedings is warranted under principles of comity when they provide, inter alia, a sure scheme for differentiation between secured and unsecured creditors, whether or not the terms are uniform with those of the Code. . . . However, a system that does not clearly distinguish at all is suspect.")

191 See In re Toga, 28 B.R. 165, 168 (Bankr. E.D. Mich. 1983) (refusing to defer to a foreign proceeding in which a local creditor was recognized as holding a secured claim under U.S. law but would be an "ordinary" (unsecured) creditor under foreign law).

192 In addition, one might query whether a U.S. court faced with such a creditor would be willing to engage in this rather fine analytical line drawing.

193 Simplification of the judicial task is of course another choice-of-law goal, and complex policy escape clauses detract significantly from the simplicity of analysis.
Section 304 jurisprudence, using overtly multilateralist methodology to attain the shared goals of multilateralism and universality.

A. Use a Stricter Jurisdiction-Selecting Rule

Multilateral analysis yields benefits only when the jurisdiction-selecting rule used for a particular type of dispute is predictable and uniformly applied. To use Savigny’s formulation, it must be knowable in advance to which jurisdiction a particular type of legal relationship will be assigned. The rules governing jurisdiction selection need not be completely inflexible. In the area of torts, for instance, the strict rule that the law of the jurisdiction in which the tort occurred (lex fori delicti) must apply has, as the Restatement (Second) reflects, given way to the more flexible principle that the law of the jurisdiction that “has the most significant relationship to the occurrence and the parties” should apply. Furthermore, as discussed above, the application of the law so chosen may in certain circumstances be waived if substantive justice would not be served by that application. But the stricter the initial rule of selection and the more predictable its application, the more likely it is that decisional uniformity will be achieved.

In seeking to develop such a rule for application to cross-border bankruptcies, we must first define precisely the legal relationship whose seat we seek to identify. Is it a single, overarching process of resolving the business of the debtor? In that case, assigning it to a single jurisdiction seems to be a sensible solution. It recognizes the collective nature of a bankruptcy proceeding, with its corollary that every action taken to impact the position of one creditor will necessarily impact the positions of others, and searches for an integrated solution. On the other hand, if the bankruptcy process is viewed as the resolution of a disaggregated series of individual debtor-creditor relationships, then each creditor might argue for the application of local law (assigning each individual relationship to the jurisdiction in which that relationship was created). Returning to the example of priorities, for instance, one might argue that the priority of each creditor is determined only in relation to other creditors, and

194 See generally SAVIGNY, supra note 82.
195 See RESTATEMENT (SECOND), supra note 127, § 145(1).
196 See supra text accompanying notes 88–89.
197 An analogy to this framework can be found in the resolution of mass tort disputes. Mass torts present similar pool problems and similar issues of collective action as contrasted with the rights of individual litigants. As in the international insolvency area, judges and commentators considering mass torts have had difficulty formulating coherent choice-of-law approaches. See generally Russell J. Weintraub, Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation, 1989 U. ILL. L. REV. 129 (1989).
198 That is, assigning heightened priority to one creditor necessarily decreases the priority level of others. The rules under which trustees in bankruptcy may avoid certain prebankruptcy transactions operate similarly: The avoidance of any single transaction will affect not only the relationship between the debtor and the creditor whose interest was avoided, but the position of all other creditors as well.
therefore that all questions of priority should be considered within a unified proceeding. On the other hand, because the legal relationship that creates the basis for a priority designation (for example, entering into a contract for a security interest in a piece of land) is an individual matter governed by local law, one might suggest that each priority question should be considered pursuant to the relevant local law.

In the United States, bankruptcy is structured as a collective proceeding.199 Therefore, it seems justifiable—and certainly consonant with the goal of equality of treatment—to view the entire bankruptcy as a single legal relationship and assign it to a single jurisdiction.

No jurisdiction-selecting rule has been established to date for application in international bankruptcy proceedings initiated in U.S. courts.200 Instead, the comity doctrine, which has served as the only conflicts rule in this area,201 has been supplemented by certain assumptions regarding the appropriate jurisdiction in which to conduct a bankruptcy proceeding. Historically, the jurisdiction of incorporation has been considered the most predictable jurisdiction. In other words, U.S. courts have suggested that creditors should expect that the law of the debtor’s jurisdiction of incorporation might apply should the debtor enter bankruptcy. The Supreme Court laid the foundations for this analysis in Gebhard, an 1883 case in which it held that domestic creditors, in doing business with a Canadian corporation, subjected their contracts with the debtor to the bankruptcy laws of Canada.202 This approach is reflected in much of the case law in this area, and seems to support the view that the “legal home” of the debtor is considered by U.S. courts to be a reasonable and predictable jurisdiction whose laws may be applied even to the detriment of creditors.203

In distinguishing between “main” and “non-main” proceedings,204 the Reform Act takes one step further toward establishing a jurisdictional rule. By

199 This is consistent with the analysis of many courts addressing international bankruptcy cases, who recognize that any action taken on behalf of local creditors will necessarily affect all other creditors with an interest in the proceedings. See, e.g., In re Rukavina, 227 B.R. 234, 243 (Bankr. S.D.N.Y. 1998).

