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INTERNATIONAL PRESCRIPTIVE JURISDICTION AND AMERICAN CONFLICT OF LAWS

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[*] B.A., J.D. Harvard University. Professor of Law, Oklahoma City University School of Law. I may be reached at elaity@okcu.edu. I am thankful for the comments on earlier drafts of this article by Lea Brilmayer, Patrick Borchers, Anthony Colangelo, Jack Goldsmith, Wendy Perdue, Kermit Roosevelt, and Symeon Symeonides. My background in international tax law and international business transactions no doubt affects my views on American conflict of laws. I am conscious of the fact that I view individual legal rules as part of a package of rules that address a given economic or social problem. I am also conscious of the fact that I view law through the lens of global economic development.

ABSTRACT

Today's conflicts law embraces two approaches: an early 20th century approach that chooses between states based on their territory and a mid-century approach that chooses between individual legal rules based on posited governmental interests. Although both approaches have merit, neither is fully conscious of lawmakers' comprehensive plans for economic and social development and the related matters of institutional competence. As a result, both approaches may lead to unsatisfactory choices of law to govern regulated contracts and relationships.

To produce more satisfying choices of law for regulated contracts and relationships, this Article proposes a third approach to conflicts law. The approach draws on the public international law of prescriptive jurisdiction and on the management of complex organizations. The Article refers to its proposed third approach as the prescriptive framework.

The international law of prescriptive jurisdiction allocates law-making power among nations, and, by doing so, establishes spheres of decision-making for economic and social development. The spheres frequently overlap, with multiple nations having discretion to make decisions about development, to select suitable institutions, and to enact law accordingly. Nations deal with the overlaps and conflicts between their plans of development through deference to each other (frequently expressed as prescriptive comity) and through negotiated settlements embodied in international agreements.

This Article brings the perspective of international prescriptive jurisdiction into American conflicts law. Within the prescriptive framework proposed by this Article, American conflict-of-law rules also allocate law-making power among sovereigns, albeit among the sub-national sovereigns of a federal state. The framework recognizes that American states have their own spheres of decision-making for economic and social development, along with discretion to make decisions about development, to select suitable institutions, and to enact law accordingly. Those subnational spheres also overlap, and the prescriptive framework gives structure to the practice of deference to another lawmaker's discretion.

The Article also draws on the institutional analysis of decision-making within complex organizations. An institutional analysis helps us understand states' comparative competence and legitimacy in lawmaking. An institutional analysis allows us to identify the best decision-makers for economic and social development through the benefits of delegation, standards, and limitations to reduce the abuse of decision-making discretion, and the value of social norms to address problems in collective action. Hence, an institutional analysis gives structure to prescriptive comity among the American states. We are then able to reframe the American law of conflict of laws as structured prescriptive comity in the management of state economies.

I. INTRODUCTION

Today's conflicts law embraces two approaches: an early 20th century approach that chooses between states based on their territory and a mid-century approach that chooses between individual legal rules based on posited governmental interests. Although both approaches have merit, neither is fully conscious of lawmakers' comprehensive plans for economic and social development and the related matters of institutional competence. As a result, both approaches may lead to unsatisfactory choices of law to govern regulated contracts and relationships.

To produce more satisfying choices of law for regulated contracts and relationships, this Article proposes a third approach to conflicts law. This approach draws on the public international law of prescriptive jurisdiction and on the management of complex organizations. This Article refers to this proposed third approach as the prescriptive framework.

The international law of prescriptive jurisdiction allocates law-making power among nations and, by doing so, establishes spheres of decision-making for economic and social development. The spheres frequently overlap, with multiple nations having the discretion to make decisions about development, select suitable institutions, and enact law accordingly. Nations deal with the overlaps and conflicts between their plans of development through deference to each other (frequently expressed as prescriptive comity) and through negotiated settlements embodied in international agreements.

This Article brings the perspective of international prescriptive jurisdiction into American conflicts law.[1] Within the prescriptive framework proposed by this Article, American conflict-of-law rules also allocate law-making power among sovereigns, albeit among the sub-national sovereigns of a federal state.[2] The framework recognizes that American states have their

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[1] This is a comparative study. The American law of conflict of laws had its origin in the law of nations, which included public international law, private international law (that is, the conflict of laws), maritime law, and the law merchant. The components of the law of nations later separated and developed independently. Re-connecting them through comparative study is a fruitful way to avoid blind spots and to recognize unasked questions. A brief history of private international law is given in PETER HAY ET AL., CONFLICT of LAWS 5-18 (5th ed. 2010).

[2] Two scholars have noted the American states' prescriptive jurisdiction as a foundation for the conflict of laws. Katherine Florey concludes her study of the American legal history of the concept of territoriality by stating that "recognizing the evolution of territoriality's meaning allows conflicts principles to be directed where they are most needed – to the demands of a well-functioning system of prescriptive jurisdiction." Katherine Florey, *Resituating Territoriality*, 27 GEO. MASON L. REV. 141, 203 (2019). In her study, Professor Florey traces the migration of the concept of territoriality in American law from enforcement jurisdiction, that is, from a state's power to coerce compliance with law, to prescriptive jurisdiction as an ordering principle for conflict of laws. *Id*. at 145, 201-03. Anthony Colangelo also connects conflict of laws with American states' prescriptive

own spheres of decision-making for economic and social development, along with discretion to make decisions about development, to select suitable institutions, and to enact law accordingly. Those subnational spheres also overlap, and the prescriptive framework gives structure to the practice of deference to another lawmaker's discretion.

The Article also draws on the institutional analysis of decision-making within complex organizations. An institutional analysis helps us understand states' comparative competence and legitimacy in lawmaking. An institutional analysis allows us to identify the best decision-makers for economic and social development through the benefits of delegation, standards and limitations to reduce the abuse of decision-making discretion, and the value of social norms to address problems in collective action. Hence, an institutional analysis gives structure to prescriptive comity among the American states. We are then able to reframe the American law of conflict of laws as structured prescriptive comity in the management of state economies.

The Article proceeds as follows. Part II presents the aspects of the international law of prescriptive jurisdiction needed for the study. International prescriptive jurisdiction allocates law-making power among nations. Nations deal with the many conflicts and overlaps in their prescriptive jurisdiction through prescriptive comity, that is, through the creation of domestic legal doctrines and practices and through international agreement.

Part III deals with the role of prescriptive jurisdiction and comity in the management of economies. It presents an institutional approach to the management of an economy and stresses the institutional value of national sovereignty, the value of standards and limitations to reduce the abuse of decision-making discretion, and the value of the international equivalent of new social norms to diminish problems in collective action in the management of economies. The discussion recasts prescriptive jurisdiction and comity in institutional terms.

Part IV takes the institutional approach to prescriptive jurisdiction into the realm of American conflict-of-law rules. The first section considers the use of customary international law (of which international prescriptive jurisdiction is a species) in common-law courts. The common-law context affects the use of customary international law, and judicial doctrines about the interpretation of statutes are a vehicle for prescriptive comity. This part also considers the partial limits set by the U.S. Constitution on the exercise of prescriptive jurisdiction by individual states. Furthermore, the Constitution's supremacy clause works as an incomplete choice-of-law rule.

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jurisdiction. Professor Colangelo states that "there does not seem to be much confusion that choice-of-law analysis chooses which state's prescriptive jurisdiction governs a dispute." Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1347 (2014), *quoted in* Katherine Florey, *Resituating Territoriality*, *supra*, at 164 n.159.

Part IV then considers how U.S. courts perceive the second component of the law of nations that is of interest to this study: private international law, better known in American courts as the law of conflict of laws. This part identifies in chronological order several of the pitfalls in the development of the American law of conflict of laws to avoid repeating those shortcomings in a prescriptive framework. It is important to avoid fusillading pejorative terms that obscure the merit of several stages in the common law development of American private international law.

Part IV then presents a prescriptive framework for American conflict of laws based on an institutional approach. It applies and illustrates the framework through a case study in regulated contracts.

Part V presents the study's conclusions and suggests further research for a more complete institutional approach to a law of conflict of laws in service to comprehensive plans of economic and social development.

II. INTERNATIONAL PRESCRIPTIVE JURISDICTION

Customary international law generally governs prescriptive jurisdiction.[3] There are no comprehensive treaties that allocate prescriptive jurisdiction among nations. Bilateral tax treaties are a notable exception to customary international law: they provide detailed allocations of prescriptive jurisdiction between their two signatories.

The customary international law of prescriptive jurisdiction allocates law-making power among nations. This allocation is by no means exclusive to specific nations: the law-making power of nations easily overlaps and conflicts.

A. ALLOCATIONS OF LAW-MAKING POWER

Customary international law authorizes nations to create laws by nations and only prohibits law-making through the absence of authorization. Sovereigns shape the rules of customary international law, including prescriptive jurisdiction, through custom, which gives customary international law a distinctive status as law; in addition, the rules are dynamic as sovereign custom gels and then dissipates. Furthermore, non-state actors may project national law throughout the global economy, in effect extending a nation's prescriptive jurisdiction beyond what customary international law authorizes. Within federal nations, the allocations of prescriptive jurisdiction also apply at the subnational level, subject to the nation's constitution and federal law. Once again, non-state actors may project a subnational unit's

[3] RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S.: SELECTED TOPICS IN TREATIES, JURISDICTION, AND SOVEREIGN IMMUNITY § 407 cmt. b (AM. L. INST. 2018). [hereinafter RESTATEMENT (FOURTH) OF FOREIGN RELS. L.].

lawmaking across a national economy. All of these matters are addressed below.

1. The Relevant Bases of Prescriptive Jurisdiction for the Management of an Economy.

Under the international law of prescriptive jurisdiction, a nation's law-making power rests on multiple bases. Although a nation's management of its economy (and the regulation of its economic and social development more generally) might involve any of these bases, four will figure prominently. First, a nation may regulate activity that occurs in whole or in part on its territory.[4] Second, a nation may regulate activity that occurs anywhere in the world that has a substantial effect within its territory.[5] Third, a nation may regulate activity anywhere in the world that its own nationals and residents conduct.[6] Finally, a nation may enact laws regulating the internal and other affairs of its companies, vessels, and aircraft.[7] Under customary international law, the bases for prescriptive jurisdiction describe a genuine connection between the nation and the subject matter of its law.[8] Although the bases are accepted as the standard frame of reference, there is no consensus on secondary principles of jurisdiction.[9]

Customary international law has no consensus on whether the bases for prescriptive jurisdiction apply to private law or only to public law.[10] The Fourth Restatement of Foreign Relations Law argues that they should.[11] Even within public law, customary international law has no consensus on whether the bases for prescriptive jurisdiction apply to civil law or only to criminal law.[12]

2. The Dynamic Nature of Customary International Law.

The oldest bases for a nation's exercise of prescriptive jurisdiction are territory and active personality (that is, the activity of nationals and residents). The other bases were accepted later as part of customary international law. In

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[4] *Id.* § 408.
[5] *Id.* § 409.
[6] *Id.* § 410.
[7] *Id.* § 407 cmt. c (vessels and aircraft); § 410 cmt. b (companies).
[8] *Id.* § 407. The reasonableness of exercising prescriptive jurisdiction is sometimes stated as a separate requirement; however, a genuine connection makes the exercise reasonable. *See id*. Reporters' Note 3.
[9] *See* Cedric Ryngaert, *International Jurisdiction Law*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY IN INTERNATIONAL LAW (Austen Parrish & Cedric Ryngaert eds., 2023) [*hereinafter* RESEARCH HANDBOOK ON EXTRATERRITORIALITY] (a compilation of papers presented at a webinar on extraterritoriality at the University of Indiana School of Law in January, 2022).
[10] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 407, Reporters' Note 5 (AM. L. INST. 2018).
[11] *Id.* § 407 cmt. f and Reporters' Note 5.
[12] *Id.* § 407 cmt. f.

the future, customary international law may recognize additional bases for a nation's exercise of prescriptive jurisdiction.[13]

The process through which nations make customary international law is unique. The same process that creates norms of customary international law also modifies, overrides, and discards those norms. The creation of a norm requires the proponent to build a consensus of support among other sovereigns. A consensus may not be possible, or it may be possible only on a regional level or for only a few instances. An existing consensus may decay as sovereigns lend their support to other norms. Furthermore, sovereigns use normative material that lacks both a clear consensus of support and a clear consensus of opposition.[14]

That is the nature of a legal process conducted by sovereigns. Among sovereigns, there is no authoritative decision-maker who can bestow permanence on a norm. Nor is there an authoritative lawmaker who can establish the text of a norm (recall that treaty-making is a separate process). Such a legal process does not allow for secondary rules.[15] Customary international law lacks some of the attributes of positive law.

The nature of customary international law, as law, depends on how sovereigns use customary law to justify claims to have authority to govern, that is, to be the actor with the authority to make a decision that may affect other sovereigns. If sovereigns dispute the conclusions drawn from data, they have a policy dispute. If, however, they dispute who has the authority to make the decision based on the data, the sovereigns have a legal dispute.[16]

3. Non-State Actors and the Projection of Prescriptive Jurisdiction.

Non-state actors may transmit a nation's prescriptive jurisdiction to other areas of the global economy.[17] For example, a nation's regulation of a

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[13] *Id.* § 407 cmt. c.

[14] Monica Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487, 1511 (2020) ("Many normative positions that are presented in the [customary international law (CIL)] process are neither collectively endorsed . . . nor summarily rejected. They remain in circulation for extended periods with only tepid or contingent support and real competition. These positions have enough support to function as CIL in some settings . . . .").

[15] *See id.* at 1506.

[16] *See id*. at 1493.

[17] Non-state actors may also transmit a nation's enforcement jurisdiction. One nation's enforcement of its law against a multinational group may lead the group to press for a global settlement with all nations in which it does a significant amount of business. *See* Branislav Hock, *Extraterritoriality, Economic and Crime*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10. Those settlements may lead to the coordination of law enforcement with the private sector, as the multinational business engages in self-policing. *See id*. The incentives for US prosecutors may lead them to favor deferred enforcement agreements. *See* Ellen Gutterman, *Extraterritoriality in the Global Governance of Corruption: Legal and Political Perspectives*, *in* RESEARCH HANDBOOK ON

multinational group's parent company may lead the company to adopt policies for the entire group and insist on compliance by all group members. A non-state actor may also extend a nation's prescriptive jurisdiction through its contracts with entities outside of its group as it responds to regulation or the threat of regulation. For example, an internet service provider may include binding provisions within its terms and conditions of service to comply with privacy regulations.[18] As another example, a consumer products company might require its vendors to comply with a code it has designed to avoid adverse publicity and possible future regulation caused by consumer sentiment. In each example, the non-state actor's contracts regulate the behavior of entities beyond the members of the actor's own corporate family. Apart from the governmental regulation of a multinational group, the group's terms and conditions for its suppliers or customers are a form of global non-state regulation if the group dominates its sector of the economy.[19]

4. Prescriptive Jurisdiction of Subnational States.

Within national economies, multiple nodes of economic activity and multiple centers of subnational regulation can exist. Subnational states exercise prescriptive jurisdiction as they make law, with their lawmaking jurisdiction resting on the bases recognized by customary international law and as limited by the nation's constitution and federal law. For American conflict-of-law rules regarding the management of economies, the most useful bases of prescriptive jurisdiction will again be territory, effects, active personality (that is, the activities of nationals and residents), and the internal affairs of companies. The equivalent to nationality at the level of an American state is domicile.[20] The United States constitution and other federal law limit the ability of individual U.S. states to project their law-making power beyond their territories, domiciliaries, and the internal affairs of their companies.[21] As

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EXTRATERRITORIALITY, *supra* note 10. Deferred enforcement agreements secure compliance with the home nation's law by the group, without the expense of a trial. A multinational group must then engage in self-regulation to avoid violations of a deferred enforcement agreement. *See id*.

[18] The European Union's General Data Privacy Regulation is one example of a regulation having indirect global effect through the terms and conditions of internet service providers. *See also* Dan Jerker B. Svantesson, *Global Speech Regulation*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10 Noting that Facebook's terms and conditions regulate the behavior of 2.8 billion people, with court orders affecting Facebook's terms and conditions.

[19] For a discussion of non-state based regulatory regimes, see Peer Zumbansen, *Law's New Cartographies*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10.

[20] In fact, domicile has substituted from time to time for nationality as the foundation for personal law under prescriptive jurisdiction. *See* HAY ET AL., CONFLICT OF LAWS, *supra* note 2, at § 2.4, notes 3 and 4.

[21] The foreign commerce clause of the U.S. federal constitution reserves extraterritorial regulation to the federal government. In contrast, in Australia both the federal government

on the national level, non-state actors may, through their managerial policies, project a U.S. state's legislation throughout the country. For example, a company may decide to conduct its nationwide operations in accordance with the strictest state regulatory law rather than bear the expense and risk of separate compliance efforts in every state.

B. OVERLAPS AND CONFLICTS IN PRESCRIPTIVE JURISDICTION

Customary international law has no rules of priority among the bases for prescriptive jurisdiction.[22] Furthermore, it has no rules of priority among nations' overlapping exercises of prescriptive jurisdiction.[23] Hence, the lawmaking power of nations frequently overlaps. A given activity may well be regulated by more than one nation as actors conduct their affairs across national boundaries. In response to such overlaps, nations may require actors to comply with both sets of laws.[24]

1. Responses to Potential Overlaps.

In cases of repeated overlaps, nations may formally delineate their respective lawmaking through treaties to reduce the burden of compliance.[25] Short of a treaty, nations may also engage in mitigation strategies. In the case of regulation, mitigation strategies include the coordination of national financial regulation by international bodies, deference by regulators to other regulators after a finding of equivalence (the European Union term) or an acceptance of substituted compliance (the U.S. term), and declining to enforce regulation in specific scenarios, *e.g.*, no-action letters issued by the U.S. Securities and Exchange Commission.[26]

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and the Australian states have extraterritorial competence. Danielle Ireland-Piper, *Extraterritoriality in the Commonwealth*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10.

[22] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 407 cmt. d and Reporter's Note 3 (AM. L. INST. 2018).

[23] *Id*. In particular, a nation does not need to defer to another nation with a stronger interest. *Id.* at § 407, Reporter's Note 3.

[24] For an example of such an approach, see Hartford Fire Insurance Co. v. California, 509 U.S. 764, 798 (1993) (defendants could simultaneously comply with both American and British law without violating either one).

[25] The approximately 3000 bilateral tax treaties are examples of such delineation. In a bilateral tax treaty, each nation agrees to limit the effect of its tax legislation, leaving room for the operation of the other nation's legislation. Treaty rules allocate domiciliaries between the two nations, with tie-breaking rules settling any overlaps. *See also* Matthew Garrod, *Expansion of Treaty-Based Exterritorial Criminal Jurisdiction*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10.

[26] *See* Matthias Lehmann, *Extraterritoriality in Financial Law*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10.

Furthermore, nations may handle overlaps in their lawmaking power through international prescriptive comity, that is, by nations voluntarily exercising less than their full prescriptive jurisdiction given their assessment of the interests of other nations.[27] In practice, economic and social development competition between nations constrains their exercise of lawmaking power, leading to less extensive use of prescriptive jurisdiction. Insufficient market power and political power are additional non-legal constraints. For example, the location of major financial centers determines the nations that can effectively regulate financial transactions globally.

2. Limitations on Lawmaking or its Effectiveness.

National law may restrict a nation's exercise of its international prescriptive jurisdiction. For example, a nation's constitution may limit its exercise of lawmaking power. Constitutions may also constrain subnational sovereigns' resort to some of the international bases of prescriptive jurisdiction.

In addition, international and domestic law limit the effectiveness of a nation's lawmaking. The international law of enforcement jurisdiction limits a nation's unilateral enforcement activity to its territory.[28] The international and domestic limitations on the adjudicative jurisdiction of a nation's courts also constrain the effect of its lawmaking.[29] For example, a nation's constitution may bar the trial of defendants in absentia.

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[27] RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW, *supra* note 4, at § 401 cmt. a.

[28] *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW., *supra* note 4, at § 432. A nation may expand its enforcement jurisdiction through extradition treaties. Those treaties may assist a nation to deal with paramilitary forces within its borders by extraditing captured paramilitaries to another nation. *See* Alejandro Chehtman, *Extraterritoriality and Latin America*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10. Where no extradition treaty exists, Latin American nations may collaborate in the prosecution of a criminal defendant. *Id*. The United States has expanded its assistance in discovery to the courts of other nations, even as it has limited its personal jurisdiction over defendants in transnational cases. Yanbai Andrea Wang, *Judicial Extraterritoriality*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10. Several scholars have argued that the enforcement jurisdiction exercised by a nation should be relational rather than territorial. *See, e.g.*, Sara L. Seck, *Emerging Issues and Practices*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10. Chimene Keitner has argued for a relational model of the rights of refugees under international law rather than a territorial model. Chimene Keitner, *The Extraterritorial Rights of Refugees*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10.

[29] The Fourth Restatement of Foreign Relations Law takes the position that customary international law sets no limits on a nation's adjudicative jurisdiction, other than the requirement to respect other nations' sovereign immunity. RESTATEMENT (FOURTH) OF FOREIGN RELS. L., *supra* note 4, at § 422, Reporters' Note 1. In contrast, the Third Restatement did find such limits. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Introductory Note to Chapter Two; § 421(1), Reporters' Note 1 (AM. L. INST. 1987); RESTATEMENT (FOURTH) OF FOREIGN RELS. L., *supra* note 4, at § 422,

3. International Conflict of Laws.

Customary international law does not provide rules for conflicts of law; however, nations may establish international conflict-of-law rules by treaty or other supra-national law-making. Within the European Union, conflicts of law are governed by a pair of legally binding, international regulations.[30]

Without treaties, nations must formulate unilateral approaches to international conflicts of law. One such approach is the unilateral adoption of legal doctrine that gives priority, in specified circumstances, to another sovereign's law-making.[31] Another unilateral approach is adjudicative

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Reporters' Note 11. The enforceability of US court judgments by other nations is of concern to the US Supreme Court, Daimler AG v. Bauman, 571 U.S. 117 (2014) (broad assertions of general personal jurisdiction may interfere with the negotiation of treaties on the recognition of judgments), so international practice in adjudicative jurisdiction may be a consideration in US courts from time to time. On extraterritoriality and personal jurisdiction in US courts, see Cassandra Burke Robertson, *The United States Experience*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10. For one scholar, if the subject matter is global and global law addresses the problem, then a domestic court with personal jurisdiction over the defendant should address the global problem and apply global law and not attempt to carve out a domestic portion of the problem. Ralf Michaels, *Domestic Courts, Global Challenges*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10.

[30] *See* Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), [2008] OJ L 177/6; Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), [2007] OJ L 199/40.

[31] For example, the United States Supreme Court has adopted the Act of State Doctrine. When it applies, it directs courts in the United States to use a foreign sovereign's formal act as their rule of decision. *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L., *supra* note 4, at § 441. An act of state doctrine is a feature of several common law systems. Danielle Ireland-Piper, *Extraterritoriality in Commonwealth Nations*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10 (discussing Australia, New Zealand, and the United Kingdom). A second example of U.S. courts indirectly protecting the interests of a foreign nation lies with their reluctance to decide invalidity claims of foreign intellectual property. *See* Timothy Holbrook, *Intellectual Property*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10. In contrast, US courts take an expansive view of the geographic scope of intellectual property rights when it comes to determinations of infringement, rather than invalidity. *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L., *supra* note 4, at § 441. Another US unilateral approach to conflicts of enacted law is the foreign sovereign compulsion doctrine, which, when it applies, reduces or eliminates U.S. penalties for compliance with foreign law. *See id*. at § 442. The US judicial presumption against the extraterritoriality of U.S. statutes has the effect of making space for another sovereign's exercise of its prescriptive jurisdiction, even if the other sovereign has not done so. Compare the US judicial doctrine that a US administrative agency may determine the geographic scope of a federal statute if the statute is silent on the matter and the agency's interpretation is reasonable. *See* William S. Dodge, *Extraterritoriality in Statutes and Regulations*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10. A prescribing nation's constitution may contain limitations on the nation's law-making as it

comity, a judicial practice that dismisses individual cases in favor of another nation's courts.[32] The enactment of a blocking statute in response to another nation's exercise of prescriptive jurisdiction is a third unilateral response.[33] Blocking statutes prohibit the blocking nation's nationals and entities from complying with another nation's extraterritorial law.