200 By contrast, the newly adopted European Union Convention does seek to implement a set of fixed choice of law rules.

201 See supra Part III.B.1.b for a discussion of comity’s role as a conflicts principle.

202 See Canada S. Ry. v. Gebhard, 109 U.S. 527 (1883). The Gebhard Court stated the following:

[Em]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts. . . . To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government. . . .

Id. at 537–38.

203 See, e.g., Cornfeld v. Investors Overseas Servs., 471 F. Supp. 1255, 1261 (S.D.N.Y. 1979) (noting that the local creditor “voluntarily associated himself” with the Canadian debtor corporation). “Legal home” in the sense used in Gebhard of course means the jurisdiction of incorporation. As discussed above, commentators have observed that this is not the only conceivable choice.

204 See Reform Act, supra note 53, § 1502(4), (5).
reserving the highest recognition—and the substantive relief that accompanies that recognition—for bankruptcy proceedings initiated in the country in which the debtor has its center of main interests,205 the Reform Act identifies that jurisdiction as the proper seat for the legal relationship that is to be resolved by the bankruptcy. The question remains how strict that rule might become in the service of uniformity. Other provisions of the Reform Act moderate the jurisdiction-selecting effect of Section 1502 substantially. Section 1528 provides that the opening of even a foreign main proceeding does not prevent a local proceeding from being opened in the United States.206 Section 1529 then establishes the primacy of any such local proceeding over a foreign proceeding,207 thereby potentially canceling the automatic effects of recognizing the foreign proceeding.208 These provisions prevent what might be characterized as a jurisdiction preference in the Reform Act from operating as a true jurisdiction-selecting rule, and vitiate the measure of predictability and uniformity that Section 1502 might otherwise have afforded. To realize the full potential of that provision as a multilateralist rule, the Reform Act would have to adopt a more overtly universality-based approach by restricting the effect of local proceedings once a bankruptcy in the jurisdiction of the debtor's center of main interests had been initiated.209 In other words, the jurisdiction-selecting mechanism introduced by the Reform Act would have to be one that brought real consequences; not an invitation to make an ad-hoc decision to grant or to withhold comity, but an assignment of the legal relationships composing the bankruptcy proceeding to a particular forum.

Obviously, a jurisdiction-selecting rule only works if it leads to the most appropriate jurisdiction. Ideally, such a rule will be predictable, nonmanipulable and fair. A jurisdiction of incorporation test, for instance, is highly predict-

205 See Reform Act, supra note 53, § 1520. See text accompanying supra notes 120–121 for a discussion of the different forms of relief available in “main” and “non-main” proceedings.

206 Reform Act, supra note 53, § 1528. The only requirement is that the debtor must have assets located in the United States. There is no restriction at all on the opening of local proceedings before the foreign proceeding is recognized. See Berends, supra note 53, at 383. In contrast to this approach, the European Union Convention provides that local proceedings can be opened only in jurisdictions in which the debtor maintains an establishment. See Schollmeyer, supra note 1, at 426.

207 In addressing the situation in which the foreign main proceeding has already been recognized, and a local proceeding is opened, Section 1529(2) provides that “any relief in effect under sections 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the case in the United States,” such relief including, if the foreign proceeding is a main proceeding, the automatic stay. Reform Act, supra note 53, § 1529(2)(A). This provision in effect refers the court back to pre-Reform Act analysis: If the sorts of considerations included in the Section 304(c) guidelines suggest that the court should defer to the foreign proceeding, it may do so; otherwise, it may permit the local proceeding to continue.

208 It is in these provisions that the Reform Act reveals itself as primarily a procedural rather than a substantive mechanism. It simplifies the process by which the representative of a foreign bankruptcy proceeding may obtain recognition in and assistance of courts in the United States, but does not prevent those courts from choosing a territorial approach to the resolution of the debtor-creditor relationships themselves.

209 As discussed supra Part IV.B, this analysis would still be subject to the implementation of the public policy exception.
able but somewhat manipulable in that a debtor could reincorporate in a new jurisdiction.\textsuperscript{210} In addition, it may not be particularly fair, since in the case of offshore registration the location of incorporation may have little connection with the business or interests of the company. In other proposed treaties and conventions dealing with international insolvencies, alternative rules of selection have been put forward. These have included selection of the location in which the preponderance of the debtor's assets are located,\textsuperscript{211} the center of the debtor's main interests,\textsuperscript{212} and any location with which the debtor has sufficient contacts.\textsuperscript{213}

The Reform Act adopts the "center of main interests" test,\textsuperscript{214} rather than using place of incorporation, and then creates a rebuttable presumption that the place of incorporation is the center of main interests. By making the presumption rebuttable, this rule sacrifices a measure of predictability in favor of fairness.\textsuperscript{215} Nonetheless, the architects of the Model Law incorporated in the Reform Act, as well as most commentators, believe that in most cases the center of a debtor's main interests will be evident.\textsuperscript{216} In establishing a single criterion for identifying the main proceeding, this rule will foreclose competing recognition claims by representatives of multiple proceedings and increase the uniformity and predictability of choice of bankruptcy forum.\textsuperscript{217}

\textsuperscript{210} Of course, creditors could include in their financing documents a covenant preventing such an action.


\textsuperscript{212} See European Union Convention, art. 3. Article 3 provides further that the location of the debtor's registered office will be presumed to be the center of its main interests. See Schollmeyer, \textit{supra} note 1, at 426.


\textsuperscript{214} Reform Act, \textit{supra} note 53, § 1502(4). This language was adopted from the European Union Convention, in which it was chosen partly because "no better definition could be agreed upon." Berends, \textit{supra} note 53, at 330.

\textsuperscript{215} While this test attempts to achieve fairness while retaining predictability, critics may suggest that it fails with respect to the latter. If the headquarters of a debtor corporation and its registered office are in Country A, but substantially all of its assets and operations are in Country B, is the presumption in favor of Country A overcome? Would the outcome be different if the corporation's assets and operations were evenly distributed between Countries B and C? See MARTIN N. FULCS & MICHAEL J. IRELAND, \textit{BANKRUPTCY AND THE PROBLEMS OF MULTI-JURISDICTIONAL WORKOUTS} 280 (1991) for a discussion of similar fact patterns. As the operations of multinational corporations become increasingly international, critics argue, these classification difficulties will multiply.

\textsuperscript{216} See, e.g., Rasmussen, \textit{supra} note 4, at 12. \textit{But see} LoPucki, \textit{supra} note 3, at 713 (criticizing this assumption).

\textsuperscript{217} See Berends, \textit{supra} note 53, at 330.
B. Adopt a More Restrictive Approach to the Policy Exception

In keeping with its nature as a discretionary tool for courts to use in altering the outcome of a choice-of-law analysis, there is no fixed definition of public policy governing application of the exception. On one point, however, there is general agreement: A restrictive approach is desirable if the full benefits of multilateralism are to be attained. Both the case law and the legislative efforts in the international bankruptcy field reflect this desire to apply the public policy exception narrowly. The formulation of public policy that has achieved the most currency in Section 304 cases limits the application of the exception to “a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense.” The UNCITRAL working group referred to “exceptional circumstances” in discussing the situations in which such an exception would arise, and drafted a public policy exception that applies only when the foreign law chosen is “manifestly” contrary to the policy of the enacting state. Such qualifying phrases, however, are not self-implementing. Under the Reform Act, for instance, a court retains discretion to identify the appropriate policy of the forum and then to decide whether a particular aspect of a foreign proceeding is sufficiently contrary to that policy to preclude its application. Even given the mandate to apply the exception clause sparingly, courts will still need guidelines to aid them in confining their use of the exception.

The stage of the international bankruptcy proceeding in which the public policy exception is most likely to be considered is at the distribution of assets. Questions of creditor ranking and, more specifically, of the establishment of priorities provide an excellent basis for discussing choice-of-law issues for two reasons. First, distribution issues present a relatively straightforward choice: Either the law of the jurisdiction in which the (main) foreign proceeding takes place is applied, or the local forum applies its own distribution rules for the

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218 The Restatement (Second) reflects this basic understanding in its use of the phrase “strong public policy” in the recognition of judgments section. Restatement (Second), supra note 127, § 117 (emphasis added). The Comment to that section notes that “enforcement will usually be accorded the judgment except in situations where the original claim is repugnant to fundamental notions of what is decent and just” in the enforcing state. Id.