Blocking statutes may be accompanied by ad hoc deference to another nation's exercise of prescriptive jurisdiction when the foreign law benefits the first state. The first state may then provide an administrative exception to enforcing its blocking regulation. For example, a U.S. extraterritorial regulation that protects the interests of the European Union may lead the Union to decline to enforce its blocking regulation.[34]

A nation formulating an approach to the international conflict of laws must determine the extraterritorial effect, if any, to accord to the law of another sovereign.[35] It must also determine the circumstances under which it will apply another sovereign's extraterritorial law.[36] A nation might take the approach of dismissing a case if none of its own laws apply, despite the existence of extraterritorial foreign law that could be applied by the dismissing nation.

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affects the rights of non-nationals outside the prescribing nation's territory. For example, the United States constitution's due process (fair notice) requirement applies to non-nationals outside U.S. territory. *See* Anthony Colangelo, *Criminal Extraterritoriality*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10. A nation that defers to another nation's prescriptive jurisdiction may condition its deference on action by the second nation. In the absence of action, the first state may then exercise its own prescriptive jurisdiction. This conditional deference figures in Cedric Ryngaert's theory of positive sovereignty. *See* CEDRIC RYNGAERT, EXTRATERRITORIALITY IN INTERNATIONAL LAW.

[32] Samuel Estreicher & Thomas H. Lee, *In Defense of International Comity*, 93 S. CAL. L. REV. 169, 178 (2020). Estreicher and Lee distinguish international prescriptive comity from international adjudicative comity. Prescriptive comity is at work when a nation selects another sovereign's law to apply to a case. Adjudicative comity is at work when a court declines to take a case, regardless of the choice of law made through prescriptive comity.

[33] Both the European Union and China have enacted blocking statutes in the face of U.S. global regulation. *See* Regis Bismuth, *The European Experience of Extraterritoriality*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10; Mari Takeuchi, *The Asian Experience*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10.

[34] *See* Bismuth, *The European Experience of Extraterritoriality*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 34.

[35] The history of private international law shows a continuing vacillation about whether, when, and why a nation might recognize the extraterritorial effect of another nation's law. *See* PETER HAY ET AL., CONFLICT of LAWS, *supra* note 2, at §§ 2.4 (when, but not why), 2.5 (why, but not when).

[36] A nation might restrict the application of another nation's law (i) only to law that is personal to the other nation's domiciliaries, (ii) only if the forum has no applicable law of its own, or (iii) only if the foreign law is consistent with the forum's essential public policy.

4. Two Expressions of Prescriptive Comity.

Prescriptive comity may lead nations to develop national law that addresses concurrent prescriptive jurisdiction.[37] In one expression of prescriptive comity, a nation may devise rules of statutory interpretation to determine the geographic scope of a law. In another expression, a nation may adopt conflict-of-law rules to choose among the laws with overlapping scope. Either exercise of prescriptive comity produces results binding on courts.

5. Equal Sovereignty of Nations as an Expression of the Equal Rights of Individuals.

The lack of a supranational law sorting out the overlaps and conflicts of nations' prescriptive jurisdiction is consistent with the status of nations as free and equal sovereigns. The equal sovereignty of nations under international law may be traced back to Hugo Grotius, who wrote during the closing years of the Thirty Years War in Europe.[38] His reasoning provided a theoretical foundation for nations to be independent of the authority of the Roman Catholic Church and the Holy Roman Emperor and for religious pluralism among nations.[39]

Grotius began his analysis with the equal human dignity advocated by the Stoics and Cicero.[40] For the Stoics, humans had equal worth because of their ability to make ethical distinctions and form ethical judgments.[41] Grotius included the social nature of humans and the group development of rules of social conduct in the Stoics' analysis.[42] Thus, under Grotius's approach, all individuals have equal worth because of their ability to develop, through deliberation, rules to govern their social life.[43] Those rules replace violence, theft, and deception as the means of governing social life.[44]

Individuals create those rules within their own nations.[45] Nations embody their citizens' lawmaking, including over matters such as religious beliefs that require pluralism among nations.[46] Nations, therefore, ought to be sovereign; no outside authority should have the power to overturn the

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[37] RESTATEMENT (FOURTH) OF FOREIGN RELS. L., *supra* note 4, § 407 cmt. e.
[38] MARTHA C. NUSSBAUM, THE COSMOPOLITAN TRADITION: A NOTABLE BUT FLAWED IDEA 100-101 (2019) [hereinafter NUSSBAUM, THE COSMOPOLITAN TRADITION].
[39] *Id*. at 101.
[40] *Id*. at 99.
[41] *Id*. at 64, 68-69; MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 129 (2011) [hereinafter NUSSBAUM, CREATING CAPABILITIES]. The Stoics built on the idea of equal respect by then creating political principles – republican institutions accountable to the people – that saw all people as ends and not as means or superfluous objects to be moved out of the way. *Id.* at 130.
[42] *See* NUSSBAUM, THE COSMOPOLITAN TRADITION, *supra* note 39, at 110-111.
[43] *Id*.
[44] *Id*.
[45] *Id*. at 104.
[46] *Id*. at 104, 106.

lawmaking of a nation's people.[47] The sovereignty of nations expresses the autonomy of their people through lawmaking.[48] An ideal international law cannot replace nations because only nations are accountable to the governed, and only nations can express the pluralism required in languages, constitutions, and non-universal moral values.[49]

6. Equal Rights of Individuals and the Exercise of Prescriptive Jurisdiction.

Whether a nation's laws truly embody its people's lawmaking depends on the peoples' political rights. The protection of individuals' equal political rights may limit a nation's exercise of its prescriptive jurisdiction. For example, a nation's constitution may channel its lawmaking process to protect the equality of individuals. In addition, the political rights of non-nationals may oppose the projection of a nation's law-making beyond its territory and nationals.[50] The lawmaking nation is an outside authority for non-nationals. To impose laws on non-nationals is a violation of the sovereignty of another nation, that is, a failure to respect the non-nationals' lawmaking within their own nation.

Customary international law requires a genuine connection between a nation and an individual for the nation to have prescriptive jurisdiction over the individual.[51] An individual's international political rights and obligations help determine the genuineness of the connection between a prescribing nation and the individual.[52] However, establishing an international foundation for the political rights and obligations of individuals is a task fraught with difficulty, especially in the case of non-nationals. At the international level, political rights have a solid basis in positive law only to the extent that treaties concerning political rights are enforceable against the sovereign in its own courts. Apart from positive law, political rights at the international level might be justified either on the basis of core equality of individuals or on the basis of the beneficial consequences of posited rights.

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[47] *Id*. at 101, 104; *see also*, JEAN BODIN, LES SIX LIVRES DE LA REPUBLIQUE (1576), *cited in* PETER HAY ET AL., CONFLICT OF LAWS, at § 2.4 (a supplementary source describing the theory of the "unrestricted power to make law"), *supra* at § 2.4. Hugo Grotius' De Iure Belli ac Pacis (On the Law of War and Peace) appeared in 1625.

[48] NUSSBAUM, THE COSMOPOLITAN TRADITION, *supra* note 39, at 100, 101-103.

[49] *Id*. at 136-137, 139.

[50] *See* LEA BRILMAYER, CONFLICT OF LAWS § 5.4 (2d ed. 1995) (a Rawlsian political rights model resting on fairness in political philosophy, to critique legal realism as a form of utilitarianism).

[51] *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L., *supra* note 4, at § 407.

[52] Lea Brilmayer has made this point in the context of subnational lawmaking that includes nonresidents within its scope. *See* BRILMAYER, CONFLICT OF LAWS, *supra* note 51, at ch. 5 (a Rawlsian political rights model resting on fairness in political philosophy, to critique legal realism as a form of utilitarianism).

7. Decisions to Exercise Prescriptive Comity.

When might we expect a sovereign to defer to a law enacted by another sovereign? The first sovereign's respect for the legitimate interest of the second sovereign is sometimes given as a reason for prescriptive comity.[53] However, the self-interest of the first nation may be a stronger and more frequent reason for deference. The law of the second sovereign may be in the immediate self-interest of the first sovereign. Anticipated reciprocity by the second sovereign is another reason for deference by the first sovereign out of its self-interest. Hence, game theory should be useful for understanding the reciprocal deference between sovereigns.[54]

Paul Stephan uses rational choice theory more generally.[55] Stephan hypothesizes that a rational sovereign will cooperate with other sovereigns in projects that increase the well-being of its people.[56] In particular, such cooperation could be carried out by reciprocating deference to another sovereign's exercises of prescriptive jurisdiction.[57] Stephan also hypothesizes that a sovereign will defer to the lawmaking of others if reciprocity in deference is a frequently recurring possibility.[58] However, a rational sovereign will vindicate its own vital interests at the expense of such reciprocity when the cost of failing to uphold a vital interest outweighs the likely benefits of reciprocity.[59] Of course, it is difficult to identify and measure the well-being of a people, the cost of failing to uphold a vital interest, and the likely benefits of reciprocity. Therefore, the cost-benefit analysis might remain only a metaphor for an educated guess about the consequences of a decision-maker's options.

Stephan is reluctant to permit normative considerations to override a sovereign's vindication of a vital interest, although he does see systemic values overriding vital interests.[60] Systemic values can be normative themselves, however. The normative preference for a pluralistic society that permits multiple comprehensive doctrines of the good and a nation's partial

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[53] *See* Estreicher & Lee, supra note 33 at 173, 175 (defining prescriptive comity as the respect that one nation should pay to the governmental interests of other nations, with respect to substantive law); *see also* RESTATEMENT (FOURTH) OF FOREIGN RELS. L., *supra* note 4, at § 402(2) ("In exercising jurisdiction to prescribe, the United States takes account of the legitimate interests of other nations as a matter of prescriptive comity"), and Reporters' Note 3 ("In exercising jurisdiction to prescribe, the United States takes account of the legitimate sovereign interests of other nations. The Supreme Court has referred to this practice as 'prescriptive comity.'").

[54] BRILMAYER, *supra* note 51, at § 4.2.

[55] Paul B. Stephan, *Competing Sovereignty and Laws' Domains*, 45 PEPPERDINE L. REV. 239 (2018).

[56] *Id*. at 20.

[57] *Id*. at 2, 22 (fourth prediction).

[58] *Id*. at 2.

[59] *Id*. at 2, 23.

[60] *See id*. at 4, 59.

definition of the good (of the wellbeing of its people or of the full potential of a person) within the overlap of those comprehensive doctrines is a systemic value that may override local vital interests for purposes of conflict-of-law rules.

In addition, the work of Elinor Ostrom on the voluntary development and maintenance of social norms to govern problems in collective action helps us understand reciprocal deference. The creation of a social norm is possible when the norm is in the self-interest of the actors, and each actor has sufficient information about the activities of the other actors and can monitor their compliance with the norm.[61] Reciprocal deference is analogous to the social norms that groups of individuals create to address their collective action problems. Ostrom's work has broader implications. Because customary international law lacks the attributes of positive law, it, too, is analogous to the social norms that groups of individuals create to govern their collective action problems.

8. Overlaps and Conflicts in Subnational Prescriptive Jurisdiction.

The challenges faced by nations in their overlapping and conflicting prescriptive jurisdiction are replicated at the subnational level in nations that are organized as federations. The subnational states are of equal sovereignty and, without more, would have to rely on prescriptive comity and custom to coordinate their lawmaking. However, subnational states have the benefit of the additional coordinating mechanism provided by national law, either in the form of the nation's federal constitution or in the form of laws enacted by the federal legislature.

A federal constitution must allocate general lawmaking power among the subnational states and provide a way to settle disputes about the allocation, with binding effect. An important tool in fashioning the allocation is the rights of individuals.[62] Individual rights may limit the prescriptive jurisdiction of the state in which the individual resides; those rights may also limit the prescriptive jurisdiction of competing states in the federation.

A federal nation faces several challenges in organizing the prescriptive jurisdiction of its states. First, a federation must define the threshold for a state to prescribe regulatory law governing activities outside its territory. The threshold helps to delineate a set of state economies within the nation's economy. Part III.C of this Article addresses the challenges that affect the definition and management of the economies of a federation's subnational states.

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[61] ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COMMON ACTION 94-100 (Cambridge University Press ed., 1990).

[62] *See* BRILMAYER, *supra* note 51, at chapter 5 (a Rawlsian political rights model resting on fairness in political philosophy, to critique legal realism as a form of utilitarianism).

Second, a federal nation must consider the treatment of one state's laws and judgments within the judicial systems of other states. Will a state court system have the option of applying the law of another state to a multistate dispute? If so, may it develop its own conflicts jurisprudence? Is the application of another state's law ever mandatory? Must a state court system recognize other states' sovereign immunity? Will it recognize and enforce judgments rendered by the court systems of other states? Questions not addressed by federal law are left to the lawmaking of individual states and, as to problems in coordination and collective action, to the workings of interstate comity and interstate custom.

III. STRUCTURING PRESCRIPTIVE COMITY FOR THE MANAGEMENT OF ECONOMIES

Prescriptive comity is an important way in which nations deal with their overlapping and conflicting prescriptive jurisdiction. In examining the management of economies, the bases of prescriptive jurisdiction take on a new look: markets become the new territoriality, and consumers become the new nationality.[63] Neither markets nor consumers are as sharply defined as territory or nationality, and so we should expect the use of prescriptive comity to be more fluid when it comes to the management of economies. Furthermore, the assertion of national law in a world of global economic transactions partly defines separate national markets with their own sets of consumers within the global economy. This circularity presents challenges for prescriptive comity in the management of economies.

In structuring the use of prescriptive comity to handle overlapping and conflicting prescriptive jurisdiction in the management of economies, it is helpful to call to mind the ultimate goal in the management of economies. It is also important to institutionally analyze legislative decision-making, highlighting the ways in which legislative discretion needs to be constrained and channeled if we are to pursue that ultimate goal with maximum benefit to the world's people. In nations with federal systems of government, the subnational units may also define and manage economies as subsets of the national economy. Those subnational exercises of prescriptive jurisdiction present their own overlaps and conflicts. The exercise of subnational

[63] Assertions of prescriptive jurisdiction over transactions that have an effect within a nation's territory are well-known in competition law. Such an effect might be better seen as an effect on a nation's economy and its consumers, rather than within its territory. Economies aren't necessarily co-extensive with national territory. Also informative are Marek Martyniszyn's citations of a Japanese case about the effect on Japanese consumers of behavior of foreign subsidiaries of a Japanese parent company and a European Union case from 2017 against Intel for its agreement with a Chinese company to limit the Chinese company's entry into the EU market. Marek Martyniszyn, *Antitrust and Competition Law*, in RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10.

prescriptive comity means that conflict-of-law rules play an important part in the management of subnational economies as well as national economies. These requirements for the structuring of prescriptive comity are the subject of this Part of the Article.

A. WHAT IS IT ALL FOR?

> *The purpose of global development, like the purpose of a good domestic national policy, is to enable people to live full and creative lives, developing their potential and fashioning a meaningful existence commensurate with their equal human dignity.*[64]

Nations pursue economic development to provide more than just a satisfactory material standard of living for their people. Economic development generates the increased public revenue that governments need to foster the capabilities of their people. People's morals and civic virtues are among those capabilities. Those moral and civic virtues find their expression within a nation's political structure. In turn, a nation's people, through its political structure, give definition to and implement the capabilities they seek to achieve. The set of capabilities identified by each nation may vary according to differences in culture.

1. Individual Capabilities as a Goal of Economic Development.

An important purpose of governments managing an economy is to foster the well-being of their inhabitants, including their inhabitants' capabilities.[65] A person's capabilities are their options to do or be various things.[66] Capabilities are opportunities and choices; a person with capabilities is a decision-maker.[67] Those capabilities may include the option to participate in democratic processes or in the creation and operation of informal institutions.[68] The exercise of these capabilities may require other capabilities, such as literacy, good health, and the ability to imagine the needs of others.[69] Consistent with its notions of equality, a nation might expect each of its people to enjoy at least a threshold level of each capability; political capabilities

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[64] NUSSBAUM, CREATING CAPABILITIES, *supra* note 42, at 185.
[65] Nussbaum goes farther and argues that the core capabilities are entitlements for people. The nation must secure those entitlements for its people if it is to be judged minimally just. *Id*. at 169.
[66] *Id*. at 20-24.
[67] *See id*. at 10-13, 32-35.
[68] *See id*. at 32-35.
[69] *See id*.

might require equality at any level beyond the threshold.[70] The achievement of threshold levels ordinarily requires economic development.[71]

2. Governance and Human Flourishing.

Economic development also funds the institutions of national sovereignty. These institutions give expression to individuals' civic capabilities, allowing further development of those capabilities. In turn, political institutions facilitate collective decisions that define and implement capabilities. National sovereignty assists people in selecting their own solutions to social challenges.[72] Martha Nussbaum argues for the protection of national sovereignty for reasonably democratic nations in part because of the value fostering an individual's ability to engage in ethical and political reasoning provides and generally bolsters political empowerment.[73]

3. The Definition of Implementation of Capabilities.

Determining capabilities requires further elaboration, requiring an acceptable threshold to be set for each capability.[74] A nation elaborates and sets thresholds through its political and judicial processes.[75] It then implements its people's desired capabilities through laws and administrative agencies.[76] In a world of finite resources, a nation may stress "fertile capabilities," capabilities that lend support to other capabilities, and promote the removal of corrosive disadvantages, failures in capabilities that spread and impair other capabilities.[77] We may monitor the implementation of capabilities by periodically comparing quality of life.[78]

A nation's political structure will affect the elaboration and implementation of capabilities, requiring the nation's political structure and the deliberative process to have features of self-rule and the need to observe

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[70] *See id*. at 32-36.

[71] *See generally* Gregory S. Alexander, *The Human Flourishing Theory*, Cornell L. Sch. Research Paper No. 20-02, http://ssrn.com/abstract=3536381. (drawing a connection between essential capabilities, as described by Nussbaum, and economic resources, supporting Alexander's argument that human flourishing theory is the best moral grounding of private property and his contention that private property is necessary for human flourishing).

[72] NUSSBAUM, CREATING CAPABILITIES, *supra* note 42, at 111, 113 ("to give themselves laws of their own choosing").

[73] *See id*. at 113-114. Nussbaum points to John Stuart Mill's connection between political liberty (*e.g.*, women's right to vote) and human self-development. *Id*. at 141.

[74] *See id*. at 170.

[75] *See id*. at 170-178.

[76] *See id*. at 178.

[77] *Id*. at 44-45, 98-99, *citing* JONATHAN WOLFF & AVNER DE-SHALIT, DISADVANTAGE (2007).

[78] For a comparative method of monitoring public initiatives, *see* AMARTYA SEN, THE IDEA OF JUSTICE (2010); *see also* AMARTYA SEN, ON ETHICS AND ECONOMICS (1988).

the lessons provided by literature on public choice.[79] To achieve a stable political structure, we must understand the emotions bound within the "political sphere," both the emotions that support fundamental capabilities and those that undermine fundamental capabilities.[80] We also need to understand early childhood development and the interventions that may shape emotions that affect the support of fundamental capabilities as entitlements.[81] An individual nation has the final responsibility for implementing its people's desired capabilities, although international agreements may assist a nation's people with their deliberations.[82]

4. Pluralism Within a Nation and Between Nations.

Some capabilities are both essential to an individual's flourishing and capable of being endorsed by a pluralistic society's multiple comprehensive approaches to value and purpose in life.[83] Martha Nussbaum's list of central capabilities includes those that protect pluralism.[84]

This list of desired capabilities may vary from culture to culture. Amongst those persuaded by Nussbaum's analysis of capabilities is a core set of ten nations.[85] Each nation specifies the details of its desired capabilities and the threshold level of each core capability that each person must achieve for its society to be just.[86] These specifications reflect a nation's history, traditions, and special circumstances.[87]

B. INSTITUTIONAL ANALYSIS FOR EFFECTIVE MANAGEMENT

> *"How do institutions evolve in response to individual incentives, strategies, and choices, and how do institutions affect the performance of political and economic systems?"*[88]

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[79] *See* NUSSBAUM, CREATING CAPABILITIES, *supra* note 42, at 178-179.
[80] *See id*. at 181-182.
[81] *See id*.
[82] *See* NUSSBAUM, THE COSMOPOLITAN TRADITION, *supra* note 39, at 218-222 (nations as vehicles for human autonomy and law accountable to their people, with international agencies and agreements as only persuasive).
[83] NUSSBAUM, CREATING CAPABILITIES, *supra* note 42, at 76, 90, 109, and 125. Nussbaum writes that a nation may cultivate those central capabilities consistently through political liberalism (79, 89-91), which looks for an "overlapping consensus" (125) in a pluralistic society on a set of "political principles that can be translated into a set of (minimally) just political institutions" (166).
[84] *See id*. at 110.
[85] *See id*. at 33-34 (listing the set of ten nations).
[86] *Id*. at 41, 108.
[87] *Id*.
[88] James E. Alt & Douglass C. North, *Series Editors' Preface* of OSTROM, *supra* note 62, at xi.

The international law of prescriptive jurisdiction allocates law-making power among nations. Allocations of law-making power are an element in the management of global economic and social development. Institutions are vital to the effective management of human development. Examining institutions is a part of pursuing the capabilities approach to human development.

1. An Administrative Approach to Prescriptive Jurisdiction.

Nations make decisions that affect global economic development. To manage global economic development effectively, we might place such national decision-making within a framework created from institutional economics and the literature on social norms.[89] Managers draw from those two bodies of knowledge as they manage complex organizations.

A manager faces a continuing, multi-part task. First, the manager must set the overall goal of the organization. The manager must then delegate decision-making authority and responsibility to multiple autonomous decision-makers within the organization. The manager must also create standards and limitations to channel the discretion of subordinate decision-makers. Those standards and limitations reduce the agency costs from the delegation of authority, the possible exploitation of individuals under the control of the subordinate decision-makers, and the likelihood that the subordinate decision-makers will impose negative externalities on each other. Finally, to facilitate the solution of problems in collective action, the manager must establish social norms among the subordinate decision-makers and establish the conditions for the subordinate decision-makers to create additional social norms among themselves.

Those are the tasks of the manager of a complex organization. When we view the world itself as a complex organization, the manager's tasks help us to imagine a framework for understanding the effective use of prescriptive jurisdiction in global economic development. For the overall goal of the organization, we might select global economic development, which will assist in the development of human capabilities. The subordinate but autonomous decision-makers become the multiple sovereign decision-makers we find in the world. If those sovereign decision-makers depart from the goal of global economic development, they create agency costs relative to our goal and possibly exploit individuals under their control. Those sovereign decision-makers also face problems in collective action as they work toward our overall goal of global economic development. We will need the international equivalent of social norms to address those problems in collective action.

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[89] I first presented this framework in Eric T. Laity, *The Competence of Nations and International Tax Law*, 19 DUKE J. COMPAR. & INT'L L. 187 (2009). The presentation here is shorter and incorporates Elinor Ostrom's work.

2. Affirming the Value of Multiple Sovereign Decision-Makers.

The framework recognizes the value of multiple sovereign decision-makers to global economic development. Of course, we have multiple sovereign decision-makers in the world. From time to time, however, it's tempting for one of the world's sovereign decision-makers to project its decision-making worldwide in the belief that its decision-making is of universal benefit, without negative side effects. For that reason, it's worthwhile to recall the benefits of having multiple sovereign decision-makers in the world. If we did not already have multiple sovereign decision-makers in the world, we would have to create them.