219 Cornfeld v. Investors Overseas Servs., 471 F. Supp. 1255, 1259 (1979) (citing Intercontinental Hotels Corp. v. Golden, 203 N.E.2d 210, 212 (1964)). One might question whether this formulation is actually useful in international bankruptcy cases, where little rises to the level of inherent viciousness. But see Story’s description of a past bankruptcy practice: “[T]hat terrible power (if it ever really existed) under the law of the Twelve Tables, which enabled creditors to cut their debtor’s body into pieces, and divide it among them[.]” Story, supra note 94, at 34. The sense that commercial transactions do not generally implicate issues of morality has led some commentators to suggest that the public policy doctrine may not be applicable at all in areas of commercial law (as opposed to family law, for example). See Albert A. Ehrenzweig & Erik Jayme, Private International Law Vol. II Special Part II (1973).

220 Guide to Enactment, note 53, at 444 (discussing Article 6 of the Model Law). For an argument that the public policy exception should be reserved to protect “fundamental principles of law,” see Berends, supra note 53, at 336. The Guide to Enactment itself contemplates only “rare” invocation of the exception. See id.
benefit of local creditors. Second, the establishment of different priority schemes in bankruptcy systems directly forces consideration of a country’s public policy.

Priorities are of course an exception to the overall mandate of equality of distribution among creditors, and therefore reflect policy choices favoring certain groups over others. While most countries rank administrative expenses and employees’ claims relatively high, for example, the exact rank of those preferred classes may vary from country to country. When asked to subject the claims of local creditors to a foreign proceeding that will apply distribution rules reflecting the policy choices of another nation, it is not surprising that courts seek to ensure that local creditors retain the benefit of their home country’s ranking.

The concern for multilateralists is whether this protectionism might prompt courts to overuse the public policy exception by considering comparative rankings as a public policy issue. Such an expanded application of the exception would undermine the predictability of outcome. The question, then, is whether despite the malleability of the exception we can nevertheless confine its application in international bankruptcy cases.

1. Basic Rule: Primary Bankruptcy Court Should Apply to All Creditors—Foreign and Domestic—its Own Bankruptcy Law, Including Provisions Regarding Ranking and Distribution

This is partly a restatement of current practice, pursuant to which courts do apply the priority rules of their own jurisdictions, and partly a statement of nondiscrimination. It is intended to reserve the public policy exception for use where application of local law is critical.

a. No Procedural Discrimination against Foreign Creditors

Procedural discrimination is primarily a matter of bankruptcy administration. It is addressed by Section 304(c)(2), which states that in deciding whether to defer, a U.S. court should consider whether domestic creditors would be subjected to procedural unfairness or overt discrimination in the for-

221 See Westbrook & Trautman, supra note 10, at 659. The “hotchpot” rules, under which a creditor who has received payment in one proceeding must count that distribution toward his share in any other proceeding, establish a limited exception to this principle. See id.
222 See Ziegel, supra note 177, at 796. As Ziegel points out, these policy choices may be based on peculiarly local concessions reflecting the political power of certain creditor groups.
223 See Westbrook & Trautman, supra note 10, at 658–659 (“Nothing is more central to the difficulty of international insolvency co-operation than the greatly differing priorities of various jurisdictions. (The constant is the insistence of each government upon preferring itself to most others.)”).
eign bankruptcy proceeding. Such discrimination would arise, for instance, if the foreign bankruptcy court accepted only the filings of local creditors. Under any choice-of-law approach, a court would be justified in choosing not to defer to a foreign proceeding on such terms. The application of a foreign bankruptcy law that raises procedural bars against the claims of foreign creditors is not the same as application of a foreign law whose substance is different from U.S. bankruptcy law. A system that does not permit foreign creditors to register claims with the bankruptcy court reflects simple prejudice against nonlocal claims. This classification thus reflects not national policy, but rather discrimination exercised only in the context of international bankruptcies. It should therefore be set aside from true policy questions informing the structure of priorities.

**b. No Substantive Discrimination against Foreign Creditors**

Substantive discrimination, on the other hand, occurs at the distribution stage of the proceeding. A distribution scheme might provide that all claims, foreign and domestic, be lodged with the trustee, but that all foreign creditors, regardless of the substance of their claims, be assigned a priority level below that of local creditors. Under a nondiscriminatory scheme, by contrast, the distribution rules of the jurisdiction in which the debtor has its center of assets would be applied to all creditors in a nationality-blind manner.

The Reform Act prevents substantive discrimination of this sort only to a point. Although it establishes the basic principle that similar claims of all

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224 11 U.S.C. § 304(c)(2) (1994). In referring to the sufficient protection of the interests of U.S. creditors, the Reform Act too permits a court to deny relief to a foreign representative under these circumstances. See Reform Act, supra note 53, § 1521(b).

225 See, for example, In re Axona, 88 B.R. 597, 612 (Bankr. S.D.N.Y. 1988), in which the court inquired whether Hong Kong law would permit creditors residing outside Hong Kong to submit their proofs of claim. Procedural unfairness might likewise result if the rules of the foreign court did not provide that adequate notice be given to nonlocal creditors. See, e.g., In re Hourani, 180 B.R. 58, 68 (Bankr. S.D.N.Y. 1995).

226 It is best to handle this kind of discrimination as a matter separate from policy concerns. Many courts, however, have imported these procedural concerns into their substantive policy analysis, with the intentional or unintentional result of broadening the application of the public policy exception. In Hourani, for instance, the court engaged in a factor-by-factor analysis of the Section 304(c) guidelines. In the section devoted to a consideration of the comity factor, however, it returned to issues of procedural fairness, concluding that comity should not be granted to Jordanian proceedings that did not promise procedural fairness. In effect, it thus considered the same factor twice. See In re Hourani, 180 B.R. 58, 67–70 (Bankr. S.D.N.Y. 1995).

227 See Londot, supra note 182, at 166. See also KURT H. NADELLENN, CONFLICT OF LAWS: INTERNATIONAL AND INTERSTATE 284 (1972) for a description of rules that provide that no foreign claims will be considered until all local creditors have been satisfied in full.

228 But see Douglass G. Boshkoff, Some Observations on Fairness, Public Policy, and Reciprocity in Cross-Border Insolvencies, in CURRENT DEVELOPMENTS, supra note 10, at 677, 682 ("Favouritism based upon geography is no more objectionable than other instances of special treatment currently found in our bankruptcy law").

229 In Argentina, for example, local creditors automatically receive priority over foreign creditors in certain circumstances. See FLICS & IRELAND, supra note 215, at 424.
creditors shall have the same ranking,²³⁰ it recognizes the validity of discriminatory ranking so long as claims of foreign creditors retain at least general unsecured status.²³¹ A better rule would afford all creditors within any given creditor class, whether foreign or domestic, the same priority.²³²

2. No Prospective Substantive Analysis

Section 304(c)(4) requires that the distribution contemplated by the foreign proceeding must be substantially similar to a distribution conducted in accordance with U.S. distribution rules.²³³ Because courts tend to view Section 304(c)(4) as a gating factor rather than as one of several factors to be considered in balance,²³⁴ this analysis invites an abstract comparison of the competing legal systems without considering whether the interests of a local creditor—let alone an important U.S. policy interest—will in fact be harmed by its application. In the 1988 Interpool litigation, the liquidator in an Australian bankruptcy proceeding moved to dismiss involuntary Chapter 7 bankruptcy proceedings that had been filed against the debtor in the United States.²³⁵ The court was troubled by the fact that Australian bankruptcy law did not allow for the remedy of equitable subordination.²³⁶ It was not clear, however, that the local creditor would have had recourse to that remedy even in a U.S. bankruptcy proceeding.²³⁷ In other words, the court did not establish that application of Australian law in the case would in fact have raised policy concerns.