The manager who delegates decision-making authority and responsibility to multiple, subordinate decision-makers gains the benefit of information and action hidden at the local level.[90] The manager also gains a variety of local approaches, which allows the organization to use the comparative method to evaluate those local approaches.[91] Furthermore, the manager gains the benefit of competition among the subordinate decision-makers, which, if properly channeled, reduces their abuse of discretion.[92]

A variety of local approaches is especially important because the comparative method compensates for several deficiencies in the independent evaluation of policies. First, we cannot know the initial endowments of people, given their incentive to hide or misrepresent such information.[93] Second, we cannot use controlled experiments in the public sphere.[94] Third, decision-making is inevitably incomplete.[95]

The benefits from the delegation of decision-making to multiple decision-makers can be rephrased in terms of sovereign decision-makers and global economic development. The use of multiple sovereign decision-makers for global economic development allows the world's people to gain the benefit of local knowledge and action. In addition, the world's people gain the benefit of multiple approaches to economic development and the comparative method in the evaluation of those approaches. Finally, the world's people gain the benefit of sovereign competition in economic development, which has the potential to reduce the abuse of discretion by individual governments.[96] Such abuse may take the form of cronyism and corruption, as well as transfers of value to influential interest groups at the expense of the public.

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[90] *See* GARY J. MILLER, MANAGERIAL DILEMMAS 139 (James E. Alt & Douglass C. North eds.,1992).
[91] *See* OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 93-119 (1996); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 21-22 (1985).
[92] *See also* ALFRED D. CHANDLER, THE VISIBLE HAND 457 (1977).
[93] *See* SEN, *supra* note 79, at 36 (1987).
[94] *See id*. at 37.
[95] *See* HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR 45-47 (4th ed. 1997).
[96] *See* ALBERT BRETON, COMPETITIVE GOVERNMENTS 229-35 (1996).

3. Standards and Limitations to Reduce the Abuse of Discretion.

The value of multiple sovereign decision-makers comes at a cost since decision-makers may abuse their discretion. The cause of the abuse is two-fold. On the one hand, a nation's public decision-makers carry the burden of re-election and the immediate provision of benefits to constituents. On the other, organized interest groups strive to insulate themselves from competitive markets. The abuse of discretion may take the form of the exploitation of individuals to the advantage of various interest groups or the imposition of negative externalities on the decision-making of other sovereigns.[97]

To contain such abuse within complex organizations, the manager turns to standards and limitations to define the institutional competence of subordinate decision-makers. Standards reduce agency costs, including the exploitation of individuals. In the context of sovereign decision-makers, standards include rights for individuals against exploitation, including freedoms that preserve competition among sovereigns. Those freedoms may include the movement of goods, services, investment, and people between nations.

Limitations, on the other hand, define the subordinate decision-makers' spheres of autonomy within the organization, tackling the decision-makers' temptation to transfer costs to the spheres of other decision-makers while illicitly grabbing benefits belonging to those other spheres. In the context of sovereign decision-makers, limitations identify transfers of costs and revenue from one sovereign's economy to another's economy and treasury. Tax revenue diverted to tax havens is an example of a transferred benefit, whereas environmental costs are an example of transferred costs.

Limitations on sovereign decision-makers at times may require the necessity of defining boundaries between national economies. When agreement on boundaries isn't possible, the development of norms of cooperation to manage common areas of the global economy is required. If nations are successful in creating and maintaining those norms of cooperation, the norms may strengthen sovereign competition in the areas of economic development that do have well-defined national boundaries.

4. Individual Rights as a Useful Standard.

We sometimes view individual rights as an a priori foundation for the state. When it comes to global economic development, individual rights have utility as well. Property rights and comparing costs and benefits are highly useful elements of economic development. The capacity of individual rights to curb the abuse of lawmaking discretion or to curb the capture of government by interest groups further individual rights as instruments to a desirable future state of affairs.

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[97] For a more extensive discussion of the abuse of sovereign discretion, *see* Laity, *Competence of Nations*, *supra* note 90, at 199-201.

Various thought experiments have suggested two individual rights that might form the basis of states: decision-making behind a veil of ignorance or decision-making through public discourse.[98] At a local level, a group of individuals, through deliberation and experimentation, may create rights as a part of an informal institution to govern a common-pool resource.[99] When it comes to economic development, empirical research on successful development efforts helps us in our selection of useful individual rights. Cost-benefit analysis can be a helpful approach, but the lack of complete information about costs may leave cost-benefit analysis as only a partial realization of the classic utilitarian thought experiment. Fortunately, Amartya Sen has shown the value of ad hoc decision-making about rights as we progress in economic development.[100]

5. Social Norms to Address Problems in Collective Action.

Subordinate decision-makers may be stymied in their pursuit of optimal results by problems in collective action. To counter those problems, decision-makers on a plane of equal authority need social norms to coordinate their actions. At the international level, customary international law and treaties are two species of social norm. Solutions may also lie in national legislation that incorporates third-party benefits. Anti-deferral regimes included in national tax codes are an example of those benefits. Anti-deferral regimes raise little tax revenue for the enacting states. Instead, the effect of the regimes is to drive foreign income back to the state that was the economic source of the income and away from tax havens.[101] Only when the taxpayer is oblivious to the existence of an anti-abuse regime does the enacting state collect tax revenue.

The literature on social norms gives us a framework for understanding the creation and survival of social norms. I use the term "social norms" to refer to institutions of self-government apart from institutions created by positive law. The creation and maintenance of these institutions are the result of the voluntary efforts of participants who make decisions based on their individual, ongoing perceptions of costs, benefits, future opportunities, and the likely behavior of other participants, and on the basis of limited information, the individual's internal norms, and trial and error.[102]

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[98] *Compare* JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999) *with* JUERGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg, trans., 1996).

[99] *See* OSTROM, *supra* note 62 (listing examples of successful efforts to create rule-based informal institutions).

[100] *See* SEN, *supra* note 79.

[101] *See* Laity, *Competence of Nations*, *supra* note 90, at 241-242 (explaining the beneficial effect of US anti-deferral rules on German tax revenue and the beneficial effect of German anti-deferral rules on US tax revenue).

[102] *See* OSTROM, *supra* note 62, at 33-38 (1990) (describing Ostrom's conception of rational action).

Elinor Ostrom identifies several attributes of successful social norms, or institutions of self-government, where individuals substitute coordinated strategies for independent action.[103] Those institutions are both sustainable and robust.[104] Ostrom also identifies failed attempts at self-government and fragile institutions of self-government that might well fail in the future.[105]

Ostrom derives attributes of successful institutions of self-government from her study of the self-management of common pool resources.[106] In our case, common pool resources are areas of the global economy that are subject to overlapping exercises of prescriptive jurisdiction. The overlaps of authority create opportunities for decision-makers to seize positive externalities from and impose negative externalities on resources cultivated by their peers. It's not possible to create property rights for individual states in all areas of the global economy, nor is there a world government that can legislate positive law to regulate the use of the global economic commons. Thus, the solution to the problem of externalities (and collective action, more generally) must include the voluntary creation and maintenance of rules by the participants to govern the global economic commons.[107]

Successful institutions that self-govern a common pool resource are self-enforcing. In general, institutions for collective action that include low-cost mutual monitoring and graduated sanctions allow their participants to make credible commitments to follow the rules that make up the institution.[108] Those credible commitments, even though contingent upon the practices of other participants, permit the self-enforcement of institutional rules.[109]

Not all international social norms are self-enforcing, so the enforcement of international social norms also requires the creation of secondary social norms to enforce the primary norms.[110] The secondary norms may be incorporated into national legislation or in treaties. The secondary norms permit measured retaliation for infractions of the primary norms.[111] To be most effective, the secondary norms should target key interest groups within the non-conforming state so those interest groups pressure their own government to comply. By doing so, the key interest groups counteract the

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[103] *Id*. at 39, 90.
[104] *Id*. at 89.
[105] *Id*. at 180 (tabulating failed attempts and fragile institutions) and 143-181 (describing the individual case studies).
[106] *See id*. at 30-38 (defining and featuring common pool resource), 89-90 (listing design principles suggested by case studies of self-governing common pool resources).
[107] *Id*. at 8-25 (discussing the three approaches of property rights, governmental regulation, and self-government to the problem of collective action).
[108] *Id*. at 43-45, 94-100, 185-192 (describing credible commitments based on low-cost mutual monitoring and graduated sanctions).
[109] *Id*.
[110] Laity, *Competence of Nations*, *supra* note 90, at 249.
[111] *Id*. at 249-50.

influence of the competing interest groups that led the government into non-compliance in the first place.[112]

6. An Environment for Decision-Making.

We may summarize Part III.B. as follows. To achieve the benefits of multiple, autonomous decision-makers while reducing the abuse of discretion, the manager of a complex organization must create a decisional environment for its subordinate decision-makers. The decisional environment consists, on the one hand, of standards and limitations to limit the horizontal and vertical abuse of discretion and, on the other, of mechanisms to foster the development of social norms among the subordinate decision-makers.

In the context of global economic development, the decisional environment includes standards and limitations to avoid the abuse of sovereign discretion, including the exploitation of a sovereign's own people and the imposition of externalities on other sovereigns' economies. The decisional environment must also encourage the development of international norms to address problems in collective action in areas of the global economy held in common. In short, the global framework coordinates the overlapping prescriptive jurisdictions of nations for the benefit of global economic development.

C. SUBSTANTIAL STATES AND THE MANAGEMENT OF ECONOMIES

The allocation of prescriptive jurisdiction among the subnational states of a federal nation has the effect of segmenting the national economy into a series of subnational economies. Even though the national economy consists of a network of transactions, the network is distributed across the regulatory regimes of a federal nation's states. The boundaries, overlaps, and conflicts between those regimes define state economies and state autonomy over economic development.

In her study, *Governing the Commons*, Elinor Ostrom stresses the importance of government in the creation and maintenance by individuals of voluntary institutions to govern a common-pool resource.[113] Governments may support those institutions by their recognition or may stymie those institutions either by imposing solutions in their place or allowing competitors to ignore those institutions with impunity. In a federal nation, states also face problems of collective action in dealing with their overlapping economies, a kind of commons. The federal constitution and federal law will affect how successful states are in addressing their problems in the coordination of economic development through comity and custom.

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[112] *Id*. at 249, 251-52.

[113] OSTROM, *supra* note 62, at 101, 137-139, 190-191.

A federal nation faces several challenges in organizing the prescriptive jurisdiction of its states. In Section II.B.8 of this Article, we considered general issues of subnational states' adjudicative jurisdiction that bore on the exercise of their and each other's prescriptive jurisdiction. We now turn to the challenges that affect the delineation of state economies through regulatory lawmaking and, through that delineation, the possible benefit to national economic development of multiple spheres of autonomy within a nation's economy.

First, a federal nation must determine the portion of its economy that is under the exclusive prescriptive jurisdiction of federal lawmakers. Second, a federal nation must avoid the creation by states of conflicting obligations for participants in the economy. Third, a federal nation must ensure against the use of overlapping prescriptive jurisdiction by its states to seize positive externalities from and impose negative externalities on the economies of their neighboring states. One cause of such externalities is lawmaking that discriminates against nonresidents. Fourth, a federal nation must determine how best to facilitate solutions to its states' problems in collective action. A federal nation's responses to those challenges help to define state economies as subunits of the national economy.

The federal constitution of the United States addresses these challenges in the allocation of subnational prescriptive jurisdiction, but only in part. The relevant clauses include the Commerce Clause, the Privileges and Immunities Clause, the Full Faith and Credit Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The American Constitution's approach is taken up in Part IV.B of this Article.

D. THE ROLE OF CONFLICT RULES IN THE MANAGEMENT OF ECONOMIES

Whether the litigation is international or multistate, a sovereign's conflicts rules may affect the development of economies. Of course, the conflicts rules for a multistate dispute may be constrained by a federal constitution or other federal law. Otherwise, sovereigns at both the national and subnational levels unilaterally create and apply a set of conflicts rules and practices. How should those rules and practices be structured to promote global economic development?

1. General Considerations for Choice-of-Law Decisions.

A sovereign encounters a number of considerations as it creates and maintains rules and practices for the selection of governing law. These considerations include locational facts, public policy, constitutional rights and structural limits, the practice of comity by sovereigns, the interests of the parties to the dispute, uniform results between sovereigns with the

accompanying virtues of certainty and finality of result in litigation, fundamental rights in the defendant's domicile, regulation of activity that crosses jurisdictional borders, the interaction of regulation by two or more governments, the effect of choice of forum on choice of law, the best point in the chronology of a series of transactions to settle upon the governing law, and the relevance of federal and international law to a subnational sovereign's choice-of-law approach.

2. Economies and Choice-of-Law Decisions.

Efficient management of one or more economies is also a consideration. Efficiency for our purposes includes efficiency in transaction costs, adaptive efficiency, and presumptions that reflect human predilections in decision-making under time constraints. Thus, institutional economics and behavioral economics are useful to our analysis.[114]

To support the management of economies, a conflict of laws approach requires taking several factors into account: the need to facilitate informal rule-making within the private sector, the recognition of affirmative policy to not regulate, the contextual recognition of a single rule within a statutory or regulatory scheme, the coordination of conflict rules and laws with other sovereigns that pose collective action problems or impose externalities, and the value of sovereign competition in lawmaking.

From time to time, a sovereign must facilitate the creation and operation of successful informal institutions to govern common pool resources. In some circumstances, informal institutions may be superior to governments in handling common pool resources.[115] These informal institutions are separate from private-sector companies and non-profit organizations. Of course, a sovereign must also facilitate the formation of private sector companies and non-profit organizations.

Inaction by a sovereign might be a suitable policy choice to facilitate informal institutions. More generally, choice-of-law theory needs to recognize that a lack of law may be the result of a sovereign policy decision. This recognition might support a presumption of lawmakers' silence as a decision not to regulate or as a decision to delegate further regulation to agencies or courts.

Furthermore, a sovereign may enact a law that depends on other laws; omissions in a law may simply be a deference to related laws enacted by the sovereign. For example, a point of insurance law may be part of a complete code of insurance sector regulation, or a point of workers' compensation law may depend on general tort law. A package of legal rules may be enacted all

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[114] *See* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002) (the use of choice of law to promote efficiency).

[115] *See* OSTROM, *supra* note 62.

at once or in pieces over time. A state's experience with an existing rule of law may affect how it shapes subsequent rules.

Moreover, sovereigns may encounter problems in collective action as they pursue their individual goals. Conflicts rules may be a form of interstate cooperation to overcome those problems.[116]

Choice-of-law rules may create markets in legal regulation.[117] For example, corporate and commercial regulation markets are created through jurisdiction choices for the organization of entities or for the governance of contracts. Markets may foster useful competition among sovereigns by eliciting effective regulation, or markets may create collective action problems that impede the achievement of beneficial states of affairs. A sovereign's response to market failures in law might be to designate laws out of which parties cannot contract. The successes in the market for subnational law may reduce the need for federal action.

IV. PRESCRIPTIVE JURISDICTION AND CONFLICTS OF LAW IN THE UNITED STATES

International prescriptive jurisdiction is the authority of a nation to make laws that apply to people, property, or conduct.[118] Domestic doctrines that limit a nation's exercise of its prescriptive jurisdiction may be national exercises of international prescriptive comity.[119] One of the uses of international prescriptive comity by individual nations is to ameliorate conflicts or overlaps in prescriptive jurisdiction.[120] International law does not require the exercise of international prescriptive comity; by definition, comity is voluntary.[121] The voluntary nature of international comity sets it apart from

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[116] *See* BRILMAYER, *supra* note 51, at § 4.2 (resting on economic analysis and game theory).
[117] *See* ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (2009).
[118] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. §§ 401(a), 402 cmt. a (AM. L. INST. 2018).
[119] *See* William S. Dodge, *International Comity in the Fourth Restatement*, *in* THE RESTATEMENT AND BEYOND 319, 320 (Paul B. Stephan & Sarah H. Cleveland eds., 2020), 320 ("The Fourth Restatement . . . embraces international comity as a way of distinguishing limits on jurisdiction that are required by international law from limits on jurisdiction that are required only by domestic law"). *See generally* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015).
[120] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 407 n.4 (AM. L. INST. 2018) ("States have developed domestic-law rules for reducing the likelihood of actual or potential instances of concurrent prescriptive jurisdiction as a matter of international comity").
[121] *Id.* § 401 cmt. a ("International comity reflects deference to foreign states that international law does not mandate"), *discussed in* Dodge, *supra* note 120, at 319. A nation's domestic rules founded on international comity "may reflect a domestic legal obligation. International comity . . . may serve as the basis for binding rules of domestic law." Dodge, *supra* note 120, at 323.

international law.[122] In terms of institutional economics, comity is a species of one decision maker's deference to another decision maker's discretion.

The prescriptive jurisdiction of the United States is an authority shared by all lawmakers in the US: Congress, other legislatures, executive branches when they promulgate generally applicable regulations, and the courts when they create generally applicable common law.[123] Prescriptive comity may be exercised by all, with the additional exercise by courts when they engage in statutory interpretation to determine the extent to which a legislature has exercised its prescriptive jurisdiction in enacting the statute.[124]

The development of American conflicts law can be traced through the concept of prescriptive comity. Beginning as a branch of the law of nations, conflicts law was general law not associated with any identifiable lawmaker other than custom. With the rise of the nation-state and a positivist understanding of the origin of law, conflicts law was given a foundation in the equal sovereignty of nations and viewed as an expression of a sovereign's decision to permit another nation's law to be applied within the sovereign's territory. Comity captured the sovereign's exercise of that discretionary authority.

Conflicts law, as general law based on international comity, entered American law via Joseph Story's treatise, *Commentaries on the Conflict of Laws*. Story understood comity as an attribute of sovereignty and not as a judicial attribute. With the rise of formalism in American jurisprudence, comity was viewed with suspicion as a judicial device that led to unacceptable variation in case outcomes. The First Restatement of Conflicts of Law attempted to eliminate comity from the specific applications of conflicts law. However, comity was still needed to explain the American states' acceptance of the First Restatement's system of conflict of laws.

The Legal Realist movement and the Second Restatement of Conflicts reintroduced comity into the specific workings of American conflicts law but as judicial comity. Now, I would like to reconnect American conflicts law with its roots in prescriptive comity and carry the field into the age of the administrative state.

This Part IV takes the institutional approach to prescriptive jurisdiction into the realm of American conflict-of-law rules. Subpart A considers the use of customary international law (of which international prescriptive jurisdiction is a species) in common-law courts. The common-law context affects the use of customary international law, and judicial doctrines about the interpretation of statutes are a vehicle for prescriptive comity. Subpart B

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[122] *See* Dodge, *supra* note 120, at 320 ("[The] use of comity to characterize rules of . . . domestic law that international law does not require").

[123] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. §§ 401 cmt. c, § 402 cmt. a (AM. L. INST. 2018).

[124] *Id*. § 402 cmt. c.

considers the partial limits set by the U.S. Constitution on the exercise of prescriptive jurisdiction by individual states. Furthermore, the Constitution's supremacy clause works as an incomplete choice-of-law rule.

Subparts C and D then consider the reception of private international law in American courts, which is better known in American courts as the law of conflict of laws. The part identifies in chronological order several of the pitfalls in the development of the American law of conflict of laws to avoid repeating those shortcomings in a prescriptive framework. One of the pitfalls to be avoided is the fusillade of pejorative terms that obscure the merit of several stages in the common law development of American private international law. Pitfalls or no, the development of the American law of conflict of laws stopped short of the advent of the administrative state.

Subparts E and F serve as an introduction to a prescriptive framework for American conflict of laws. The rules-based approach of the draft Third Restatement is useful to a prescriptive framework that promotes the management of state economies. Subpart G presents the prescriptive framework for American conflict of laws based on an institutional approach. Subpart H then applies and illustrates the framework through a case study in regulated contracts.

A. THE USE OF CUSTOMARY INTERNATIONAL LAW IN COMMON LAW COURTS

The law of nations was made through two means: treaties and custom. In addition, the law of nations comprised four subject areas: inter-sovereign relations (now known as public international law), the law merchant, the law maritime, and private international law (the latter being better known in the United States as conflict of laws).[125] The doctrine of prescriptive jurisdiction is part of public international law. Both prescriptive jurisdiction and private international law were largely made by custom. In today's nomenclature, both are part of customary international law as distinguished from treaty law.

State and federal courts in the early Republic applied the law of nations without the need to determine its status as state or federal law.[126] Eventually, merchant law was largely supplanted by a state statute, the Uniform Commercial Code, and by treaty. The law of maritime was largely supplanted

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[125] For the law of nations at the time of the ratification of the Constitution, *see generally* ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION (2017).

[126] *See* Thomas H. Lee, *Customary International Law and U.S. Judicial Power: From the Third to the Fourth Restatements*, *in* THE RESTATEMENT AND BEYOND, *supra* note 120, at 254 ("The modern debate about whether customary international law is federal law or State law or something else would have been incomprehensible to the early twentieth-century U.S. jurist").

by federal statutes dealing with admiralty and prizes in war.[127] Private international law is treated as state common law, although Congress has the power under the Constitution to legislate conflict-of-law rules that override state common law. For those three components of the original law of nations, their status in a hierarchy of sources of law is like that of common law: states may enact statutes modifying the three components, as may Congress within the limits on federal power set by the Constitution. The status of public international law has been more contentious. Some have argued that customary public international law is a part of federal common law in the sense that it overrides inconsistent state law.[128] Others have argued that the law of customary international law is similar in status to the other components of the law of nations that have not been supplanted by treaty, and thus, states are free to enact statutes or to modify customary international law through state common law.[129]

For our purposes, we may largely sidestep the debate about the status of customary public international law. Private international law or the law of conflict of laws has flowed easily into the common law, which, post-*Erie*, is shepherded by the states. Although international prescriptive jurisdiction is a doctrine of customary public international law, the national limitations on prescriptive jurisdiction to deal with conflicts and overlaps are a matter of prescriptive comity and are not required by international law. In addition, common-law courts are free to incorporate elements of international prescriptive jurisdiction into the common law of conflict of laws. To be sure, the debate about the status of customary international law still affects the bases for prescriptive jurisdiction.

When customary international law—whether private international law, public international law, or some other component of the law of nations—is received into the common law, interesting things happen. The doctrine of stare decisis applies, possibly divorcing the received law from the further development of customary international law. In addition, customary international law, as incorporated into common law, may be subject to equitable doctrines as a form of metalaw.[130] Three sorts of equitable interventions are of particular interest to conflicts law: the interventions

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[127] *See id.*. at 255 ("Domestically within the United States, Congress started passing statutes in the twentieth century to regulate much of the subject matter that had formerly been regulated by customary international law. . . .").

[128] *See id.*. at 263 ("The law of nations was the original federal common law." (quoting *The Law of Nations and the Judicial Branch*, 106 GEO. L.J. 1707, 1709 (2018))); Paul B. Stephan, *The Waning of the Federal Common Law of Foreign Relations*, *in* THE RESTATEMENT AND BEYOND, *supra* note 120, at 179-202.

[129] *See* Stephan, *supra* note 129; Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

[130] *See generally* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021).

triggered within the domain of polycentric tasks, parties' conflicting presumptive rights, and opportunism in the use of legal rules.[131]

1. Equal Sovereignty of the American States.

At the time of the Constitution's ratification, the American states retained all elements of sovereignty under customary international law that they did not explicitly convey to the federal government.[132] Among those retained elements of sovereignty is the equal sovereignty of states.[133]

2. The Effect of Common Law Adjudication on CIL.

The normative material of customary international law is fluid, partly because the actors in the legal process of CIL are advocates for their positions and not disinterested observers.[134] The fluidity is also due to the lack of authoritative judicial decision-makers in a sovereign legal process to declare the existence and content of a norm.[135]

Once CIL enters the realm of decision-making by national courts, things change. For those within the jurisdiction of a nation-state's courts, the state of CIL is fixed by the courts' decisions. Of course, CIL continues to form and re-form at the sovereign level, so the norms of CIL fixed by the decisions of national courts may lose their character as CIL in the sovereign sense with the passage of time.