²³⁰ See Reform Act, supra note 53, § 1513(a); see also Model Law, supra note 53, at art. 13(1).
²³¹ Reform Act, supra note 53, § 1513(b). See also Model Law, supra note 53, at art. 13(2). The comments to that section note that the article “leaves intact the provisions on the ranking of claims in insolvency proceedings, including any provisions that might assign a special ranking to claims of foreign creditors.” Guide to Enactment, supra note 53, at 450.
²³² The public policy exception would remain available to avoid the rare unjust result. For a suggested model of “cross-priority” in international insolvencies, see Universal Priorities, supra note 9, at 27. Westbrook points out that such a system would “lessen national discrimination while increasing discrimination among classes of creditors.” Id. at 31. But discrimination among creditor classes is precisely the point of distribution rules and therefore a legitimate result of application of a particular country’s bankruptcy law, whereas “national discrimination” is an exercise in illegitimate distinctions among creditors that further no policy other than territorialism. See also Patrick J. Borchers, Choice of Law Relative to Security Interests and Other Liens in International Bankruptcies, 46 AM. J. COMP. L. 165, 181 (1998) (arguing that all courts seek in any event is reasonable protection for secured creditors and equality of distribution, at least among distinct classes of creditors).
²³⁴ See supra note 48 and accompanying text.
²³⁶ Id. at 378. Hourani, too, discussed the unavailability of equitable subordination without considering its potential for application in the specific case. See In re Hourani, 180 B.R. 58, 67–68 (Bankr. S.D.N.Y. 1995).
²³⁷ Interpool v. M/V Venture Star, 102 B.R. 373, 380 (Bankr. D.N.J. 1988) (“While I do not hold that equitable subordination should be invoked in this case since the substantive issue was not argued before this Court, a trustee in Bankruptcy must consider this issue.... The lack of... substantive redress... could significantly affect creditors’ rights.”) (emphasis added).
The court thus used an unrealized policy problem as an element of its choice-of-law analysis. Without examining whether application of foreign bankruptcy law in a particular case would actually violate U.S. public policy, the court determined simply that the structure of Australian bankruptcy law as a whole was inconsistent with U.S. policy.

This sort of prospective analysis is wholly inconsistent with traditional multilateralist methods, in which the choice of law is made before the substance of that law is inspected for policy problems. The use of Section 304(c)(4) as a mechanism for screening legal systems that seem too different from our own preempts that stage of the analysis. It substitutes a prospective comparison of laws for an analysis of whether an escape device such as the public policy exception should be used in the particular case. Especially because there is no choice-of-law principle calling for the weighting of Section 304(c) factors, reliance on Section 304(c)(4) amounts to an abstract condition of similarity. If the distribution rules implemented in the foreign bankruptcy proceeding are substantially different from the rules implemented by the Bankruptcy Code, the court may deny recognition of the foreign proceeding whether or not the differences would work to the disadvantage of a local creditor.238 A more principled approach would adhere to multilateralism's focus on neutral territorial factors, independent of the content of the chosen law. It should be assumed that the law of the jurisdiction selected pursuant to the Reform Act will apply unless application of that law in the particular case would violate public policy. Under a true multilateralist approach, there is no need for a substantial similarity condition independent of the public policy exception.

The Reform Act refers to the substantial similarity condition only in connection with the granting of relief beyond that otherwise contemplated by the Act.239 In deciding whether the interests of local creditors will be sufficiently protected in a foreign proceeding, however, a U.S. court is likely to consider that condition unless explicitly instructed not to do so.240 Indeed, local creditors will certainly argue that their claims are sufficiently protected only when the distribution rules applied to them in the foreign proceeding are as favorable as those that would have been applied in a domestic one. This argument will

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238 This approach may have derived in part from the practice that developed under the original Restatement of Conflict of Laws, which suggested that courts were permitted to reject foreign law on the basis of a "great difference" between the foreign law and forum law. See generally RESTATEMENT OF CONFLICT OF LAWS (1934). The Restatement (Second), however, expressly adopted a narrower version of the escape clause: In discussing enforcement of foreign judgments, for instance, Comment c to Section 117 notes that "enforcement will usually be accorded the judgment except in situations where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought." RESTATMENT (SECOND), supra note 127, § 117 cmt. c.

239 See Reform Act, supra note 53 § 1507(b)(4).

240 See text accompanying supra note 63 for a discussion of the point at which the Reform Act necessitates a Section 304-style analysis.
lead directly to the substantial similarity analysis, and therefore away from a truly multilateralist approach.

3. No Protection of Individual Rights as Opposed to Public Policy

In his formulation of the general principle of comity, Story writes that it is “inadmissible, when it is contrary to [the granting nation’s] known policy, or prejudicial to its interests.” While acknowledging the importance of state interests, his description of the then-prevailing U.S. approach to international bankruptcies also refers to the interests of individual citizens. He notes that “comity requires us to give effect to such assignments only so far, as may be done without impairing the remedies, or lessening the securities, which our laws have provided for our own citizens.” The Supreme Court’s classic formulation of comity also recognized the balance between “international duty and convenience, and [the] rights of [the granting nation’s] own citizens.” Interpreted literally, these formulas suggest that there are two distinct justifications for withholding comity: a violation of the public policy of the state, and any impairment, regardless of whether a public policy is implicated, of the rights of a citizen of that state.

Decisions in the international insolvency cases reflect this duality. Some cases frame the decision whether to grant comity in terms of national interests alone, while others refer to the rights of particular domestic claimants. Although courts have demonstrated a tendency to defer to foreign proceedings, often in the face of vigorous protest by local creditors, they tend to frame their

241 Story, supra note 94, at 37.
242 Id. at 348.
243 Hilton v. Guyot, 159 U.S. 113, 163–64 (1895). See also Krause et al., supra note 34, at 2592.
244 See, for example, Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, 44 F.3d 187 (3d Cir. 1994), in which the court noted the following:
[W]e have stated that ‘comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.’ Thus, a court may, within its discretion, deny comity to a foreign judicial act if it finds that the extension of comity ‘would be contrary or prejudicial to the interest of the United States.
44 F.3d 187, 192 (citing Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971)).
245 See, e.g., Triton Container Int’l, Ltd. v. Cinave, S.A., 1997 U.S. Dist. LEXIS 16075 (1997) (citing Cunard S.S. v. Salen Reefer Services, 773 F.2d 452, 457 (2d Cir. 1985)) (“Comity will be granted to the decision or judgment of a foreign court if...the laws and public policy of the foreign state and the rights of its residents will not be violated.”). See also Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 65 B.R. 466, 468 (Bankr. S.D.N.Y. 1986) (“Before the court extends such deference to the foreign proceeding, it must first satisfy itself that forum creditors will be protected.”); Clarkson v. Shabec, 544 F.2d 624, 629 (2d Cir. 1976) (explaining that comity will be granted as long as “the foreign proceeding has not resulted in injustice to New York citizens, prejudice to creditors’ New York statutory remedies, or violation of the laws or public policy of the state”).
public policy considerations in terms of protecting individual creditors.\textsuperscript{246} The courts do not always use these principles consistently. In \textit{Philadelphia Gear}, for instance, the court framed the issue before it as whether according comity to bankruptcy proceedings in Mexico would be prejudicial to the interests of the United States.\textsuperscript{247} In listing factors for the district court to consider on remand, however, it included not only whether a stay imposed by the Mexican court would violate U.S. public policy, but “whether [the local creditor] will be prejudiced by the stay.”\textsuperscript{248}

The orientation chosen is particularly important in the area of priorities. While protecting a national interest would suggest that comity can be granted so long as the overarching goals of our bankruptcy system are not undermined, protecting the interest of an individual creditor would dictate the application of U.S. law whenever necessary to protect that creditor’s particular rank in distribution. It is the latter orientation that has caused some courts to adopt a territorial, outcome-oriented approach to international bankruptcies. This analysis conflates U.S. interests, as reflected in the bankruptcy rules, with the interest of a particular creditor in obtaining a particular priority classification, and raises the interest of an individual creditor to higher status as if it alone were a manifestation of national policy.

It would be more consistent with the goals of comity and of multilateralism to apply the public policy exception only when a national public policy is actually violated. A violation can of course involve the impairment of an individual creditor’s rights, so long as that impairment also implicates a public policy. But an impairment that causes no actual violation of public policy should not trigger the application of local law in the face of international concerns. For instance, if foreign bankruptcy law would grant heightened priority to employee creditors, thereby effectuating the policy goal of U.S. law, but would nonetheless yield a smaller distribution to U.S. employees than what would be available under the Bankruptcy Code, a U.S. employee creditor should not prevail merely because his specific interest—in the form of a higher bankruptcy dividend—was not protected.

Withholding from courts the discretion to refuse comity in certain situations in which the application of foreign law might harm U.S. citizens does effect a change in the traditional application of comity to cross-border bankruptcy issues.\textsuperscript{249} The change is, however, consistent with other adaptations

\textsuperscript{246} See, e.g., \textit{Disconto v. Umbreit}, 208 U.S. 570, 579 (1908) (“All civilized nations have recognized and enforced the doctrine that international comity does not require the enforcement of judgments in such wise as to prejudice the rights of local creditors and the superior claims of such creditors to assert and enforce demands against property within the local jurisdiction.”)

\textsuperscript{247} \textit{Philadelphia Gear}, 44 F.3d at 194.

\textsuperscript{248} \textit{Id}.

\textsuperscript{249} See Morales & Deutsch, supra note 101, at 1587 for a discussion of the legislative decision not to overturn the “general American rule of conflict of laws” that local creditors had a paramount right to levy on local assets.
that have been made to the use of comity in that context. More importantly, it will allow the full benefit of the jurisdiction-selecting rule that is currently only implicit in U.S. international bankruptcy jurisprudence to be realized, by limiting the situations in which an escape clause could be used.