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[131] *Id*. at 1071-81.

[132] Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 854-857 (2020). This is the understanding of the U.S. Supreme Court. *Id*. at 917 ("the Court sought to ascertain the sovereign rights of the States by starting with the baseline established under the law of nations and then examining the extent to which the States affirmatively surrendered their rights in the Constitution," discussing Franchise Tax Board of California v Hyatt, 139 S. Ct. 1485 (2019)).

[133] Bellia & Clark, *The International Law Origins of American Federalism*, *supra* note 133, at 935. The American states also retained the element of immunity from suit in each other's courts. *Id*. at 914.

[134] Monica Hakimi, *Making Sense of Customary International Law*, *supra* note 15, at 1507 ("Most actors approach CIL not as detached observers assessing different normative positions against certain preestablished criteria but as advocates advancing their own preferences."); *id.* at 1516 ("[CIL] emerges … through an unstructured process in which the participants apply variable criteria to justify their normative positions in CIL. These disjointed interactions define the content of CIL.… Much of CIL's content is inconstant and contingent, not fixed or generalizable.").

[135] *See id*. at 1496 ("Although the [International Court of Justice's] position was for the time being authoritative, it was also contestable. It was subject to disruption through the same process that brought it about. Because authority in this process is diffusely held, no actor – not even the ICJ – has the final say on its content.")

In addition, national courts may create judicial doctrines limiting their discretion in the use of CIL.[136] These doctrines, too, may create a specifically national version of CIL that limits the effect of CIL's fluidity within the national court system. The CIL used by a national court system is akin to a photograph taken of a complex sporting event in progress, with the event moving on to other configurations of players after the photograph is taken.

3. Judicial Doctrines that Reduce Conflicts in Prescriptive Jurisdiction.

Federal courts have developed three doctrines of statutory interpretation that reduce conflicts between federal law and international prescriptive jurisdiction. Under the first, *The Charming Betsy* canon of construction, if a federal statute reasonably admits of such a reading, courts will interpret the statute so as not to violate the customary international law of prescriptive jurisdiction.[137]

The second canon of construction sees courts limit the scope of an ambiguous federal statute still further, as a matter of prescriptive comity.[138] Unless Congress indicates otherwise, courts will interpret a federal statute not to interfere unreasonably with the prescriptive jurisdiction of other sovereigns.[139] A reasonableness analysis is appropriate, even if the other sovereign has determined not to regulate the activity in question.[140] Courts sometimes use a choice-of-law analysis to determine the statute's exercise of prescriptive comity, at least in the case of the Bankruptcy Code.[141]

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[136] *See id*. at 1510 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004)).

[137] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 406 (AM. L. INST. 2018). The *Charming Betsy* canon encompasses more than international prescriptive jurisdiction. It seeks to reduce conflict between Congressional lawmaking and customary international law generally. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). Under federal law, Congress has the power to exceed the limits of international prescriptive jurisdiction. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 406 cmt. b (AM. L. INST. 2018). When it does so, however, the United States violates international law. *Id*.

[138] *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 405 (AM. L. INST. 2018); *id*. Reporters' Note 1, citing Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) ("this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations").

[139] *Id*. § 405 cmt. a. Interfering with the prescriptive jurisdiction of other nations may be reasonable "if application of the federal statute would serve the legitimate interests of the United States." *Id*. at cmt. b.

[140] *Id*. § 405, Reporters' Note 2.

[141] *Id*. (citing *In re* French, 440 F.3d 145, 153 (4th Cir. 2006)) ("finding, after choice-of-law analysis, that application of U.S. Bankruptcy Code was reasonable"). The determination of extraterritorial scope for the Bankruptcy Code has been made provision by provision. *See id*. § 405, Reporters' Note 4. After the geographic scope of a provision of the Bankruptcy Code has been determined, courts sometimes engage in a second level of choice-of-law analysis to determine whether the extraterritorial provision should be applied in a specific case. *Id*.

The third canon is a judicial presumption against the extraterritoriality of federal statutes.[142] Unless rebutted, the presumption interprets an exercise of prescriptive jurisdiction by Congress as limited to the basis of territory and thus is the most restrictive of the three canons.[143] The presumption against extraterritoriality is discussed below.

American states are free to develop their own judicial doctrines to coordinate their lawmaking with the customary international law of prescriptive jurisdiction.[144]

4. Extraterritorial Statutes.

Sometimes, the basis for a nation-state's exercise of prescriptive jurisdiction is not clear. A litigant may claim that a particular statute regulates or protects nationals, wherever they may be located, in addition to regulating intra-territorial activity.[145] Courts must then determine if the statute has extraterritorial scope.

The determination of a statute's geographic scope may involve three questions: Is the plaintiff's desired application truly extraterritorial? If so, is the statute extraterritorial in scope? And, if so, what is the extent of that scope? Regardless of the geographic scope of the statute, two follow-up questions must be answered: Are there foreign statutes whose scope encompasses the controversy, and if so, which statutes should govern the case?

In the United States, the three questions fall under the rubric of statutory interpretation. To help answer the three questions for a federal statute, the Supreme Court has furnished courts with an approach, a presumption, and a canon of construction.

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[142] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 404 (AM. L. INST. 2018).

[143] The presumption serves functions in addition to the reduction of conflicts in prescriptive jurisdiction. In its early years, the presumption was rooted in the *Charming Betsy* canon and then in international comity. *Id*. § 404, Reporters' Note 1. Later, the Supreme Court based the presumption on Congress' likely focus on domestic matters. *Id*. § 404, Reporters' Notes 1 and 2, (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949)). The Supreme Court also expanded the comity rationale to protection against "unintended clashes between our laws and those of other nations which could result in international discord." *Id*. § 404, Reporters' Note 2 (citing EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991)).

[144] As the Fourth Restatement of Foreign Relations Law notes, "the Supreme Court has held that a State with a legitimate interest may regulate extraterritorially to the same extent as the federal government." RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 406, Reporters' Note 4 (AM. L. INST. 2018) (citing Skiriotes v. Florida, 313 U.S. 69, 77 (1941)). The Note continues, "To date, State statutes do not appear to have tested customary international law limits on jurisdiction to prescribe." *Id*.

[145] This was the plaintiff's claim in *EEOC*, 499 U.S. 244.

(a) The First Question and the Domestic Focus Approach.

To answer the first question, the Supreme Court directs courts to determine the domestic focus of the federal statute.[146] If the statute's domestic focus includes aspects of the controversy, the plaintiff has not requested the statute's extraterritorial application.[147] Of course, if the controversy is multinational and the federal statute governs the entire transaction or event, the statute does in fact have extraterritorial effect through its domestic focus.[148] In the language of conflicts of law, the domestic focus approach serves as a localization rule[149] and may import into prescriptive jurisdiction the drawbacks of jurisdiction-selecting conflicts rules if a separate conflicts analysis is not undertaken as a follow-up.[150]

How do courts determine the domestic focus of a federal statute? The determination is ad hoc. George Rutherglen ruled out the use of the localization rules of the First Restatement of Conflicts, which are in a state of flux following substantial scholarly criticism.[151] Without more detailed localization rules to assist courts in determining a statute's domestic focus, participants in an economy cannot predict the outcome of a court's analysis with certainty.[152] Participants must await precedents to know which federal statutes and which provisions of those statutes have extraterritorial effect.[153]

The domestic focus approach has the virtue of providing a useful reframing of effects as a basis for prescriptive jurisdiction. If the lawmakers' concern is the avoidance of domestic restrictions on activity that causes domestic harms by moving the harm-causing activity offshore, then their lawmaking has a domestic focus and is essentially territorial.[154]

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[146] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).
[147] *Id*. at 266.
[148] Anthony J. Colangelo, *Extraterritoriality and Conflict of Laws*, 44 U. PA. J. INT'L L. 1, 1–40 (2022).
[149] *Id*. at 9 (discussing localization of rules).
[150] *See* George Rutherglen, *Territoriality and its Troubles*, *in* THE RESTATEMENT AND BEYOND, *supra* note 120, at 371, 379 (providing jurisdiction-selecting rules, citing David F. Cavers, *Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933)).
[151] *See id*. at 379 ("The absence of consensus on choice of law has effectively cut loose the presumption from the legal foundation that would make it operate smoothly and efficiently to determine the scope of federal statutes"), 384 ("choice-of-law principles in their current state of disarray").
[152] *See id*. at 381 ("What the presumption cannot do is rely upon an infrastructure of choice-of-law rules that no longer exists, and with its disappearance, the prospect of treating the presumption as a determinate rule also disappears").
[153] *Id*. at 382-384 ("judicial decisions that determine extraterritorial coverage offer only locally predictable results confined to particular statutes after they have been interpreted").
[154] *See id*. at 380 (reinterpreting United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945)).

(b) The Second Question and the Presumption of Extraterritoriality.

To help answer the second question, the Supreme Court has developed a judicial presumption against the extraterritoriality of federal statutes. This presumption does not apply to state statutes.[155] Some states have created their own presumptions against the extraterritoriality of their own statutes.[156] Otherwise, the extraterritoriality of a state statute is determined by the state's conflicts law.[157]

The presumption for federal statutes operates as a canon of statutory interpretation. Unless Congress has clearly indicated that a statute has extraterritorial scope, the statute has none.[158] Without extraterritorial scope, the statute was enacted by Congress exercising only the territorial basis for prescriptive jurisdiction.

The presumption is not without its critics.[159] Anthony Colangelo suggests the *Charming Betsy* canon of construction as a better starting point on the issue of extraterritoriality.[160] He believes the *Charming Betsy* canon to be a better starting point because its application requires resorting to reasonableness factors for the exercise of prescriptive jurisdiction.[161] The reasonableness factors carry out a conflicts analysis while the court is simultaneously interpreting the scope of the statute.[162] If, under prescriptive comity, some other nation's statute should be given priority, then a complete extraterritorial analysis might not be necessary. If the US statute has a domestic focus, it might still not be the appropriate choice of law, given the prescriptive comity analysis and a conflicts analysis.

Hence, Professor Colangelo advocates the use of the *Charming Betsy* canon, together with the reasonableness analysis given in the Third and Fourth

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[155] Maggie Gardner, *Deferring to Foreign Courts*, 169 U. PA. L. REV. 2291, 2347-2348 n. 340 (2021) (*citing* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020)).

[156] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 404, Reporters' Note 5 (AM. L. INST. 2018). The Draft Third Restatement of Conflict of Laws does not adopt a presumption against the extraterritoriality of state statutes. *Id.* § 5.01 cmt. c.

[157] Gardner, *supra* note 156, at 2346.

[158] Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 255 (2010). As the Fourth Restatement of Foreign Relations Law notes, "The presumption is not a clear statement rule, and a court will examine all evidence of congressional intent to determine if the presumption has been overcome." RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 404 cmt. b (AM. L. INST. 2018).

[159] *See* George Rutherglen, *Territoriality and its Troubles*, *supra* note 151, at 373. (citing Larry Kramer, *Vestiges of Beale: Extra-Territorial Application of American Law*, 1991 Sup. Ct. Rev. 179).

[160] Anthony J. Colangelo, *Extraterritoriality and Conflict of Laws*, *supra* note 149, at 4; *see id*. at 22.

[161] *Id*.

[162] *See* Anthony J. Colangelo, *Extraterritoriality and Conflict of Laws*, *supra* note 149, at 23.

Restatements of Foreign Relations Law for the exercise of prescriptive jurisdiction and a conflicts analysis based on section 6 of the Second Restatement of Conflicts, instead of the presumption against extraterritoriality.[163] This multilateral approach has the virtues of taking into account the interests of other nations and the strength of those interests, and the interests of the international system and the interest of the United States in avoiding judicial involvement in the conduct of foreign relations and other unplanned international friction;[164] promoting primary predictability for actors in economies as the applicable law for multi-jurisdictional activity;[165] recognizing individual rights including the rights of litigants;[166] and harmonizing the analysis of the extraterritoriality of state and federal statutes.[167] Those goals cannot be met by identifying the domestic focus of a federal statute because the step is essentially a localization rule (which projects one jurisdiction's law over an entire multistate transaction or event)[168] as well as an automatic selection of the forum's law without a proper conflicts analysis.[169]

Professor Colangelo's suggested approach, however, must deal with the Supreme Court's stress that the extraterritoriality of a statute is not to be determined case by case,[170] the narrowed role for reasonableness in the Fourth Restatement of Foreign Relations Law in the analysis of prescriptive comity,[171] and the causes for the current reluctance to use the *Charming Betsy*

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[163] Anthony J. Colangelo, *Extraterritoriality and Conflict of Laws*, *supra* note 149, at 3, 6, and 22-24.
[164] *Id*. at 6, 22, 24; *see id*. at 18.
[165] *Id*. at 6, 24; *see id*. at 14.
[166] *See id*. at 4 and 14.
[167] *Id*. at 6.
[168] *Id*. at 19. Page 9 discusses localization rules.
[169] *Id*. at 20.
[170] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 405, Reporters' Note 5 (AM. L. INST. 2018) ("In the antitrust context, the Supreme Court has rejected the argument that [prescriptive] comity should be evaluated case by case.") (citing F. Hoffmann-La Roche Ltd. V. Empagran S.A., 542 U.S. 155, 168).
[171] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 405 cmt. a (AM. L. INST. 2018) ("Reasonableness is a principle of statutory interpretation and not a discretionary judicial authority to decline to apply federal law"). For the differences between the Third and Fourth Restatements of Foreign Relations Law in the role of reasonableness in prescriptive comity, *compare* William S. Dodge, *International Comity in the Fourth Restatement*, *with* Hannah L. Buxbaum & Ralf Michaels, *Reasonableness as a Limitation on the Extraterritorial Application of U.S. Law*, both in THE RESTATEMENT AND BEYOND, *supra* note 120.

canon.[172] For those reasons, I have left the conflicts analysis as a separate step of analysis.[173]

(c) The Third Question and the Extent of Extraterritoriality.

If the statute rebuts the presumption against extraterritoriality, the interpreting court must then move to the third question and determine the extent of the statute's international scope. The Supreme Court has given general guidance that the statute is to be interpreted so as not to cause unreasonable interference with foreign law.[174] Justice Scalia gave a more detailed suggestion in his dissenting opinion in the *Hartford Fire Insurance* case: the statute is then to be interpreted using the Supreme Court's *Charming Betsy* canon of construction.

Under the canon, a federal court is required to construe a federal statute, where fairly possible, so as not to violate the jurisdiction, rights, or immunities of another nation under international law or an international agreement with the United States.[175] The Supreme Court devised the canon of construction early in the history of the Republic to reserve the conduct of the nation's foreign relations to Congress and the executive branch without political participation by the judiciary.[176] The canon also assists Congress and the nation in avoiding inadvertent violations of international law.[177] In that sense, the canon implements a presumed congressional intent.[178]

The use of the *Charming Betsy* canon to determine the limits of a Congressional exercise of prescriptive jurisdiction is somewhat sensitive at

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[172] See also Anthony J. Bellia Jr. & Bradford R. Clark, *Restating* The Charming Betsy *as a Canon of Avoidance*, THE RESTATEMENT AND BEYOND, *supra* note 120, at 204-205 ("[The canon as restated by] the Third Restatement could be read to require courts to construe statutes to enforce international law against other nations. It also could be read to require courts to construe federal (and State) statutes to avoid violations of modern customary international law rules that restrict how nations treat their own citizens within their own territory.").

[173] See also RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 405, Reporters' Note 4 (AM. L. INST. 2018) ("Lower courts have nevertheless engaged in additional choice-of-law analysis to determine whether a particular provision of the Bankruptcy Code should be applied in a particular case").

[174] Gardner, *supra* note 156, at 2234 (citing F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004)).

[175] Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804), as restated by Bellia & Clark, *Restating* at 228. States may adopt their own version of the *Charming Betsy* canon, but few have done so. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 406, Reporters' Note 4 (AM. L. INST. 2018).

[176] Bellia Jr. & Clark, *supra* note 173, at 203.

[177] Colangelo, *supra* note 149, at 5.

[178] Bellia Jr. & Clark, *supra* note 173, at 218.

present because lower courts may use a broader version of the canon to interpret federal statutes to include international human rights norms.[179]

As Justice Scalia pointed out, the use of the presumption and the canon are an exercise in prescriptive comity, that is, they are grounded on Congressional intent in enacting legislation. The presumptions apply to the substantive provisions of federal legislation. Statutory interpretation is not an exercise in judicial comity. Judicial comity is an exercise of judicial discretion about possibly declining to hear a dispute for which the court has personal jurisdiction over the defendant and subject matter jurisdiction over the matter in dispute.[180]

(d) The Follow-Up Question: Conflicts Analysis with Overlapping Foreign Statutes.

Whether the federal statute is extraterritorial in nature or has domestic application to a multi-jurisdictional event or transaction, there is a follow-up step to take if the court continues to have subject matter jurisdiction over the controversy. The court must undertake a conflicts analysis of the federal statute and any conflicting or overlapping foreign law.[181] The conflict between a federal statute and foreign statutes may primarily be with remedies; the

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[179] *See* Samuel Estreicher & Thomas H. Lee, *In Defense of International Comity*, 93 S. CAL. L. REV. 169, 180 n. 31 (2020); *see also* Bellia Jr. & Clark, *supra* note 173, at 204-205 ("[The canon as restated by] the Third Restatement could be read to require courts to construe statutes to enforce international law against other nations. It also could be read to require courts to construe federal (and State) statutes to avoid violations of modern customary international law rules that restrict how nations treat their own citizens within their own territory").

[180] *See* Estreicher & Lee, *supra* note 180, at 178 (stating that prescriptive comity deals with the question of "how to manage overlapping substantive legal norms, [a matter for] conflict of laws . . . bounded by customary international law"); William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2099-2109 (2015) (defining prescriptive and adjudicative comity), cited in Gardner, *supra* note 156, at 2344 n.324.

[181] *See also* RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 403(3) (AM. L. INST. 1987) (deferring to the nation with the greater interest, but apparently deferring to that nation's jurisdiction rather than applying that nation's law). Estreicher and Lee disagree and would always apply a US statute with extraterritorial application over foreign law, an approach reminiscent of Brainerd Currie's forum-centric approach. *See* Estreicher & Lee, *supra* note 180, at 204. They might have been writing from the viewpoint of adjudicative comity only, without regard to prescriptive comity. Kermit Roosevelt III has written that federal extraterritoriality jurisprudence does not perform the second step as a matter of federal precedent; precedent gives priority to the federal statute in all cases. *See* RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.01, Reporter's Note to cmt. b (AM. L. INST., Tentative Draft No. 3, 2022) (citing to RESTATEMENT (FOURTH) OF FOREIGN RELS. L. §§ 402, 404 (AM. L. INST. 2018)). If the federal practice is truly precedential, state courts would be required to give priority to a federal statute if relevant to a controversy, instead of completing a priority analysis under the law of conflict of laws.

statutes may expect much the same behavior from those who engage in the regulated activity.[182]

Part of that conflicts analysis is reexamining federal statute to determine if a conflicts rule was included. Although Congress may have given clear indication that the statute has extraterritorial scope, Congress might not have included a conflicts rule for the application of the statute. If it did not, the court must continue analyzing Congress' exercise of prescriptive comity through choice-of-law rules. The relevant rule might be found in another US statute or a US treaty. The interest of the United States as the forum nation might be in the application of the foreign law.

International law permits a nation to exercise adjudicative jurisdiction over a defendant even if the adjudicating nation does not have prescriptive jurisdiction over the defendant's conduct.[183] The adjudicating nation may apply the law of another nation in accordance with the forum's choice-of-law rules.[184]

B. THE AMERICAN APPROACH TO SUBNATIONAL PRESCRIPTIVE JURISDICTION

The federal constitution of the United States addresses the challenges for the allocation of subnational prescriptive jurisdiction, but only in part. The relevant clauses of the constitution include the interstate and foreign commerce clauses, the privileges and immunities clause, the full faith and credit clause, and the due process and equal protection clauses of the Fourteenth Amendment. The remaining allocation of prescriptive jurisdiction must be accomplished through federal statute and by state comity and custom with regard to the states' unilateral assertions of prescriptive jurisdiction. State comity and custom reflects each state's unilateral development of its conflict-of-law rules.

The extraterritorial competence of the individual American states is limited by the interstate commerce clause and the foreign commerce clause, as well as the foreign affairs power. Whether individual states retain prescriptive jurisdiction to enact extraterritorial statutes that complement

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[182] Rutherglen, *supra* note 151, at 384 ("the conflict of federal law with foreign law goes beyond the … conduct prohibited or permitted by each source of law, which might be largely subject to agreement in form. In practice, however, federal law might provide remedies where foreign law seldom if ever does"). *Id.* at 385 ("the gap between rights and remedies").

[183] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 401 cmt. d (AM. L. INST. 2018) ("A state may exercise jurisdiction to adjudicate in a civil case if it has personal jurisdiction over the defendant … and may apply the substantive law of another state under choice-of-law principles, even if the adjudicating state lacks jurisdiction to prescribe with respect to the defendant").

[184] *Id*.

federal foreign policy or federal statutes that apply extraterritorially are questions that have not yet been answered definitively.[185] American states do have extraterritorial prescriptive jurisdiction to impose tax on international transactions unless displaced by federal statute.[186]

1. Prescriptive Comity and the Partial Surrender of Sovereignty by the American States.

Before the American states ratified the Constitution, they were fully sovereign states.[187] As fully sovereign, the American states had the discretion to grant sovereign immunity to other nations and the discretion to exercise international prescriptive comity with respect to other sovereigns' lawmaking. With ratification, the states limited their sovereignty by transferring their sovereign powers over foreign affairs, the conduct of war, and the regulation of interstate and international commerce to the federal government. The states retained their other sovereign powers.[188]

Among a state's retained sovereign powers might be the discretion to grant immunity to other American states from legal proceedings in the state's courts. Recently, though, the Supreme Court has held that the act of ratification transformed each state's discretion to grant immunity from suit to other states into an unqualified obligation to grant immunity.[189] Under the court's reasoning, American states continue to have the discretionary power to grant sovereign immunity to other nations, given that those nations did not ratify the American constitution.

This raises the question of whether ratification transformed each state's discretion through sovereign prescriptive comity to defer to other states' lawmaking. Did ratification transform a state's sovereign power to exercise comity into an obligation to apply other states' lawmaking in its own territory or economy? As we will see, the Constitution's full-faith-and-credit clause only partially transformed such discretionary comity into obligation. The

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[185] *See* Cassandra Burke Robertson, *The United States Experience*, *in* RESEARCH HANDBOOK ON EXTRATERRITORIALITY, *supra* note 10. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 403, Reporters' Note 5 (AM. L. INST. 2018) (gathering relevant authority). Although state "regulations must give way if they impair the effective exercise of the Nation's foreign policy," Zschernig v. Miller, 389 U.S. 429, 440 (1968). Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 419 n.11 (2003) suggests that States may act within the areas of their traditional competence even if the action has foreign-policy implications, as long as no conflict with federal law exists. Skiriotes v. Florida, 313 U.S. 69, 77 (1941), authorizes the application of state law to the high seas "with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress."

[186] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 403, Reporters' Note 6 (AM. L. INST. 2018).

[187] Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1493 (2019).

[188] *Id*. at 1494-95

[189] *Id*. at 1497. The Constitution "divests the states of the traditional diplomatic and military tools that foreign sovereigns possess" and therefore "embeds interstate sovereign immunity within the constitutional design." *Id*. at 1497.

Constitution also granted Congress the legislative power to transform more of the states' discretion to exercise interstate comity into a legal obligation. Until Congress acts, the Supreme Court conceivably could create a law of conflict-of-laws, but it has declined to do so.[190] Conflict of laws continues to be largely a matter of each state structuring its exercise of comity toward the lawmaking of other states.[191]

Rather than constitutionalizing the law of choice of laws, the Supreme Court could resume with Joseph Story's Commentaries and its use of general and international law and approaches based on comity.[192]

2. The Commerce Clause and the Delineation of State Economies.

The commerce clause reserves interstate and foreign commerce for federal law-making.[193] In so doing, the clause indirectly defines the remaining portions of the national economy as state economies and limits conflicting state law-making affecting the shared areas of those state economies.

Through its applications, the Commerce Clause preserves sovereign competition between states, which assists in curbing the abuse of sovereign discretion caused by the workings of interest groups at the expense of consumer welfare. For example, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, the clause prevented a state regulatory scheme ostensibly designed to give state retailers the lowest available prices from operating as a floating floor on national wholesale prices, to be fixed once a month by distillers.[194] The exercise of overlapping prescriptive jurisdiction through the extraterritorial projection of state law-making caused conflicting obligations for sellers under state laws.[195]

The Commerce Clause is not a complete response to the interstate efforts of interest groups; the clause does permit protectionist state legislation in some cases. This occurred in *CTS Corp. v. Dynamics Corporation of America*, when a state statute enacted on behalf of existing management of state-incorporated companies was upheld at the expense of all shareholders in those companies, regardless of their residence.[196]

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[190] William Baude, *Constitutionalizing Interstate Relations*, 44 HARV. J. L. & PUB. POL. 57, 58 (2021). For a proposal to create a constitutional law of choice-of-law doctrine, see Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

[191] "There is nothing in the text [of the Constitution] that says which state's law applies in a multi-state conflict." Baude, *supra* note 191, at 61.

[192] *See id*. at 65-66.

[193] U.S. CONST. art. I, § 98, cl. 3.

[194] *See* 476 U.S. 573 (1986).

[195] *See id*. at 583-84.

[196] *See* 481 U.S. 69 (1987). The majority found that the state statute did not discriminate against interstate commerce, nor did it create an impermissible risk of inconsistent

Jack Goldsmith and Alan Sykes have argued persuasively that efficiency in the form of interstate free trade is the proper animating principle of the Dormant Commerce Clause.[197] They have recently proposed that the evaluation of process-oriented regulation under the Dormant Commerce Clause follow two doctrinal practices of international trade law:[198] first, deferential judicial review of the risk assessment rationally supporting the regulation, with leeway for cases of bona fide scientific uncertainty,[199] and, second, a judicial inquiry into the availability of less burdensome regulation to achieve the promulgating state's goal.[200] Goldsmith and Sykes make the recommendation in the context of competitive industries, externalities associated with the regulation of imports, and large-state effects on imports (when out-of-state producers modify their production practices to facilitate their exports to states with large markets and standardize their practices to simplify their regulatory compliance for multiple states).[201] The approaches recommended by Goldsmith and Sykes would not eliminate the imposition by a state of negative externalities on other states' economies: negative externalities might be justified if the in-state benefits outweigh the out-of-state costs.[202] In any event, the approaches would save the courts from full-blown, empirical cost-benefit analysis for which courts are ill-suited.[203]

3. The Privileges and Immunities clause and the Imposition of Negative Externalities.

I have suggested in the institutional approach to economic development that a sovereign who seizes a positive externality from or imposes a negative externality on another sovereign has abused the discretion granted to it for the purpose of global economic development. Subnational units may also abuse their discretion through externalities on neighboring units' economies. The externalities detract from the economic development possible through a proper matching of costs and benefits within regulatory lawmaking.

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regulation by different states. *Id*. at 88-89. The dissent found the state statute to be the kind of economic protectionism that the Framers targeted with the commerce clause. *Id*. at 100.

[197] Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785 (2001).

[198] *See* Jack Goldsmith & Alan Sykes, *The California Effect, Process-Based Regulations, and the Dormant Commerce Clause*, HARV. PUB. L. WORKING PAPER NO. 22-35 (2022).

[199] *Id*. at 20.

[200] *Id*.

[201] *Id*. at 6-7, 10.

[202] *Id*. at 10.

[203] *Id*. at 11, 16 ("If the [Supreme] Court were faced with the need to assess the costs and benefits of the California law under [Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)], therefore, it would lack the necessary tools and information").

The Privileges and Immunities Clause of the U.S. Constitution addresses discriminatory burdens on nonresidents.[204] We may view a discriminatory burden as a transfer of value between state governments and economies, that is, as an externality.

Austin v. New Hampshire is an example.[205] In that case, New Hampshire took advantage of a common feature of state income tax systems to transfer tax revenue from next-door Maine to itself at no expense to New Hampshire. New Hampshire accomplished the transfer by imposing an income tax on nonresidents who commuted to New Hampshire for work. Despite the imposition of a New Hampshire tax, there was no additional tax burden on the commuters. Why? Because Maine, like many states that impose a state income tax, gave its residents a credit against their Maine income tax for any income tax paid to other states. New Hampshire collected additional revenue while Maine received less tax revenue, with the commuting residents acting as a conduit from the Maine treasury to the New Hampshire treasury.

New Hampshire's economy provided the jobs that generated the commuters' employment income, so there was an economic foundation for New Hampshire to derive tax revenue from the commuters as part of its economy, an economy that New Hampshire might enhance through its efforts at economic development.

However, New Hampshire did not impose an income tax on its residents. This failure to impose a burden on its residents equivalent to the burden it had imposed on commuters meant that the New Hampshire tax violated the Privileges and Immunities Clause.[206]

This result makes sense for two reasons. First, without the imposition of a tax on residents, there was no consent to the legislation by the governed; commuters weren't represented in the New Hampshire legislature by their own representatives or by New Hampshire voters as proxies. Second, the tax revenue from the commuters would have offset the cost of public expenditure made for the benefit of both groups. Costs and benefits were not tied together for the consideration of the representatives of the governed. The commuters were subsidizing the residents despite the possible benefits that New Hampshire bestowed on its commuting workforce.

4. The Full Faith and Credit Clause, State Sovereign Immunity, and State Autonomy.

Recall that multiple spheres of state autonomy are important to economic development because of the need for a variety of approaches to development.

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[204] The clause's scope is limited to discrimination against human beings; juridical persons must rely on the less effective equal protection clause as a safeguard against interstate discrimination.

[205] *See* 420 U.S. 656 (1975).

[206] *See id.* at 660, 666. The majority opinion stated that the clause "establishes a norm of comity" and that the "underlying policy" of the clause is comity

Another clause that partly defines the spheres of state autonomy is the full faith and credit clause.[207] It differs from the Privileges and Immunities Clause by its point of view. The Privileges and Immunities Clause looks at law-making by a state, whereas the full faith and credit clause looks at the application and enforcement of another state's law.

The Full Faith and Credit Clause is most demanding in the enforcement of judgments rendered in other states. A judgment rendered in the courts of one state must be enforced by other states as long as the rendering court has jurisdiction over the matter and the defendant. The enforcing state's enacted substantive policies are irrelevant to its enforcement of a judgment from another state.[208] In effect, a defendant's assets are not isolated for the benefit of the enforcing state's plan of economic and social development. The defendant's assets within the enforcing state are available to satisfy judgments of the rendering state.

The Full Faith and Credit Clause does not prevent states from exercising prescriptive jurisdiction. One state may certainly enact and apply its own workers' compensation statute when an accident occurs within the state, even though the injured employee and his employer are residents of another state with its own applicable workers' compensation statute.[209] The first state's legislature is not required to defer to the second state in its law-making, nor must the first state's tribunals apply the second state's statute.[210]

Furthermore, an injured worker who has recovered workers' compensation benefits from the state where the person was injured may file for additional benefits from the state in which both the employee and the employer are resident.[211] The application of one state's statute by its tribunal does not prevent the application of the second state's statute for the difference in benefits between the two states.[212]

Spheres of state autonomy are also partly delineated by state sovereign immunity. International sovereign immunity from suit is a matter of comity

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[207] *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 322-323, (1981) (Justice Stevens in his concurring opinion writes that the clause involves the federal interest in ensuring that one state respect the sovereignty of other states. The clause directs a state, "when acting as the forum for litigation having multistate aspects or implications, [to] respect the legitimate interests of other states and avoid infringement upon their sovereignty." In Stevens' opinion, "the clause should not invalidate a state court's choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another state.").

[208] Fauntleroy v. Lum, 210 U.S. 230, 237, 241 (1908).

[209] Pacific Emps. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 500 (1939) (finding California courts may apply California's workers' compensation statute to Massachusetts resident injured in California while working for his Massachusetts employer, even though the accident was also covered by Massachusetts' workers' compensation statute).

[210] *See id*.

[211] Thomas v. Washington Gas Light Co., 448 U.S. 261, 285-86 (1980).

[212] *See id*.

under customary international law. In contrast, interstate sovereign immunity is absolute in the United States.[213] Thus, state court systems must recognize and grant immunity from suit to other states. The U.S. Supreme Court has ruled that the states' ratification of the U.S. Constitution transformed the permissive nature of international sovereign immunity into an absolute interstate sovereign immunity.[214] Additionally, the U.S. Constitution does not grant federal courts jurisdiction over suits against states brought by private plaintiffs of other states.[215] As a result, a state controls its exposure to economic and social development private suits, wherever those suits may be brought in the United States.

5. The Due Process Clause: Who Participates in a State's Economy and its Regulation?

The Due Process Clause of the Fourteenth Amendment sets the minimum requirement for a state to assert adjudicative jurisdiction over a defendant. The clause also sets the minimum requirement for a state to apply its law to a defendant over whom it has adjudicative jurisdiction.[216] In setting these two thresholds, the clause determines the individuals and companies who may effectively be regulated as part of the state's economy.

This determination partly defines the boundaries of the state's economy. The boundaries of a state economy for our purposes are set by the reach of a state's regulation and other law-making. Although the underlying transactions are the substance of an economy, the regulatory regimes of states influence those transactions and shape the general economy into partly detached portions.

Thus, an out-of-state company cannot be subject to a state's regulation if the company has no contacts with the state.[217] In contrast, an out-of-state company that purposefully avails itself of the state's markets is subject to the state's adjudicative jurisdiction in connection with events taking place within

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[213] Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1490 (2019).

[214] *Id*. at 1497-98; *cf. id.* at 1500 (reference to the absolute approach to sovereign immunity) (Breyer, J., dissenting).

[215] U.S. CONST. amend XI.

[216] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (stating that the Due Process Clause of the Fourteenth Amendment requires "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair" (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981))).

[217] *See generally* Home Ins. Co. v. Dick, 281 U.S. 397 (1930) (holding state law cannot be applied to contracts formed or to be performed within the state, and the defendant not admitted to do business in the state nor doing business in the state and not having authorized anyone to receive service of process); *see also* 427 U.S. 797 (1985) (holding state law cannot be applied to out-of-state owners of royalty interests in out-of-state oil and gas leases).

the state.[218] To be subject to the state's adjudicative jurisdiction in connection with events taking place outside the state, the company must essentially be at home in the state.[219]

A company that either is incorporated in the state or has its principal place of business in the state may be regulated by that state, with a relationship to the state similar to that of individuals who are domiciled in the state. Even investors in companies must have minimum contacts with a state before the state may apply its regulation to them.[220]

C. THE RECEPTION OF INTERNATIONAL PRESCRIPTIVE JURISDICTION AND THE FIRST RESTATEMENT

The federal Constitution sets important limits on subnational lawmaking, but those limits do not amount to a code of conflicts rules for states. Nor has Congress enacted such a code. Therefore, states largely retain their status of sovereigns, with deference as the general approach to conflicts of law between sovereigns.

1. The Reception of International Prescriptive Jurisdiction.

The international law of prescriptive jurisdiction enters U.S. domestic law through Joseph Story's treatise, *Commentaries on the Conflict of Laws*.[221] Although the common law courts of England and the early United States dealt with choice-of-law problems, none of the writers on English common law gave any significant treatment of the subject.[222] In contrast, continental European writers had written extensively on conflicts, treating its principles as part of general international law.[223] Story himself refers to conflicts as a branch of international jurisprudence.[224] He considered conflicts a branch of public law and suitably named private international law.[225]

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[218] *See generally* World-Wide Volkswagen Corp. v Woodson, 444 U.S. 286 (1980) (identifying five factors relevant to the determination of minimum contacts required for specific personal jurisdiction); *see also* Asahi Metal Indus. Co. v. Superior Ct. of Cali., 480 U.S. 102 (1987) (identifying two additional factors for the determination of minimum contacts).

[219] Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S.Ct. 2846, 2851 (2011) (finding general adjudicative jurisdiction over a defendant company is proper only when the company's affiliations with the state are so constant and pervasive as to render it essentially at home in the state)).

[220] *See* Shaffer v. Heitner, 433 U.S. 186 (1977) (adjudicative jurisdiction based on property requires minimum contacts).

[221] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (Arno Press Inc. photo. reprt. 1972) (1834).

[222] *See id*. § 10.

[223] *Id*. § 11.

[224] *See, e.g.*, *id*. at iii (dedication to the Honorable James Kent).

[225] *Id*. § 9.

Story cites continental European treatises on international law for general conflicts rules and their elaborations and then discusses those rules in the context of common law cases, both English and American. Some of the common law cases cite the continental treatise writers. Story's List of Authors Cited is overwhelmingly continental, with many illustrious names in international law included.[226] In addition, he describes three French writers and one Dutch writer as particularly clear-thinking about the subject of conflict of laws.[227]

Story's treatise follows the continental European writers in treating unqualified national sovereignty as a bedrock principle in international law.[228] This, in turn, leads him, following Huberus, to the comity of nations as the foundation for conflicts and for a forum court's use of foreign law.[229] Thus, Story's treatise brings the continental European combination of sovereignty and comity into the U.S. common law of conflicts. The U.S. Supreme Court's treatment of the law of nations as part of the general U.S. law surely facilitated Story's transmission of continental private international law into US common law.

2. The First Restatement's Use of Prescriptive Jurisdiction.

Joseph Beale, the primary reporter for the First Restatement of Conflict of Laws and the author of an extensive treatise on the subject, eliminated all bases for prescriptive jurisdiction other than territoriality.[230] Even when he based the selection of legal rules on domicile, it had the effect of choosing one state's territory over that of another.[231] Territory determined the lawmaker with the authority to make law for an activity, which in turn determined the choice between ostensibly conflicting laws. Beale's conceptualization of the First Restatement suffered from his reliance on territoriality.[232] He failed to

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[226] *Id*. at xi-xiv.

[227] *Id*. at vi. (listing Boullenoi's, Bouhier's, Froland's and Rodemburg's approaches to the subject)

[228] *See id*. § 8.

[229] *Id*. §§ 29, 36, 38.

[230] *See* RESTATEMENT (FIRST) OF THE L. OF CONFLICT OF LS. § 1 (AM. L. INST. 1934) ("No state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law").

[231] *See id*. § 16 ("Requisite of Physical Presence: To acquire a domicil [sic] . . . , a person must be physically present there"); *id*. § 11 ("One and Only One Domicil [sic]: Every person has at all times one domicil [sic], and no person has more than one domicil [sic] at a time."); *see also* White v. Tennant, 8 S.E. 596 (W. Va. 1888) (holding application of Pennsylvania's probate law, over West Virginia's probate law, was determined by the decedent's new domicile in Pennsylvania).

[232] *See* Laycock, *supra* note 191, at 322. Douglas Laycock sets Beale's territorialism in perspective, however: "Critics of the [First] Restatement appear to have assumed that all of Beale's mistakes were inherent in territorialism, and they diverted a generation of

appreciate the reframing of the object of sovereign concern from territories to economies.[233]

Beale also eliminated prescriptive comity or the comity of nations as the foundation for a forum state's decision to apply the law of another state within the forum state's territory. In this, Beale departed from the classical analysis established by Huber and continued by Story.[234] Apparently, Beale feared that the classical analysis opened the way for judges to exercise judicial comity in place of prescriptive comity in the choice to apply foreign law. Beale wrote, "[comity's] error . . . lies in the supposition that the courts are accepting the doctrines of Conflict of Laws by comity rather than the legislative power of the state."[235]

In place of prescriptive comity, Beale substituted locational rules and vested rights.[236] Locational rules selected *a priori* an element of a multistate transaction or event that determined the single state whose law was to apply.[237] Beale's theory of vested rights justified the application of that law by the courts of another state.[238]

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conflicts scholars from the task of developing more sensible and sophisticated territorial rules."

[233] For other theoretical problems with the First Restatement's territorial approach, *see* Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1830-36 (2005).

[234] Story wrote, "[T]he phrase 'comity of nations' . . . is the most appropriate phrase to express the true foundation and extent of the obligation of the laws on one nation within the territories of another. It is derived altogether from the voluntary consent of the latter; and is inadmissible, when it is contrary to its known policy, or prejudicial to its interests" STORY, *supra* note 222, § 38. Story also wrote, "it is not the comity of the courts but the comity of the nation which is administered and ascertained." *Id*.

[235] JOSEPH H. BEALE, 1 A TREATISE ON THE CONFLICT OF LAWS § 6.1 (1935). *See also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) ("The 'comity' [at issue] is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed 'prescriptive comity:' the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. It is a traditional component of choice-of-law theory.").

[236] *See* Colangelo, *supra* note 149, at 9.

[237] *See* Beale, *supra* note 236 §§ 5.4, 53.2, and 59.2 (regarding localization rules); *see also* Caleb Nelson, *State and Federal Models of the Interaction between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 671-673 (2013) (discussing the function of localization rules under the First Restatement).

[238] Beale's use of vested rights seems anachronistic to us today. We should remember, though, that Beale was writing within the common law tradition, which separated rights from remedies, rather than within the world of statutes, especially comprehensive regulatory statutes.

Beale's attempted elimination of prescriptive comity wasn't wholly successful. He simply lodged sovereign comity at a higher level of analysis with a state's decision to consent to the rules of the First Restatement as the proper basis for the state's decision whether to apply the law of another state within its own territory.[239] Beale did eliminate prescriptive comity from individual cases through this wholesale consent by the state.

If the state consented, its judges were bound by the rules, as Beale had envisioned, although judges found ways within the rules to avoid the locational rules. The gist of the methods was to use dépeçage to separate the elements of a cause of action, re-characterize some of those elements to fall within different locational rules, and to apply the classical exception, incorporated by Beale, of the forum's established public policy to override foreign law.

3. The First Restatement and Changing Approaches to Private Ordering.

Despite its critics, the First Restatement was a quiet success. Its specific conflicts rules in areas other than torts and contracts gained widespread acceptance and remain in circulation.[240] Even in the areas of torts and contracts, the First Restatement's rules remain as presumptions in the Second Restatement. However, the theoretical underpinnings of the First Restatement fell victim to the rise of statutes and the administrative state and to concomitant changes in legal theory.

The theoretical underpinnings of the First Restatement included Beale's assumption that conflicts rules were part of general common law.[241] As such, conflicts rules were part of the law applied by all state courts. The rise of statutes and the administrative state changed the primacy of common law and its apparent independence from legislatures. Legislatures enacted statutes to meet objectives. As statutes became more widespread and a larger part of the body of state law, laws more broadly came to be seen as driven by goals and as the expression of politics and the democratic process. Statutes, with their democratic purpose and pedigree, took precedence over common law.

The rise of statutes and the administrative state led to changes in legal theory. Positivism in legal theory posited that the only valid state law was created by individual states' legislatures. There was no general law shared by states. Common law was re-conceptualized as being state-specific, with judges as lawmakers to the extent that lawmaking authority had been

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[239] For Beale's consent requirement, *see* Colangelo, *supra* note 149, at 4, 10-11.

[240] *See generally* HAY ET AL., CONFLICT OF LAWS, *supra* note 2, at 78, n.1. Professor Hay and his co-authors point out that most of the traditional choice-of-law rules other than *lex loci delicti* and *lex loci contractus* "survived the conflicts revolution virtually unscathed."

[241] *See* Lea Brilmayer & Charles Seidell, *Jurisdictional Realism: Where Modern Theories of Choice of Law Went Wrong, and What Can Be Done to Fix Them*, 86 U. CHI. L. REV. 2031, 2046 n.82 (2019) (citing Beale, 1 Treatise on the Conflict of Laws § 3.4 at 23 (1935)).

delegated to them by legislatures. Common law was then seen as existing at the pleasure of legislatures by virtue of a reception statute. The positivist impulse removed all law that had no legislative provenance.

With the goal-oriented nature of law paramount, legal theorists reimagined the common law and the judicial process to support the objectives of an administrative state. Contract law was reconceptualized as an instrument of government policy to create and support markets to benefit from private ordering for public objectives. Tort law was reconceptualized as the public regulation of behavior to promote both economic activity and the redistribution of the burden of compensation for inevitable harm. Courts needed to engage in empirical and policy analysis in order to give detailed realization to statutory objectives.

These changes in legal theory led courts to eschew the application of any law not tied to their own legislature or judicial decisions. The application of the law of other states was not seen as wholly legitimate. Conflicts rules, in particular, were seen as state-specific rather than part of a body of law common to all states. In addition, a state's prescriptive jurisdiction could be based on the relationship between a legislature and its electorate and not merely on territory. The various bases for prescriptive jurisdiction could be pressed into service to preserve the authority of the forum's own legislature.

With law seen as purposive, legal analysts added the methods of the empirical sciences to their practices based on Euclidian deductive logic from a limited set of axioms. Legal Realism then joined positivism in reshaping legal theory for a world seen as governed primarily by statutes.

4. The First Restatement and Social Contract Theory.

The First Restatement's worldview also failed to take account of the social contract between electorates and their governments. The social contract justified the state's enforcement of the law on citizens on the theory that the electorate participated in the making of the law, and it was therefore just to require citizens' compliance with the law so made. Participation in lawmaking also justified citizens' legal obligations to each other. The justification gave normative bite to citizens' customary expectations for each other's behavior; those expectations could be changed through lawmaking by the electorate.

A state's accountability to its electorate meant that using the state's law to govern disputes between residents of the same state, regardless of where the litigation was brought, was a permitted outcome of conflicts law. Thus, the selection of another state's law by a forum state to govern a dispute was not limited to cases in which the actions forming the basis of the dispute occurred in the other state. The use of the nationality basis for prescriptive jurisdiction was justified by social contract theory, at least for disputes between litigants with a common domicile.

As it crafted its conflicts rules as a form of prescriptive comity, a forum state was justified by social contract theory to include the option of deferring to another state's law as the governing law if the litigants were both residents of that other state. This option was not available under the rules of the First Restatement.

D. THE INFLUENCE OF LEGAL REALISM AND THE SECOND RESTATEMENT

> *One of the most discouraging spectacles for the historian of legal thought is the unselfconscious process by which one generation's legal theories, developed out of the exigencies of particular political and moral struggles, quickly come to be portrayed as universal truths good for all time.*[242]

Legal Realism's most significant contribution was its introduction of cognitive relativism into American legal reasoning.[243] With the aid of cognitive relativism, the Legal Realists recognized that American legal theory rested upon multiple frames of reference, each of which embodied moral and political presuppositions.[244] This recognition led the Realists to emphasize multi-factor explanations in legal reasoning with high levels of factual detail.[245]

The Realists were primarily concerned with the increasing concentration of market power in the American economy,[246] and their legal theorizing played a supporting role to their concern. Because the Realists saw centralized political power as the necessary counterweight to concentrated market power, they emphasized the role of federal legislation and regulation.[247] Their theorizing, in turn, sought to restrict judicial review and minimize procedural requirements, which they saw as politically motivated impediments to using federal political power to further their goals.[248]

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[242] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, 271 (1992).
[243] *Id*. at 5, 270. The term "cognitive relativism" comes from PETER NOVICK, THAT NOBLE DREAM (1988). *Id.* at viii, 181.
[244] *Id.* at 6.
[245] *See id*. at vii, viii (speaking of multi-factored explanation and highly specific description in social thought generally).
[246] *Id*. at 4.
[247] *See id*. at 222-25. Their advocacy of federal legislation included regulation by federal administrative agencies.
[248] *See id*. at 252-53, 258-68 (regarding judicial review), 233-46 (regarding procedure).