VI. CONCLUSION: THE FUTURE OF UNIVERSALITY IN INTERNATIONAL BANKRUPTCY LAW

In exploring the multilateralist principles at work in the U.S. system of modified universality, and in applying those principles to suggest refinements to that system, this Article has demonstrated that the universality/territoriality framework is not the only analytical tool suited for exploring international insolvency. Indeed, it has suggested that the focus on universality and territoriality has, to some extent, prevented the choice-of-law processes embedded in Section 304 proceedings from evolving into a fully realized system of modified universality. But by building on an existing multilateralist foundation, the approach as modified retains the quality of territorialism inherent in any system of multilateralist rules. I refer here not to territoriality, the international bankruptcy theory, but to territorialism—that is, reliance on concepts of sovereignty and territorial jurisdiction. I will conclude by speculating as to the future of a continuing commitment to territorialism.

In a multilateralist system, locating the proper jurisdiction for the administration of an international bankruptcy depends largely on identifying the home jurisdiction of the debtor. But this concept of a “home” jurisdiction is less meaningful as applied to a debtor that is a transnational conglomerate than to a debtor organized and operating in a single country. Similarly, the concept of protecting a “local creditor” is less meaningful as applied to the local branch of a multinational lender than to a truly local bank. Today it remains both possible and sensible to align entities (both debtors and creditors) with particular jurisdictions. As international commerce becomes increasingly denationalized, however, it may become less appropriate to use jurisdictional concepts to order commercial relationships. This is true not only because the identification of the appropriate jurisdiction will be made more difficult, but because juris-

250 The notion of reciprocity, for instance, which played a substantial role in Story’s conflicts theory, is no longer a major factor in bankruptcy cases. More importantly, courts applying Section 304 have evidenced a growing disinclination toward reflexive protection of U.S. citizens, choosing instead approaches that for the most part favor foreign bankruptcy proceedings. See In re Axona, 88 B.R. 597, 611 (Bankr. S.D.N.Y. 1988) (discussing the “modern need for flexibility in the construction of comity”).

251 In other words, the choice of law depends not on the substance of competing laws, but on locating the geographic jurisdiction to which the dispute should be assigned. See text accompanying supra notes 91–92.

252 But see LoPucki, supra note 3, at 723–28 (arguing that a universalist approach does not clearly resolve the issue of jurisdiction). The practical difficulties that arise even today in assigning transnational corporate actors to particular jurisdictions engender much of the criticism of fixed jurisdictional rules. See id.
diction-based inquiries are not compatible with legal systems that trade on denationalized norms rather than sovereign authority. Should we, then, continue to anchor our analysis of international insolvencies in considerations of place?

An alternative would be to depart from the substance-neutral, territory-oriented approach common to both multilateralism and unilateralism—and to both universality and territoriality—in favor of a substantive approach. In some respects, that is what the extraregulatory approach adopted in Maxwell and similar cases seeks to do: It attempts to identify and synthesize competing rules in order to arrive at the best outcome for the parties involved. On a larger scale, perhaps, the development of a harmonized or supranational bankruptcy law might be possible. The idea of extricating international bankruptcy law from the web of sovereignty-based concerns in which it is currently entangled is an attractive one, and is consistent with the larger shift in the area of private international law away from sovereignty and toward denationalized systems of law. As the demands of participants in international business play an ever-greater role in shaping international business law, the territorial-based orientation of multilateralism may therefore cause that approach to fall out of favor.

The system discussed in this Article, then, might be simply a way station on the road to harmonization. But that road is a long one. The harmonization of international bankruptcy law, which is dependent on the prior harmonization of underlying business and commercial law, is hardly imminent. In the meantime, I argue against abandoning our long-standing commitment to universality of treatment in cross-border bankruptcies. Using traditional choice-of-law analysis to illuminate what is, after all, a choice-of-law process can instead render our existing system a better version of modified universality.

253 See MULTISTATE JUSTICE, supra note 82, at 160–61 (discussing private international law as a discipline increasingly shaped by "the exigencies of international trade, rather than sovereignty").

254 See supra Part II.B.2.b for a discussion of these cases.

255 See Flaschen & Silverman, supra note 70, at 630–31.

256 One commentator has indeed suggested that the ad-hoc cooperation evident in the Maxwell line of cases will directly influence the development of a harmonized insolvency regime. Thomas M. Gaa, Harmonization of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?, 27 INT’L LAW: 881, 902 (1993).

257 See MULTISTATE JUSTICE, supra note 82, at 160.

258 Particularly in favor of territoriality, which, like universality, is a sovereignty-based system.