The Realists' theorizing failed to consider the importance of institutional arrangements.[249] This led to an underappreciation of the social context in which the multifactor explanation was to take place. That underappreciation allowed their theorizing to undermine important features of the democratic process and limited the value of Realist thought for American conflict of laws.

Part of that social context is the distinction between policy analysis and rule drafting. Today's policy analysis occurs in government agencies, universities, and independent research centers and is conducted by people with degrees in public policy analysis. The drafting of legislation is best conceived of as a separate intellectual activity, consisting of the expert drafting of rules based on public policy by people experienced in predicting how rules will be implemented or avoided by actors in the economy. The Legal Realists failed to fully appreciate this distinction between policy analysis and rule drafting, leading to unrealistic assumptions about the amount of policy analysis judges could engage. Multifactor balancing tests are the stuff of policy analysis rather than expert rule drafting. At most, multifactor balancing tests are an input for rule drafting rather than an output.

1. Cognitive Relativism.

Cognitive relativism derives from the sociology of knowledge and posits that hypotheses for explanation or justification reflect analysts' frames of reference.[250] Those frames of reference depend upon social and historical influences, which affect the structures of thought that the analysts use.[251] The structures of thought embody moral and political premises as part of their dependence on social and historical influences.[252] Cognitive relativism has been described as an element of cultural modernism and is said to lead to a hermeneutic or interpretivist epistemology.[253]

Cognitive relativism affects not only legal theory but also historical explanation. For the legal historian, explanation now must rest on highly detailed descriptions of events.[254] Historical explanation also must acknowledge multi-factor causation and the passing of the use of opposing pairs of concepts to systematize thought.[255] For at least one legal historian, the history of Legal Realism mirrors a parallel change in his approach to historical explanation.[256]

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[249] *See id*. at 254.
[250] *See id.* at 6.
[251] *Id*.
[252] *Id*.
[253] *Id*. at 6, 270 ("creating an interpretativist [sic] or hermeneutic understanding of the relationship between thought and reality").
[254] *Id*. at vii.
[255] *Id.* at viii; *see also id.* at 7 (the overthrow of Progressive historiography as simplistic).
[256] *Cf. id*. at vii-ix (providing highly specific description and multifactored explanation) and 200 ("greater particularity and contextualism.").

How does one choose among theories embodying different frames of reference with their moral and political presuppositions? For theories of explanation, we are urged to borrow from the American neo-pragmatists and make our selections based on the results of these theories, that is, on their power to explain.[257] This is akin to the methods of the empirical sciences, where hypotheses are valued by their explanatory power. For theories of justification, however, a method of selection is less clear. For now, we must entertain multiple hypotheses simultaneously and appreciate their conflicting moral and political presuppositions, testing them for internal coherence and working with the hypotheses that pass the test.[258]

2. Cognitive Realism and Legal Reasoning.

Cognitive relativism led the Legal Realists to criticize both deduction and analogy in legal reasoning, to stress multifactor explanation based on a wealth of factual detail, and to insist on deference to legislatures.

For the Realists, deductive reasoning is not possible without detailed rules and context.[259] General concepts are not sufficient as a starting point for reasoning, given the over- and under-inclusiveness of rules.[260] Euclidean geometry, with its multilevel chain of deduction from a handful of key axioms, cannot be the model for legal reasoning.[261] Paired exclusive general categories such as substance and procedure cannot serve as the axioms of legal theory.[262]

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[257] *See id*. at 271; *see also id*. at 194-95 (pursuing consequentialist analysis and judging markets by their social consequences).

[258] For a coherentist approach to political theory, *see* JOHN RAWLS, A THEORY OF JUSTICE (1971). Amartya Sen argues for "an agreement, based on public reasoning, on rankings of alternatives that can be realized." SEN, *supra* note 79, at 17. If such an agreement is possible, we might be able to sort our coherent theories of justification by their effectiveness in reaching the ranked alternatives. As the agreement changes over time, so would our selection of theories. For a critique of Sen's use of public reasoning, *see* Onora O'Neill, *Book Review: The Idea of Justice, Amartya Sen*, 107 J. PHIL. 384, 387-88 (2010). *See also* HORWITZ, *supra* note 243, at viii. Pragmatism's denial of a sharp separation of principles from consequences is thrown into high relief by a specific historical transformation of a consequence into a principle. *Id.* at 266 (freedom from slavery).

[259] HORWITZ, *supra* note 243, at 200.

[260] *Id*. at 200-01 ("The Realists' rule skepticism thus represented a protest against what today we would call the over- and under-inclusiveness of rules and doctrines in orthodox legal thought.").

[261] *See id*. at 200. Walter Wheeler Cook was an advocate for empirical science as a model for the determination of legal principles, in place of the model of Euclidian geometry. *See* Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924) (the model of observations leading to a hypothesis the predictions of which are then tested against future observations). Cook's recommendation is limited, however, because, in the case of law, the observed behavior is influenced by the theorizing.

[262] *See* HORWITZ, *supra* note 243, at viii (dualisms), 271-72 (standard dichotomies of American jurisprudence).

Instead, common law adjudication must employ multifactor balancing tests with as commodious an approach to factual detail as possible.[263]

Analogical reasoning in common law adjudication was also a problem for the Realists. Given that common law rules had moral and political presuppositions, extending the rules to new areas via analogy cannot be justified without determining the validity of those presuppositions for the new area. This includes the extension of those presuppositions to third persons who are not parties to the litigation.[264] According to the Realists, the political process of a legislature is needed to choose among the conflicting values and to take into account the needs of third parties.[265]

One strand of Legal Realism sought to eliminate concepts altogether from legal reasoning. This a-conceptual approach hoped to base legal reasoning on social facts alone.[266] However, this approach ultimately bases legal reasoning on social custom, which in turn requires choices among conflicting customs and the conflicting groups that maintain those customs.[267] This approach suffers from a deeper problem as well. One cannot base statements on direct experience: structures of some kind are needed to mediate between sensory experience and language.[268]

3. Legal Realism and Markets.

When it came to the American economy, both the Legal Realists and the conservatives, whom the Realists challenged, wanted a world of small competitive units.[269] Both groups were dismayed by the concentrated market power that existed at the beginning of the 20th century.[270] However, their reactions were quite different. The conservatives sought to return to the status quo ante by using judicial review to defeat legislative moves inconsistent with their vision of a world of small competitive units.[271] The Realists, on the other hand, championed centralized political power as the counterweight to the

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[263] *See also id*. at viii (by analogy with historical explanation).
[264] *Id*. at 202-05.
[265] *Id*. at 203-05 (analyzing Justice Brandeis' dissent in Int'l News Serv. v. Associated Press, 248 U.S. 215, 248-67 (1918) (Brandeis, J., dissenting).
[266] HORWITZ *, supra* note 243, at 202.
[267] *See id.* at 210, 212.
[268] *See generally* RUDOLF CARNAP, THE LOGICAL SYNTAX OF LANGUAGE (Amethe Smeaton trans., 1937). Rudolf Carnap pursued the idea that language could directly mirror sensory experience and hoped to use the correspondence to create a foundation for epistemology, but without success.
[269] HORWITZ*, supra* note 243, at 4.
[270] *See id*. at 4, 7 ("[the] conservative view that big business was unnatural and illegitimate").
[271] *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

concentration of economic power and sought to restrict judicial review of legislation and regulation.[272]

The Realists disputed the conservatives' view of American markets as politically neutral fora for economic exchange. The Realists argued that both markets and legislatures had moral and political premises. Markets are social creations and create property rights and other entitlements through the law that governs the workings of the markets and through the limited economic coercion permitted in the markets.[273] As Dewey and the American pragmatists might argue, markets embody moral and political decisions and should be judged by their social outcomes.[274]

More generally, the Realists conceptualized private ordering (*e.g.*, contract law) as a form of public regulation and judicial enforcement of private law as state action.[275] Common law decision-making rested upon a delegation of authority from legislatures. The Realists also recognized a regulatory role for intermediate groups between the state and individuals, such as trade associations, accrediting agencies, and licensing bodies for professions.[276]

4. The Interplay of Process and Result.

Jurisprudence was not the goal of the Legal Realists; the continuation of the Progressivist social movement was.[277] Their efforts at legal theory were influential but incomplete, given their combination of cognitive relativism and moral certainty. The Realists concluded that procedural requirements are not free from moral and political values and were an impediment to the Realists' program.[278] Yet, process values are important, even if dependent upon social and historical circumstances. The Realists' goals kept them from an appreciation of the requirements and benefits of process.

One area in which the Realists undervalued process values was judicial review. The Realists sought statutory intervention in the markets and criticized the Supreme Court for striking down those interventions. The Realists did not work out an extensive theory of judicial review of the legislative process, one that would correct for the lack of representation of the disenfranchised and include a role for courts in the protection of personal rights.[279] Yet, judicial review can be an institutional arrangement that

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[272] *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908).
[273] HORWITZ, *supra* note 243, at 195-97 (discussing Robert Lee Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) in part).
[274] HORWITZ, *supra* note 243, at 195.
[275] *Id*. at 207.
[276] *Id*.
[277] *Id*. at 5 (contending that the Legal Realist movement was a continuation of the Progressivist movement).
[278] *See id*. at 220-22, 233, and 240.
[279] *See id.* at 252-53, 258-67.

preserves the integrity of the exercise of discretion in the process of lawmaking.

In the area of conflict of laws, the Realists also failed to consider the limitations to multifactor analysis and balancing tests posed by the time constraints on judges and the lack of training in policy analysis or moral and political philosophy in the professional education of lawyers and judges.[280] Time constraints, in particular, are a substantial transaction cost to quality multifactor analysis. The use of a balancing test can result in an unreflective reaction to facts without consideration of fairness to litigants in other cases or the need for the legal system to advise a much larger number of clients than the judicial system can possibly handle.

In short, the Realists viewed process values with suspicion and gave short shrift to institutional arrangements.[281] Nevertheless, institutional arrangements may reduce the abuse of discretion.[282] We choose among institutional arrangements by their outcomes. More generally, we seek a reflective equilibrium between process and result and anticipate that the equilibrium will change over time.[283] And, if we do not have strong intuitive convictions about results, process values may help us to choose.

5. Legal Realism and Conflict of Laws.

The Legal Realist influence on American conflict of laws was primarily felt in torts and contracts cases. In those cases, the Realists championed statutes of the forum that they believed reformed the common law, such as workers' compensation statutes and statutes establishing employer liability for employee negligence. The Realists also sought to limit the effectiveness of statutes from outside the forum that impeded progress as they saw it within the forum. Those impeding statutes might fail to recognize compensation as the desired paramount function of tort law, as was true of guest statutes, or might present setbacks in progress on women's capacity to conduct a business, as was true of coverture laws.

Focused on statutes, the Legal Realists pursued their reforms using a conceptual apparatus based on governmental interests in the application of

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[280] *See id.* at 214-15. Those limitations of time and training did lead the Realists to espouse the expertise model for administrative law.

[281] The Legal Realists' critique of markets as neutral process was based in part on institutional analysis carried out by the original institutional economists. *See* HORWITZ, *supra* note 243, at 182-83, 195-97. However, given the importance to the Legal Realist project of rooting out ostensibly neutral processes, the Realists were unreceptive to the process values of institutional arrangements. The subsequent Legal Process School was in part a response to the Realists' lack of attention to process values. *See id*. at 254-55.

[282] *See id.* at 254.

[283] *See id.* at 194-95, 271-72 (regarding Dewey and the neo-pragmatists on the interplay of process and result and on the combining of principles and results in ethics and jurisprudence).

enacted policies.[284] The full apparatus, as presented in the Second Restatement of Conflicts, sought to identify the state with the stronger interest in having its enacted policy apply. The comparison was to be made on the basis of specific conflicting legal rules of decision, isolated from a jurisdiction's complete body of law. The comparison itself required a detailed multi-factor analysis of the parties and their relationship and gave greater weight to the parties' domicile than did the First Restatement.

Brainard Currie presented a narrower version of the apparatus that was quite persuasive for a time. For Currie, courts should not compare governmental interests to determine the stronger one. Such a comparison, he believed, was illegitimate for the judicial branch of government. For the comparison, Currie substituted a presumption in favor of the forum's law. If the forum state had an interest in the application of its law, the court should apply forum law, regardless of the strength of other states' interest in the application of their own law.[285] Only if the forum state had no interest in the application of its law should the court consider the application of another state's law.

The Currie variant had several limitations. An approach that favors the forum's law cannot fully account for the interests of other states and nations and the strength of those interests.[286] The failure to analyze other states' interests can lead to interstate friction, including retaliation. The failure to analyze other nations' interests can lead to diplomatic ructions, to the consternation of the U.S. State Department.[287] Such an approach does not fully account for the interests of the interstate and international systems of which the forum state is a part.[288] Nor can such an approach provide primary predictability for actors in the economy, given that the applicable law will

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[284] *See, e.g.*, Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L. J. 171, 178 (1963) (determining governmental policies and whether states have an interest in the application of their policies).

[285] STORY, *supra* note 222, at 37 (Currie's approach harkens back to a statement in Story's Commentaries. Extending comity to another sovereign, Story writes, may be withheld if extending comity would contradict an interest of the forum: "[T]he . . . comity of nations . . . is inadmissible, when it is contrary to [the forum nation's] known policy, or prejudicial to its interests.").

[286] *See* Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1305 (1989).

[287] *See* Arthur Taylor von Mehren, *Book Review*, 17 J. LEG. ED. 91, 97 (1964) (reviewing BRAINERD CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS (1963)).

[288] *See* Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and A Beginning*, 2015 U. ILL. L. REV. 1847, 1852 (2015) (noting that the forum state has multistate interests as well as domestic interests, although Currie used only domestic interests in his analyses).

likely be determined by the plaintiff by its selection of the forum.[289] Nor does such an approach account for individual rights or the rights of litigants.[290]

The governmental interest approach proposed that state choice-of-law rules be jettisoned in favor of a statutory analysis of the forum's law.[291] Instead of non-purposive common law rules, a state's law of multistate problems should be set, issue by issue, by the state legislature through its statutes. The purposes of those statutes would be extended into the law of multistate problems and replace the considerations that previously had been important to choice-of-law rules.

The forum court should discern each statute's multistate scope through statutory analysis. Did the statute apply extraterritorially? Did the statute apply to non-domiciliaries? If the statute's multistate scope included controversies of the kind appearing before the court, the court applied the forum's statute without regard to statutes enacted by other states.[292]

Of course, the aspiration of the governmental interest approach was rarely realized in practice. State legislatures rarely considered the multistate scope of their statutes, and accordingly, state statutes were silent on their scope.[293] The silence required forum courts to exercise their judicial discretion in ascertaining the multistate scope of a statute of the forum, but instead of openly elaborating a common law of multistate problems, forum courts were expected to find the statute's multistate scope in materials available to the state legislature, under the guise of statutory interpretation and construction.[294]

Forum courts also had to determine the multistate scope of any statute enacted by the legislature of another state that was brought to the forum court's attention. In the event that the forum's own statute did not apply to the multistate problem before the court, the court might then apply another state's

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[289] Colangelo*, supra* note 149, at 14.

[290] Kermit Roosevelt III, *The Myth of the Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2477 (1999); *see also* Colangelo*, supra* note 149, at 14.

[291] *See* Currie, *supra* note 285, at 183-184 ("We would be better off without choice-of-law rules . . . . The court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation . . . . We may determine how [the statute] should be applied to cases involving foreign elements in order to effectuate the legislative purpose.").

[292] *See id.* at 177, 184 ("If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy.").

[293] *See* Brilmayer & Seidell, *supra* note 242, at 2058-65.

[294] *See id*.

statute.[295] Here, too, the probable silence of the other state's statute stymied the search for the applicable rule of decision.

The analysis of another state's statute raised a second problem. The authoritative decision-maker of another state was that state's legislature, and the authoritative interpreter of that legislature's enactments was the supreme court of that state. Yet, governmental interest analysis was seemingly oblivious to the need of the forum court to defer to the decisions of another state's supreme court on the multistate scope of an out-of-state statute.[296]

In the event that the multistate scope of both an in-state statute and an out-of-state statute encompassed the controversy before the court, governmental interest analysis proposed the rule that the forum court apply the in-state statute.[297] The forum court, after all, was the creature of the forum's constitution and bound to uphold the forum's law. That simple rule was out of keeping with the Realists' pursuit of justice in individual cases on the basis of multiple factors.[298]

More generally, the law of multistate problems is essentially different from the substantive law of any particular state because two or more authoritative decision-makers figure in multistate problems. Not only are there two or more state legislatures involved, but there are also two or more state supreme courts present as authoritative interpreters of state statutes. A forum's choice of law cannot be determined from its substantive statutes alone, given that multistate problems introduce an additional set of considerations into the mix.[299]

Legal Realist improvements to governmental interest analysis have been proposed. Chief among the improvements advocated by Lea Brilmayer and Charles Seidell is deference by the forum court in the determination of the scope of a statute enacted by another state to the determinations of its scope either in the statute itself or by the highest court in the other state.[300] The draft

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[295] *See* Currie, *supra* note 285, at 177, 184 ("If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.").

[296] *See* Brilmayer & Seidell, *supra* note 242, at 2083-84.

[297] *See* Currie, *supra* note 285, at 177, 184 ("The court . . . should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy.").

[298] With no little irony, the most influential Legal Realist in conflict of laws argued for analysis based primarily on statutory purpose rather than for multi-factor analysis. *See* Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1156, 1160 (2010) (speaking on Brainerd Currie and arguing for a multi-factor approach to choice-of-law).

[299] *See* Lea Brilmayer & Charles Seidell, *Jurisdictional Realism*, *supra* note 242, at 2084-2086.

[300] Brilmayer & Seidell, *supra* note 242, at 2086 ("In assessing . . . the scope of a state substantive law, [that] state's subjective position should be determinative."). Brilmayer and

Third Restatement of Conflict of Laws incorporates this approach.[301] Brilmayer and Seidell also advocate that if the statute is silent on its multistate application and the state's courts have not ruled on its scope, the forum court would then have to give a provisional determination based on its estimate of how the other state's supreme court would rule, just as a federal court does on a question of state law in the absence of precedent from the state's supreme court.[302]

Once the forum court ascertains the scope of the forum state's statute and the other state's statute, the forum court would move on to determine the priority between the two statutes. The priority presumably would be determined by the forum's law of multistate problems. In most states, the rules of priority are part of state common law.

Lea Brilmayer, writing with another co-author, Daniel Listwa, has advocated that state courts use systemic choice-of-law values even at the initial stage of determining the scope of a state statute through statutory interpretation.[303] Choice-of-law values, they argue, are part of the materials courts may use to fill gaps in statutes.[304] They encourage state courts to view the rules of the draft Third Restatement as presumptions, the use of which would promote systemic choice-of-law values.[305]

The approach of governmental interest analysis did open the door to multiple bases for state prescriptive jurisdiction, although the approach did not consciously make use of private international law. Courts were left to re-invent the wheel of prescriptive jurisdiction through their determination of the

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Seidell point out that a state supreme court's determination of scope may be teased out of a decision that conflates scope and priority. *See id.* at 2091.

[301] RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.01 cmt. c ("The scope of foreign internal law . . . is a question of foreign law. . . . it is determined in light of how the foreign law is understood and applied in the foreign jurisdiction."); § 5.08(b) ("Ordinarily, the court should determine foreign law in light of how it is authoritatively interpreted and applied in the foreign state.") (AM. L. INST., Tentative draft No. 3, 2022).

[302] When the other state's supreme court hasn't ruled on the scope of the other state's statute, Brilmayer and Seidell would permit the forum state to base its decision on scope partly on the other state's choice-of-law rules. *See* Brilmayer & Seidell, *supra* note 242, at 2091-92 ("States ought to be able to use choice-of-law rules to assist with scope determinations if they want to.").

[303] Lea Brilmayer and Daniel B. Listwa, *A Common Law of Choice of Law*, 89 FORDHAM L. REV. 889, 919 n.136 (2020). Brilmayer and Listwa also believe the separation of scope analysis from priority analysis is misguided. *Id*. at 31-33 n. 131-135. However, if forum courts give deference to out-of-state courts' determination of the scope of out-of-state statutes, conflicts between statutes may still arise. Priority rules are then still needed as a separate step.

[304] *Id*. at 916-20, 22.

[305] *Id*. at 922. In the terms of game theory, the background presumptions of the draft Third Restatement could serve as focal points for coordination of state court common-law law-making. *Id*. at 925 n.151-153.

multistate scope of statutes. In general, there was no sophisticated analysis of deference as a coordinating mechanism between authoritative decision-makers.[306]

The Realist approach reflected the rise in American law and politics of norm-creating statutes. The Realist approach was less effective with common law rules. The underlying purposes of common law rules were difficult to discern; the incremental development of common law from individual cases meant that purposes and policies were the fruit of later scholarly theorizing. In addition, the approach did not consider the interests of third parties who might be affected by a new or extended common law rule. Furthermore, the approach entailed unrealistic assumptions about the training of judges and lawyers in policy and interest analysis and an under-appreciation for the time constraints on judicial decision-making. Those shortcomings could be addressed through comprehensive statutes accompanied by agency rule-making.[307]

Yet, the Realist approach to conflicts analysis did not incorporate the general movement's emphasis on the administrative state. The Realist approach of comparing specific conflicting rules of decision in isolation from a jurisdiction's entire body of law actually increased the risk of failure to appreciate the overall regulatory structure.[308] The Realist proposal for conflicts analysis did not push for a legislative or regulatory response to conflicting state law.[309]

In a number of classic Realist conflicts cases, the Realist outcome could have been achieved under the First Restatement by resort to the exception for a forum's strong public policy.[310] For example, a forum state could simply declare that automobile guest passenger statutes violate the strong public

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[306] However, two forms of governmental interest analysis can be seen as advocating a kind of deference: Baxter's comparative-impairment-of-scope approach and Leflar's better-law approach. *See* William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); Robert Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584 (1966).

[307] Those shortcomings of adjudication are a reason for a new rule to be created by a legislature or agency rather than by a court. *See* Int'l News Serv. v. Associated Press, 248 U.S. 215, 248-67 (1918) (Brandeis, J. dissenting).

[308] For such a failure by a state supreme court, *see generally* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (Minnesota supreme court failing to consider the regulatory context of a Wisconsin automobile liability insurance policy). For a discussion of *Hague*, *see infra* Part IV.H.

[309] Brainerd Currie did note the need for Congressional action: "We would be better off if Congress . . . were to legislate concerning the choice between conflicting state interests in some of the specific areas in which the need for solutions is serious." Currie*, supra* note 285, at 177, 183.

[310] Paul v. Nat'l Life, 352 S.E.2d 550, 555 (W. Va. 1986) ("the same concerns can be addressed and the same result achieved through judicious employment of the traditional public policy exception").

policy of the state that victims of negligence should be compensated.[311] Or, a forum state could simply declare that its strong public policy in defense of families of spendthrifts overrode the law otherwise applicable to a contract.[312] But this use of the public policy exception might be anachronistic, made possible by Legal Realism itself; one of the contributions of Realist legal thought was the expansion of the category of judicially recognized public policy from a few traditional policies recognized in common law to include enacted policy generally.

The West Virginia Supreme Court reminds us of the motivation behind the development of interest analysis as an approach to conflict of laws rules.[313] During a time of significant change in tort law, forum courts in states that had already changed their tort law were reluctant to apply the law of states that had not.[314] Instead of invoking their revised tort law as the forum's fundamental public policy and then invoking the exception to the application of the law of the state where the accident occurred, forum courts waded into the world of random contacts, enacted and unenacted state policies, and state interests in enforcing those policies in a frequently successful attempt to apply the forum's law to an out-of-state accident. In contrast, the West Virginia Supreme Court simply declared guest statutes to be in violation of the state's fundamental public policy and carried on with the traditional rule by applying the rest of the tort law of the state where the accident occurred.[315] Under the approach of the draft Third Restatement, West Virginia courts would apply West Virginia law to the interpretation and performance of its domiciliary's insurance policy. The out-of-state guest statute, if it had denied the policyholder's liability, would have given the West Virginia insurance carrier a windfall.

The Legal Realists had only a partial approach to conflict of laws. Given their concentration on championing specific Progressivist statutes and their suspicion of process values as impediments to the realization of those statutes, it's not surprising that their approach to conflicts gives little attention to systemic goals and the choice among institutional arrangements, including the proper allocation of lawmaking power to the judiciary. Other omissions include the needs of other states, multi-state problems, and economic

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[311] *Id*. *Cf.* Babcock v. Jackson, 12 N.Y.2d 473 (1963) (comparing relative contacts and interests of New York and Ontario with the conclusion that New York had the greater interest in having its law apply).

[312] *Cf.* Lilienthal v. Kaufman, 395 P.2d 543 (1964) (comparing the connections and interests of California and Oregon, with the same result as the traditional method's exception for the forum's strong public policy).

[313] *Paul*, 352 S.E.2d 550.

[314] The changes in tort law identified by the *Paul* court were the elimination of guest statutes (a form of limitation on a driver's tort liability), interspousal or interfamily immunity from tort liability, and contributory negligence. *See id*. at 556.

[315] *Id*.

development, whether state or regional.[316] In particular, the lack of predictability in judicial decision-making about choice of law raised a barrier to interstate trade that created the loss of economic benefits that come from freer interstate trade. A final omission is the Realist failure to address the abuse of judicial discretion in the selection of a rule of decision, abuse made possible by the broad discretion the Realists granted to judges through multi-factor balancing tests.

6. The Second Restatement of Conflicts.

The Second Restatement of Conflict of Laws adds elements of the Realist approach to its analysis of contracts and torts cases. Although it preserves the conflicts rules of the First Restatement as presumptions for contracts and torts cases, the Second Restatement offers a balancing test as an approach for judicial experimentation to rebut a presumption.[317] The test invites a court to identify the state with the more significant relationship with the parties and events.[318] As a balancing test of multiple factors, the more significant relationship test reflects the influence of Legal Realism. In addition, the two levels of analysis in the balancing test each provide a set of factors without a fixed combinatory algorithm, again reflecting the influence of Legal Realism. One level of analysis identifies, by contacts, the states whose relationships are to be compared, and the other level of analysis accomplishes the comparison.[319] The factors of comparison include Realist factors such as each state's enacted policies.[320] The Second Restatement improves on the Realist analysis by including process values and systemic values in the comparison, although it's not clear how those values factor into the relationships of specific states.[321]

The American conflict-of-law rules have been the object of a vigorous discussion about the nature of judicial decision-making, the relationship of statutes to the common law, and the rise of the administrative state. Much of the jurisprudential analysis was prompted by an underlying transformation of

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[316] The Second Restatement compensated for a number of those Realist omissions. *See* RESTATEMENT (SECOND) OF CONFLICT OF LS. § 6(2) (AM. L. INST. 1971).

[317] *See, e.g., id.* § 188(3) (one presumption for contracts cases). The balancing test for torts cases is found in the combination of §§ 6 and 145, and the balancing test for contracts cases is found in the combination of §§ 6 and 188.

[318] *Id*. §§ 145(1), 188(1).

[319] *Id*. §§ 145(2) (first level for torts cases, in part to identify other interested states), 188(2) (first level for contracts cases, in part to identify other interested states), 6 (second level for both torts and contracts cases).

[320] *Id*. §§ 6(2)(b) ("relevant policies of the forum"), (c) ("relevant policies of other interested states and the relative interests of those states"), and to a lesser degree (e) ("basic policies underlying the particular field of law, which is also a systemic value").

[321] *Id*. §§ 6(2)(d), (f), (g) (process values for either litigants, courts, or both), 6(2)(a), (e), (f), (g) (systemic values, some of which are also process values).

tort law to serve as part of a social safety net for personal injury funded through private-sector insurance. The Second Restatement of Conflict of Laws sets off a large-scale experiment in judicial lawmaking based on a recommended set of factors suitable for consideration by judges as they decide conflicts cases.[322] The Third Restatement, now being drafted, hopes to restate the results of the grand experiment.

7. Conflicts and the Legal Process School.

One of the insights of the Legal Process School was the recognition of delegated lawmaking power. A legislature might expressly delegate lawmaking power to an administrative agency, as when the legislature enacts a statute that authorizes an agency to promulgate regulations under the statute. In addition, a legislature might notionally delegate lawmaking power to courts when a statute is open-textured, leaving key questions to be resolved by the courts through statutory interpretation or common-law lawmaking during litigation.

That insight has two ramifications for the law of conflict of laws. First, the choice of governing law might involve a choice between competing packages of statutory rules, administrative regulations, and court decisions. The choice of governing law isn't necessarily a matter of choosing between relevant rules of decision in isolation from their packages of delegated lawmaking. Furthermore, the hunt for purposes behind statutory rules could profitably be expanded to include the preambles written by agencies to their promulgations of regulations. In the case of federal tax law, for example, the General Explanations written by the staff of the Joint Committee on Taxation shortly after the enactment of a revision to the tax code is the place to find the abuses perceived by Congress that triggered the revision. A knowledge of those perceived abuses is sometimes essential to turn meaningless linguistic formulation into intelligible text.

The second ramification has to do with a notional delegation to the private sector. To be sure, sometimes the delegation to the private sector is explicit, as when a tax code creates a tax expenditure intended to shape the behavior of actors in the economy so that they take over an activity that otherwise must be conducted in detail by the delegating government.[323] Employee health and pension programs are examples.

However, another kind of delegation to the private sector is salient to conflicts of law. The more complex a state statute, the more complex companies' internal and external policies and practices in response to the

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[322] Kermit Roosevelt III, *Certainty vs. Flexibility in the Conflict of Laws*, Research Paper No. 18-40 U. OF PENN. L. SCH. PUB. L. & LEGAL THEORY RSCH. PAPER SERIES 1, 16 (2019).
[323] *See* Eric T. Laity, *The Corporation as Administrative Agency: Tax Expenditures and Institutional Design*, 28 VA. TAX REV. 411 (2008); *see also* Christopher Howard, *Tax Expenditures*, *in* THE TOOLS OF GOVERNMENT 410 (Lester M. Salamon, ed. 2002).

statute are. Legal theory might view the important web of policies and practices as the result of a notional delegation of regulatory authority to respond to the statute and complete the role of the statute in the economy.

The ramification for conflicts policy is that a statute ought not to be shorn automatically of its web of private policies and practices in the economy as courts choose a governing law. Although those webs aren't binding on courts, courts should not be oblivious to them. The following conflicts policy's phrase, "the parties' expectations," is an inadequate reference to those webs of private-sector policies and practices. This phrase may also lead us to ignore the participation of third parties in those webs and the industry-wide structuring that the webs create.

E. THE APPROACH OF THE DRAFT THIRD RESTATEMENT OF CONFLICTS OF LAW

In the absence of legislative lawmaking, states create their conflicts rules through judicial lawmaking.[324] A state's common-law conflicts rules are a kind of standardized deference to other sovereigns, if you will. A state court may also engage in the judicial practice of comity, evaluating factors *ad hoc* and ruling on deference without precedential effect. Furthermore, a state court may take an intermediate approach, using in a specific case a list of general factors set by its common law and arriving at a decision with precedential effect on the choice of law for the case.[325]

A list of general factors is useful for policy analysis but falls short of the needs of elected state judges hearing multi-state disputes. In those circumstances, judges need standardized conflicts rules that promote timely resolution of disputes and reduce partisan criticism by electoral opponents. In such circumstances, state judges may find adequate justice an acceptable outcome rather than perfect justice that cannot be discerned in a timely manner nor justified to the public through sound bites.

A list of general factors is also unsuited to the needs of the public and an economy that includes a high volume of multi-state transactions. Planning transactions requires usable rules for the advance determination of governing law. The number of planning decisions far outweighs the number of judicial decisions; the needs of the judiciary are just the tip of the iceberg compared to the needs of actors in the economy.

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[324] *See* RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.01 cmt. a (AM. L. INST., Tentative Draft No. 3, 2022).

[325] This is the approach taken by the Second Restatement of Conflicts of Law § 6 for tort and contracts cases. RESTATEMENT (SECOND) OF CONFLICT OF LS. § 6 (AM. L. INST., Tentative Draft No. 4, 2023).

The draft Third Restatement of Conflict of Laws addresses the needs of state judges and economic actors. The Third Restatement replaces the complex, multi-factor balancing test for contracts and tort cases given in § 6 of the Second Restatement of Conflict with rules.[326] Instead of using a balancing test to determine the governing law in such cases, judges and actors in the economy generally use rules of priority.[327]

The draft Third Restatement envisions a two-step analysis to resolve conflicts of law.[328] First, judges are to determine the state laws that create rights for the litigants under the facts of the dispute.[329] Judges make the determination of those laws through traditional legal interpretation.[330]

To determine the scope of a state law, judges would respect the enactments of the state legislature and the decisions of the state's highest court about the scope of that state's laws.[331] When the state's authoritative law-maker and authoritative law interpreter are silent on the matter of scope, judges would employ presumptions given in the Third Restatement.[332] A state law would be presumed to create rights for everyone within its territory and for its domiciliaries elsewhere.[333] If the dispute involves domiciliaries of more than one state, a state's law would be presumed to apply only if it would be beneficial to the state's domiciliary.[334]

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[326] RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.01 cmt. b ("[Under the Second Restatement,] the determination of which of multiple conflicting laws should be given priority is performed . . . under the multifactor analysis of § 6."); § 5.01 cmt. e ("The Restatement Second was conceived as a transitional document that would help courts generate the decisions [*e.g.*, under § 6,] necessary for future Restatements to draft more precise rules . . . . This Restatement provides those rules.") (AM. L. INST., Tentative Draft No. 3, 2022)

[327] *Id*. § 5.02(c) ("[A] court will use the rules of this Restatement to identify the law to be given priority").

[328] *Id*. § 5.01; Kermit Roosevelt III, *Professor Brilmayer and the Third Restatement*, RESOLVING CONFLICTS IN THE LAW: ESSAYS IN HONOUR OF LEA BRILMAYER 24, 30 (Chiara Giorgetti and Natalie Klein, eds. 2019).

[329] Roosevelt III*, Professor Brilmayer and the Third Restatement, supra* note 329, at 30; *see also* RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.01 (AM. L. INST., Tenative Draft No. 3, 2022). The Second Restatement of Conflicts also uses a two-step process. In contracts cases, the first step includes resort to § 188, and, in torts cases, the first step includes resort to § 145. RESTATEMENT (THIRD) OF CONFLICT OF LS. §§ 5.01 cmt. b ("The Restatement of the Law Second, Conflict of Laws also generally follows the two-step model"), 5.02 cmt. a (discussing the use of §§ 145 and 188 to identify relevant state laws in the first step of a two-step model) (AM. L. INST., Tentative Draft No. 3, 2022).

[330] Roosevelt III*, Professor Brilmayer and the Third Restatement, supra* note 329, at 31.

[331] *Id*.

[332] *Id*. at 33.

[333] *Id*. at 36.

[334] *Id*. at 36-37.

After judges determine which state laws apply, they move on to the draft Restatement's second step. Second, judges apply rules that determine the priority among the applicable laws.[335] The rules of priority are being distilled by the reporters from the caselaw created during the period of experimentation established by the Second Restatement.[336] The rules will take the form of narrowly written rules, with exceptions and safety valves.[337]

The rules of priority will pursue both systemic considerations and right-answer considerations.[338] Systemic considerations include the ease and low cost of use by judges, litigants, and planners.[339] Systemic values also include uniform and predictable results.[340] Right answers, in this context, are results in individual cases that do not violate background criteria that allocate law-making authority among equal sovereigns.[341]

The draft Restatement's favoring of rules rather than standards or balancing tests reflects the draft's drive to achieve systemic values.[342] The draft Restatement's planned use of safety valves promotes the right answers. Judges would use the safety valves when the result under the rules is inconsistent with the criteria that allocate law-making authority among equal

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[335] RESTATEMENT (THIRD) OF CONFLICT OF LS. §§ 5.02(a), (c), 5.01 cmt. e (AM. L. INST., Tentative Draft No. 3, 2022) ("This Restatement provides those rules [of priority among relevant laws]"; *see also* Roosevelt III*, Professor Brilmayer and the Third Restatement, supra* note 329, at 37. The Second Restatement also uses a two-step process. In contracts and torts cases, the second step includes resort to § 6 to determine the priority among conflicting laws. RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.01 cmt. b (AM. L. INST. Tentative Draft No. 3, 2022).

[336] RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.01 cmt. e (AM. L. INST. Tentative Draft No. 3, 2022) ("The Restatement Second was conceived as a transitional document that would help courts generate the decisions necessary for future Restatements to draft more precise rules . . . . This Restatement provides those rules."); Roosevelt III*, Certainty vs. Flexibility in the Conflict of Laws, supra* note 323, at 16.

[337] Roosevelt III*, Certainty vs. Flexibility in the Conflict of Laws, supra* note 323, at 17.

[338] RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.01 cmt. d (AM. L. INST. Tentative Draft No. 3, 2022); Kermit Roosevelt III, *Certainty vs. Flexibility in the Conflict of Laws, supra* note 323, at 16.

[339] Kermit Roosevelt III, *Certainty vs. Flexibility in the Conflict of Laws, supra* note 323, at 9, 38.

[340] *Id.* at 9.

[341] *Id*. at 3 ("the criteria that sensibly allocate regulatory authority among co-equal sovereigns"), 4 (referring to "balancing the regulatory authority of co-equal sovereigns" as "the basic choice of law task"), 8-9 n. 47 (Roosevelt as viewing "the role of choice of law as allocating authority among co-equal sovereigns"). Among those right-answer considerations are "the policies underlying the relevant laws, the connections between the relevant states and the particular issue under consideration, and the reasonable expectations of the parties." RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.01 cmt. d (AM. L. INST. Tentative Draft No. 3, 2022).

[342] Kermit Roosevelt III, *Certainty vs. Flexibility in the Conflict of Laws, supra* note 323, at 17.

sovereigns, which would need to be stated in the notes and commentary of the completed Restatement.[343] In addition, the drafters of the Third Restatement will base the restatement's rules on the experimentation conducted by judges under the aegis of the Second Restatement.[344] The field data might help the drafters formulate the background criteria that allocate law-making authority among equal sovereigns.

Examples of rules of priority include those for tort disputes. In tort disputes, the rules of priority will give pride of place to the law of the state where the tort occurred unless the parties are common domiciliaries of another state and the dispute is about shifting an acknowledged loss rather than the regulation of activity.[345] In that case, the law of the common domicile would have priority in the event of a conflict. The same rule and exception apply in the European Union curtesy of the Rome II regulation, Article 4(2).[346]

Background criteria would determine whether the result in a specific case is a right answer, so that a safety valve need not be used.[347] The Reporter of the draft Restatement, Kermit Roosevelt III, envisions the background criteria as allocating regulatory authority among equal sovereigns.[348] Hence, the background criteria bring us to the matter of prescriptive jurisdiction. Prescriptive jurisdiction would help us determine whether a choice of law system produces sensible or arbitrary results in individual cases.[349]

Roosevelt mentions that several scholars believe the background criteria should promote economic efficiency.[350] Of course, institutional economics tells us that, for economic efficiency, we need to delegate economic decision-making to equal sovereigns who compete and coordinate, so the classic economic approach to conflicts of law might fruitfully be incorporated into the background criteria.

The framework presented by this Article deals with the Draft Third Restatement's second step of conflicts analysis, that of determining priority among conflicting laws.

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[343] *Id*. (referring to "an overarching methodology").
[344] *See id*. at 16 ("policy sensitive rules"), 17, 18 ("The Second Restatement was intended . . . as a means of generating data about right answers that could be used as the basis for drafting rules").
[345] Kermit Roosevelt III, *Professor Brilmayer and the Third Restatement*, *supra* note 329, at 39.
[346] Kermit Roosevelt III, *Certainty vs. Flexibility in the Conflict of Laws*, *supra* note 323, at 13.
[347] *Id*. at 3, 4, 8-9 n.49 (background criteria as useful to evaluate whether a choice of law system generates "sensible or arbitrary" answers in specific cases).
[348] *Id*. at 6 n.28.
[349] *See id*.
[350] *See id*. at 9 n.47.

F. THE MANAGEMENT OF STATE ECONOMIES

The First Restatement of Conflicts has been criticized for being jurisdiction-selecting. Is the prescriptive framework open to the same criticism? Not really; the prescriptive framework argues for the selection of a regulatory regime within a state's economy. In that sense, the prescriptive framework is a middle way between the First Restatement's jurisdiction-selecting approach and the Legal Realists' rule-selecting approach.

G. A PRESCRIPTIVE FRAMEWORK FOR AMERICAN CONFLICT OF LAWS

A framework for the law of conflict of laws must meet several requirements. Experience has given us a list of considerations that we need to incorporate into a framework for the law of conflict of laws. The Second Restatement of Conflicts gives us one such list.[351]

There are other requirements as well. A framework must keep in mind the practices to which its theory will apply. One such practice is that of the judicial system. The practice of courts when they are faced with a choice of governing law may be divided into four steps. That four-step judicial practice is the subject of section 1 below.

Another important practice is that of actors in the economy and their advisors. For that practice, a framework must generate usable rules, that is, rules capable of application by actors in an economy and their advisors as they plan and manage their organizations and transactions. Usable rules for managerial practice are the subject of section 2 below.

In the administrative state, the creation of usable rules is the responsibility of expert rule-drafters. Expert rule drafters must take the conclusions of policy analysts and translate them into carefully worded legal rules that take into account how actors in the economy are likely to avoid the rules. Those rules then become available to legislatures and administrative agencies for enactment or promulgation, to judges for adoption and application, and to actors in the economy to structure their management practices. Section 3 below discusses the province of expert rule drafters as a sphere of legal thought located between policy and law.

A prescriptive framework needs to reflect the elements of our institutional analysis of decision-making. Those elements include the designation of an overall goal, decision-makers of equal authority charged with the achievement of the goal in their respective areas or societies, standards for and limitations on the decision-makers' exercise of discretion to reduce their abuse of their discretion, and the creation of new social norms to address problems in collective action by decision-makers on the same plane of authority. Sections

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[351] RESTATEMENT (SECOND) OF CONFLICT OF LS. § 6 (AM. L. INST. 1971)

4 through 6 below translate this study's institutional analysis into elements of a prescriptive framework for the law of conflict of laws.

A framework should then be tested, illustrated, and elaborated through case studies. The overall project's first case study deals with regulated contracts, presented in Part H below. Most of the traditional choice-of-law rules other than *lex loci delicti* and *lex loci contractus* "survived the [Legal Realist] conflicts revolution virtually unscathed,"[352] so either contracts or torts seemed like an appropriate choice for the project's first case study. Future case studies will deal with the workforce, specifically with the role of a trained and healthy workforce in economic development and in employees' ability to create savings to fund education, business creation, and retirement.

1. Steps in the Judicial Practice of Choice of Governing Law.

Whether the choice includes foreign law, federal statutes, or state law, a court faced with a multistate transaction or event must first identify the sovereigns with prescriptive jurisdiction over the transaction or event, then marshal the possibly relevant law taking note of the absence of law and its implication that lawmaking has been delegated, then determine whether each ostensibly relevant law or absence of law indeed includes the transaction or event within its scope, and finally choose the governing law from among the surviving options.

The steps are simple enough in concept, and yet there are surprising anomalies. First, courts generally omit the first step, relying on the limited universe of possibly relevant law presented by the parties to litigation. Second, federal courts will consider whether a federal statute includes the transaction or event within its scope but will then fail to choose among the other options if the statute is ineligible to be chosen as the governing law. If the federal statute is the sole basis of the court's subject matter jurisdiction, the court's decision to dismiss the litigation is understandable. However, if the court's subject matter jurisdiction rests on another basis, the court may continue with the case under the law of another jurisdiction, including the jurisdiction's regulatory law, although we rarely hear of federal courts in the United States applying the regulatory law of another jurisdiction.

A third anomaly exists. If the scope of a sovereign's enacted law isn't evident, courts frequently will collapse the scope question into the question of selection. If a sovereign's law is not selected, then a definitive interpretation of the law's scope isn't necessary.

Once the court has chosen the governing law, it must determine whether it is up to the task of hearing and deciding the dispute under that law. Considerations of witnesses, discovery, or public prosecution may counsel the court to dismiss the case in favor of a court in another jurisdiction under the

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[352] HAY ET AL., *supra* note 2, at 78 n.1.

doctrine of forum non conveniens or under choice-of-law doctrines about penalties and tax statutes.

At each of the four stages of judicial practice, the framework must recognize the incentives of a forum's judiciary, the members of which in many states are elected or subject to a retention vote.

2. Usable Rules for the Practice of Management.

Any framework must support usable rules, that is, rules that are straightforward to apply and give predictable results for the large number of actors in the economy and their advisors. The results must be known prior to the time that the actors engage in multistate activity and not just at the time a dispute arises over the law governing a given activity.

On those counts, complex multi-factor balancing tests aren't usable rules. Complex balancing tests are highly useful for policy analysts taking advantage of data and theoretical analysis. But the results of policy analysis must be reduced by skilled drafters of law to rules that are usable by the bulk of the legal system, that is, by the many actors in the economy and their advisors. The rules must also be usable by courts in their interventions in the economy. Actors in the economy and their advisors are a much larger set of users of law than are courts, despite the essential role of courts.

3. The Province of Expert Rule-Drafters.

Legal theorists sometimes divide the universe of their work into theory, policy, and law. There is a fourth area of thought and practice that we can add to the continuum: the province of expert rule-drafters.

Expert rule-drafters combine the results of policy analysis with their knowledge of transactions in the economy and compliance with past rules to create new rules. Because of that combination, we can visualize the province of expert rule drafters as occupying a position between policy and law. Our continuum then becomes theory, policy, rule-drafting, and law.

Examples of expert rule drafters include the monumental achievement of the creators of the body of federal tax regulations, which, for all its complexity, completed the Internal Revenue Code as positive law and significantly reduced federal tax litigation over the Code's interpretation through the regulations' detailed rules usable by lawyers in their compliance work.

Other examples of expert rule drafters are the Reporters of Restatements. Reporters take the great sea of reported cases, with their fact-specific settings, and create an organized statement of an area of common law addressed chiefly to judges but also to lawyers and their clients in the economy. Sometimes, Reporters are consciously drafting usable rules, as is the case with the draft Third Restatement of Conflicts, after a period of judicial experimentation with

balancing tests and general standards, and at other times, Reporters are capturing and presenting the judiciary's needs for continued experimentation.

Fortunate state legislatures have expert law-writing staff that troubleshoot lawmakers' intuitions about policy and, when political consensus allows, produce draft legislation of improved clarity, cohesion, and capacity for compliance. The drafters of uniform state laws available to state legislatures for enactment are also expert rule drafters. The drafter of the Uniform Commercial Code wrote from a knowledge of commercial transactions and practices, as well as a knowledge of faulty commercial behavior under common law, to create usable rules.

Common-law judges occasionally are called upon to create or modify a rule of law. Judicial rule-drafting benefits from the fact-intensive settings that prompt the creation or modification of a rule. However, judges do not have the time, nor do they necessarily have the power, to create rules on a par with enacted legislation or promulgated regulations. Judges are part of the clientele of expert rule-drafters.

This Article is addressed to legal theorists, policy analysts, and expert rule-drafters. Its recommendations must be translated into usable rules before its analysis may enter the realm of adjudication.

4. Distinction and Deference to Other Sovereign Decision-Makers.

Our institutional analysis of decision-making stressed the importance of having multiple decision-makers on the same plane of authority. The use of decision-makers of equal authority allowed the overall decision-making structure to take advantage of local knowledge and action, which is otherwise hidden; to generate multiple approaches, allowing the use of the comparative method to evaluate approaches; and to benefit from competition among decision-makers as a partial check on their abuse of their discretion in decision-making.

Grotius, as a theoretician for the equal sovereignty of nations, gave us another reason for our decision-making structure to employ multiple decision-makers of equal authority. Grotius' use allowed us to preserve pluralism in values.[353] The decision-makers could reflect the values of their constituents as they set subgoals and selected and designed institutions and other instruments to achieve those subgoals.

To gain the benefit of such pluralism, decision-makers must be accountable to their electorates through political processes. Through political processes, decision-makers are accountable to their electorates for the specific mix of capabilities to pursue as their society's ultimate goal for its economic

[353] *See supra* Part II.B.5.

and social development. Such accountability serves as an additional check on the decision-makers' abuse of their discretion.

Grotius believed that the equal sovereignty of nations reflected the equality of individuals in the political processes of their nations.[354] Equal accountability of decision-makers to the members of their electorates preserved the right of each member to be governed by laws of their own making. Equal sovereignty preserved self-government.[355]

How do we gain the benefits of decision-makers of equal authority for American conflicts law? The decision-makers of concern to conflicts law are the American states. How should conflicts law recognize and preserve the states' equal authority as decision-makers? Of course, the U.S. Constitution partially addresses the equal sovereignty of American states. The states' equal sovereignty prior to the ratification of the Constitution is recognized in court decisions, with adjustments for sovereign powers relinquished by the states through ratification.[356]

How should American conflicts law supplement the Constitution? We need usable rules that push lower state courts to recognize the decision-making of other states' legislatures as equally useful as the decision-making of their own legislature and to respect pluralism in values, including their own. Those rules should reflect the following considerations:

a. Other states' decision-making includes the selection of institutions to guide development. Faced with a need, a state legislature must choose among a comprehensive statute, a guiding statute with delegation to an administrative agency or the private sector as administrator, a general statute to be supplemented by judicial interpretation, and reliance on existing statutory and common law. The decision not to enact new law is a decision of a decision-maker of equal authority. Furthermore, another state's rule of decision may be part of a larger regulatory regime.
b. Transactions may be extensions of a state's regulatory regime. Transactions will inform the content of the regulatory regime and will be shaped by the regulatory regime. Regulated transactions project the state's regulatory regime into the state's economy and, in that sense, are part of the regulatory regime selected by the regulating state's legislature.
c. Decision-making by states may reflect pluralism in values, including in a state's selection of the set of human capabilities to champion as its goal for the economic and social development of that state.

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[354] *See id*.
[355] *See id*.
[356] *See* Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1493 (2019).

d. The equal authority of each state as a decision-maker is in the self-interest of each state. Furthermore, a state's self-interest may well include conflicting elements in need of reconciliation before a specific decision can be made.
e. The conflicts and overlaps in state decision-making, to the extent that they are not dealt with by the Constitution or future federal legislation, are handled through usable rules of structured deference (that is, conflicts rules) created or affirmed by each state itself.

5. Standards for and Limitations on the Exercise of Discretion.

Our institutional analysis of decision-making stressed the importance of standards for and limitations on the decision-making of subordinate decision-makers to reduce their abuse of their discretion in decision-making. Standards help reduce the vertical abuse of discretion, that is, the exploitation of individuals for whose benefit the holder of discretion ostensibly is making decisions. Limitations, on the other hand, reduce the horizontal abuse of discretion, that is, the transfer of costs to and the capture of benefits from other decision-makers on the same plane of authority.

In terms of American states as decision-makers in law-making, useful standards include individual rights, such as property rights to match costs with benefits and an individual's right to participate in political processes so that lawmakers are accountable to the electorate. Those standards only reduce the abuse of discretion. Interest groups' quest to transfer wealth from individuals to themselves through susceptible legislators remains a danger. Public choice theory helps us understand the vulnerability of legislators to interest groups as legislators seek support for re-election bids.

Limitations reduce the horizontal abuses of discretion by decision-makers on the same plane of authority. Earlier in this study, we noted the role of the federal constitution to reduce horizontal abuses of discretion by states as they pursue economic development; the temptation to transfer costs to and to gather revenue from other state economies must be an illegitimate vehicle for economic development if the overall project of national economic development is to flourish fully.[357] The federal constitution also limits a state's projection of its lawmaking to regulate the populations and economies of other states.[358] Those constitutional provisions serve as limitations within the meaning of the institutional analysis of decision-making.

State judicial doctrines have the capacity to reduce the inadvertent horizontal abuse of lawmaking discretion through presumptions in statutory interpretation about the extraterritoriality of state statutes and regulations. Such doctrines, if adopted, would highlight laws in need of possible

[357] *See supra* Part IV.B.3.
[358] *See supra* Part IV.B.2.

reconsideration by lawmakers. A clear statement by the state legislature that the statute does indeed include multistate activity within its scope should rebut the presumption.

Conflicts rules, too, may function as standards for and limitations on the abuse of discretion by state legislatures and their delegates. Conflicts rules that select governing rules of decision serve as standards when they inhibit the exploitation of individuals by interest groups through the means of state lawmaking. Conflicts rules serve that function when they restrict such exploitation to the enacting state's own economy. Conflicts rules may serve as limitations when they restrict a state legislature's attempts to impose negative externalities on the economies of other states or to seize positive externalities from the economies of other states.

How, specifically, should American conflicts law reduce states' abuse of their discretion in economic and social development? We need usable conflicts rules that will supplement the federal constitution and reflect the following considerations:

a. Individuals who fall within the scope of a relevant law should either participate in the making of that law or elect to be governed by that law by some other means.
b. Laws that transfer wealth from individuals not within a state's electorate to opportunistic interest groups may be relevant laws but should not be chosen as governing law, *ceteris paribus*.
c. Laws that transfer costs to, or benefits from, other states' economies may be relevant laws but should not be chosen as governing law, *ceteris paribus*.
d. State economic development is part of national economic development. Just as federal law is a part of every state's law, federal interests and policies are among the interests and policies of every state.
e. Each state has multistate interests.

Separately, we also need to consider state supreme courts' discretion to modify their states' conflicts rules. Until either Congress or state legislatures enact conflicts rules, a state supreme court's discretion about conflicts rules is subject only to the standards and limitations set out in state constitutions, the federal constitution, the electoral or retention process, and the norms of judicial practice. We address in the next section the problems in collective action that state supreme courts face as they modify conflicts rules. Are state supreme courts likely to create a successful institution of self-government that replaces their independent action with coordinated voluntary action?

6. Social Norms to Address Problems in Collective Action.

Multistate economic activity is a common-pool resource. As such, states need norms that coordinate their activity when they face problems of collective action in multistate economic development. Those norms are an informal institution of self-government in the sense that states voluntarily adopt the norms rather than having the norms dictated to them by positive federal law.

Conflicts rules are some of the norms that facilitate states' coordinated action over multistate economic activity. We can visualize each state legislature's exercise of prescriptive comity toward the law of other states as part of a larger voluntary institution to govern the common-pool resource of multistate economic activity.

State supreme courts also participate in the larger voluntary institution that we are visualizing. State supreme courts are the custodians of their state's conflicts rules and, from time to time, modify those rules. If we are correct in viewing conflicts rules as expressions of a state's prescriptive comity, changes to a state's conflicts rules would need to reflect the considerations that go into decisions about the extension of a state's prescriptive comity to the laws of other states.

How likely is it that state supreme courts will find it rational jointly to create conflicts rules as norms of an informal institution to coordinate their independent actions? Elinor Ostrom described the elements of rational decision-making when it comes to the creation and maintenance of an informal institution of governance for a common-pool resource (or, in the language of the institutional analysis of decision-making, the creation and maintenance of social norms to address problems in collective action).[359] Translated into the setting of state supreme courts, Ostrom's insight is that state supreme courts' creation and maintenance of jointly created conflicts rules will be the result of the voluntary efforts of those courts, making decisions based on their individual, ongoing perceptions of costs, benefits, future opportunities, and the likely behavior of other state supreme courts, and based on limited information, each state supreme court's internal norms, and trial and error. The fact that each supreme court is composed of multiple individual humans adds complexity to the analysis.

We should distinguish between existing conflicts rules and new conflicts rules. In terms of game theory, existing conflicts rules, other than those for torts and contracts, easily serve as a focal point around which state supreme courts may coalesce (and have coalesced) to form a continuing equilibrium.[360] For new conflicts rules, including those desirable in the management of state

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[359] *See* OSTROM, *supra* note 62, at 33-38.

[360] For a game theoretic analysis of conflicts rules, *see* LEA BRILMAYER, CONFLICT OF LAWS, *supra* note 51, § 4.2.

economies, Ostrom's analysis of the rational decision-making that leads to the voluntary formation of informal institutions is illuminating.

Ostrom derived her insights from her studies of informal institutions that people create to govern common-pool resources. For this Article, the common-pool resource is multistate economic activity, and we seek conflicts rules to manage overlaps and conflicts in laws governing overlapping and inter-penetrating state economies. States and their lawmakers are the participants who compete for the revenue from the common-pool resource.

New conflicts rules need to be self-enforcing among state supreme courts. Ostrom identified two characteristics of a successful informal institution that allow its rules to be self-enforcing. In general, institutions that include low-cost mutual monitoring, on the one hand, and graduated sanctions, on the other, allow their participants to make credible commitments to follow the rules that make up the institution. Those credible commitments, even though they depend upon the practices of other participants, permit the institution's rules to be self-enforcing.[361]

When the participants in an informal institution are state supreme courts, the participants are concerned with whether other states will reciprocate in their exercises of prescriptive comity. Will individual state supreme courts make credible commitments to follow a new conflicts rule? Mutual monitoring by the supreme courts is indeed low cost: published judicial opinions allow for it. However, the creation of graduated sanctions against a supreme court that fails to follow a conflicts rule is difficult. State supreme courts could anticipate the possibility of a wayward court by designing their new conflicts rules to create two levels of prescriptive comity depending on past reciprocity. State supreme courts could then employ the lower level of prescriptive comity with a wayward court.

A greater range of graduated sanctions for a state supreme court's noncompliance with new common-law conflicts rules doesn't seem to be available. Action by a state legislature to bring its state supreme court back in line on a conflicts rule seems unlikely, given the press of other legislative business. Furthermore, without an interstate compact on conflicts rules, secondary norms that permit measured retaliation through sanctions against key influential interest groups capable of bringing vulnerable legislators back into line don't seem possible either.

So, group development of new conflicts rules by state supreme courts should be only partially successful; a lack of measured retaliation weakens those courts' ability to make credible commitments to new rules.

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[361] *See* ELINOR OSTROM, *supra* note 62, at 94-100.

H. CASE STUDY: REGULATED CONTRACT

For purposes of this Article, regulated contracts are those that are governed by an industry-specific state code, with that code usually administered by a state agency with the power to promulgate regulations. Such contracts are a true union of the traditional concepts of private law and public law and, as such, are especially suitable for a case study in the application of the prescriptive framework suggested by this study. Furthermore, the more extensive the regulation, the more we might conceive of the regulated industry as the delegate of the state legislature to adopt managerial policies and practices that complete the regulatory program.

Three of the prescriptive framework's considerations are especially important for regulated contracts. First, a forum court ought not to select a rule of decision in isolation from the rule's regulatory package. The elements of a regulatory package are interconnected, and the entire regulatory package is part of the social contract between the legislature and the electorate. Second, a forum court ought not to view rules of regulatory law in isolation from the transactions they regulate. Regulatory codes shape economies and their constituent transactions. Third, laws that transfer costs to, or benefits from, other states' economies may be relevant laws but probably should not be chosen as the governing law for multistate transactions, *ceteris paribus*.

The following case study considers automobile insurance policies. It concludes that an additional consideration is needed for regulated insurance contracts: a forum court should not remove one or more rules from another state's regulatory package for insurance, given the difficulty of recomputing *ex post* the pricing of risk. Hence, a forum court should not invoke its own public policy to reshape another state's regulatory package if doing so would affect the fund for paying out claims.

The case study analyses its facts under the prescriptive framework and under the Second Restatement of Conflicts. The case study also considers the prescriptive framework's ramifications for contracted risks moving between state economies and the possible choice by insurance companies among different states' regulatory regimes to govern their contracts.

1. Automobile Insurance: Contractual Loss-Shifting and Spreading.

One of the notable proposals of the Third Restatement of Conflicts is the separation of the determination of tort liability from the matter of shifting the loss once identified.[362] In the case of an automobile accident, conflicts rules are to apply separately to the initial assignment of the loss from the accident and to the follow-up determination of whether the loss assigned to a party in

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[362] Kermit Roosevelt III, *Professor Brilmayer and the Third Restatement*, *supra* note 329, at 39.

the accident is to be shifted to the party's insurance carrier.[363] If both the insured and the carrier are domiciled in the same state, then that state's law applies to the question of loss-shifting.[364] The location of the accident does not affect the law governing the loss-shifting contract.

This case study uses the facts of *Hague v. Allstate Insurance Company*.[365] Ralph Hague was a resident of Wisconsin who held an automobile insurance policy for the three vehicles he owned. The policy listed a separate premium for each vehicle and included uninsured motorist coverage. The policy was issued in Wisconsin and was regulated by Wisconsin's insurance board.

Hague commuted each day to Minnesota for his work. His home was in a small Wisconsin city close to the Minnesota border, and his work was in a nearby small Minnesota city just across the border.

Hague was killed while riding on the back of a motorcycle owned and driven by his son. The motorcycle was rear-ended at an intersection in Wisconsin while the motorcycle waited in a left-turn lane for the traffic light to change. The intended route of the motorcycle trip was entirely within Wisconsin; the trip was unrelated to Hague's work in Minnesota. Neither Hague's son nor the driver of the automobile that killed Hague carried insurance.

Hague's widow moved to Minnesota after his death. Just before the Minnesota statute of limitations was due to run, she remarried and asked a Minnesota probate court to appoint her as the executor of her late husband's estate. She made the request even though her late husband had been a Wisconsin domiciliary who had died in Wisconsin. The Minnesota probate court granted her request.

Hague's widow then sued in Minnesota district court to collect on the uninsured motorist coverage of Hague's insurance policy. She sought to recover three times the amount of uninsured motorist coverage, once for each of the three vehicles covered by the policy. However, the policy contained an excess insurance clause. According to precedent of the Wisconsin Supreme Court under Wisconsin insurance law, such clauses limited recovery to just the amount of uninsured motorist coverage without a multiplier.[366]

Precedent of the Minnesota Supreme Court held that such a clause was ineffective to prevent triple recovery of the amount of uninsured motorist

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[363] *See id*.

[364] *See id*. The draft Third Restatement presumes the domicile of a juridical person for choice-of-law purposes is the location of its principal place of business. *See also* RESTATEMENT (THIRD) OF CONFLICT OF LAWS, *supra* note 325, § 2.08(2).

[365] Hague v. Allstate Ins. Co., 289 N.W.2d 43 (Minn. 1979) (affirming lower's court's ruling against a challenge under the due process and the full faith and credit clauses).

[366] Hague v. Allstate Ins. Co., *supra* note 366, at 48 (citing Nelson v. Emps. Mut. Cas. Co., 63 Wis.2d 558, 217 N.W.2d 670 (1974)).

coverage.[367] In the nomenclature of automobile insurance, Minnesota law permitted "stacking" of the uninsured motorist coverage under a single policy and prevented attempts by insurance companies to limit stacking by contract. The Minnesota district court chose the Minnesota rule to govern the Wisconsin insurance policy and awarded triple recovery to Hague's estate. The Minnesota Supreme Court affirmed.

The Minnesota courts used the Leflar better-rule-of-law approach, which Minnesota had adopted a few years earlier, to select Minnesota's stacking rule to replace Wisconsin's anti-stacking rule for an automobile insurance policy regulated by Wisconsin.[368] In effect, the interpretation and performance of the insurance policy in *Hague* was governed by the Wisconsin insurance code and insurance board, with the forum court customizing the Wisconsin insurance code by swapping out one of the Wisconsin rules in favor of the conflicting Minnesota rule.

2. The Case Study Under the Prescriptive Framework.

Within the prescriptive framework proposed by this Article, regulated contracts should be governed by the internal law of the regulating state, without deletions or additions by the forum court. Insurance policies in the United States are regulated at the state level. Each state has an insurance code administered by a state insurance board that regulates the issuance and terms of policies in that state. The insurance code is part of the enacted policy of the state legislature on matters of economic and social development. The specifics of the regulation may be imperfect, but the voters of each state are the final arbiters of enacted policy.

Insurance companies frequently set up separate subsidiaries in each state to better meet the specific state requirements for insurance coverage. Those subsidiaries price their policies based on their state insurance codes, including whatever requirements and limitations those codes contain. As they set their premiums, insurance companies cannot control for the location of accidents, which may well be out-of-state, but they can control for the state-prescribed requirements and limitations of the insurance codes. The premiums they charge create funds for paying out claims to state residents, funds that are keyed to the state-prescribed requirements. Premiums will indirectly reflect each state's comprehensive plans for economic and social development.

Furthermore, the subsidiaries in each state usually will not sell a policy to residents of other states. If an out-of-state customer applies for a policy, the

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[367] *Id*. at 47 (*citing* Van Tassel v. Horace Mann Mut. Ins. Co., 296 Minn. 181, 207 N.W.2d 348 (1973)).

[368] Excess insurance clauses were enforceable under the Wisconsin insurance code, but such clauses were not enforceable under the Minnesota insurance code. When enforceable, excess insurance clauses prevent the multiple recovery or stacking of uninsured motorist coverage from multiple covered vehicles under the policy. *See id.* at 48.

subsidiary directs the customer to its sibling subsidiary in the customer's state of residence. Automobile insurance policies and their premiums are keyed to specific state insurance codes. Even when a subsidiary serves customers in several states, its policies are state-specific.

It is not feasible to recompute premiums after a policyholder has suffered a loss and a court has held that another state's insurance law governs the payout. Once the loss has occurred, the risk of loss is 100 percent rather than the pre-loss probability based on the policyholder's risk factors. That consideration argues in favor of keeping a state's insurance code intact for purposes of choice-of-law analysis. A forum court ought not to swap out one or more rules of a state insurance code in favor of rules from another state's insurance code. To do so affects the payouts from a fund created by the premiums charged under the regulating state's code. A rule substitution that reduces the payout under the regulating state's code is one matter; a rule substitution that increases the payout is quite another. A reduced or increased payout may be a transfer of funds from one state's economy to another state's economy, an externality in economic terms. For an elected judge facing a politically difficult issue with another state's insurance code, the dismissal of the case with leave to refile in the regulating state might be in order.

On the facts in *Hague*, Wisconsin law should govern an automobile insurance policy regulated by Wisconsin through its insurance code and insurance board with premiums priced under the Wisconsin code, and Minnesota law ought to govern policies regulated by Minnesota's code and insurance board, with premiums priced under the Minnesota code. Insurance codes and institutions give us the choice of law for the interpretation and performance of policies. Put another way, using older terminology, insurance codes and institutions are the relevant contacts for selecting a state's law as the governing law. A forum court only needs to read the automobile insurance policy to determine the regulating state and, thus, the state law to apply to the interpretation and performance of the policy, so the rule is quite usable.

Contacts such as the location of the policyholder's employment or the location of the policyholder's executor or heirs are irrelevant to the Minnesota regulation of automobile insurance policies.[369] However, the location of the policyholder's employment is relevant to the matter of the state regulation of the employment relationship, including vicarious liability, pensions, benefits, and workers' compensation.

The decision of the Minnesota Supreme Court has the effect of transferring from Allstate's Wisconsin premium pool a net amount equal to twice the amount of the Hague uninsured motorist coverage from the Wisconsin economy to the Minnesota economy for the benefit of a new resident of Minnesota, a net amount that had not been paid for in either

[369] *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 337 (1981) (Powell, J., dissenting).

Wisconsin or Minnesota through premiums. The transfer of funds from the Wisconsin economy to the Minnesota economy is a positive externality of the Minnesota decision and is out of keeping with the prescriptive framework.

Under the prescriptive framework, the separation of the issue of stacking uninsured motorist coverage from the issue of indemnification under an insurance policy and treating the two issues under the laws of different states is an illicit form of dépeçage. The two issues of compensation are closely related and reflected in the pricing of insurance policies and should be governed by the same state insurance code.[370] The pricing of risk is an indicator of issues too closely connected in purpose to separate in selecting the governing law.

The pricing of risk is also an extension of the governing insurance code into a state economy by participants in transactions. The prescriptive framework recognizes such extensions of lawmaking through the practices of business administrators as part of the universe of relevant laws and practices from which conflict-of-laws rules choose the governing law. The practices instituted by managers in an economy, even though the practices are only binding within the manager's organization, should not be shorn from the regulatory codes that induce them without understanding their import for conflict of laws. The practices give structure to transactions in the economy. That structure is more important to economic development than the traditional phrase, "expectations of the parties," suggests.

3. The Case Study Under the Second Restatement of Conflicts.

The Second Restatement of Conflicts gives a presumption about the law that governs multistate contracts when the parties haven't made an effective choice of governing law: if the place of the contract's negotiation and the place of its performance are within the same state, the internal law of that state governs.[371] The presumption is familiar to us as a recasting of the First Restatement of Conflicts' rule about the law applicable to multistate contracts.[372] The Second Restatement of Conflicts provides exceptions to the presumption[373] as well as a two-step, multi-factor balancing test for times when the presumption doesn't apply.[374]

One of the exceptions to the presumption pertains to insurance policies. Under the Second Restatement of Conflicts, the law governing an insurance

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[370] The Draft Third Restatement of Conflicts places limitations on the practice of dépeçage. RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.02 cmt. g (AM. L. INST., Tentative Draft No. 3, 2022).

[371] RESTATEMENT (SECOND) OF CONFLICT OF LS. § 188(3) (AM. L. INST. 1971).

[372] RESTATEMENT (FIRST) OF CONFLICT OF LS. §§ 332, 358 (AM. L. INST. 1934).

[373] RESTATEMENT (SECOND) OF CONFLICT OF LS. §§ 188(3), 189-199, 203 (AM. L. INST. 1971). Of interest to this case study is § 193 dealing with casualty and surety insurance.

[374] *Id*. §§ 188(1), (2) (for the first step), § 6 (for the second step).

policy is the internal law of the location of the insured risk.[375] The same law governs the policy's collision coverage and its liability coverage.[376] The Second Restatement of Conflicts considers the insured risk under an automobile liability insurance policy to be the automobile rather than the insured person.[377] Hence, the location of the insured risk is the location where the automobile is garaged during most of the policy's term. The Second Restatement of Conflicts notes that the location typically is also the state where the insured is domiciled.[378] Nevertheless, the location of the insured risk receives greater weight.[379] In justification of the greater weight assigned to the location of the insured risk, the Second Restatement of Conflicts points out that the location may well affect the pricing of the policy, as well as other terms and conditions of the policy.[380] The Second Restatement of Conflicts usually will not recognize a contractual choice of law in an insurance policy if the insured receives less protection under the chosen law than he would under the internal law of the state where the insured risk is located.[381]

If the Minnesota courts had applied the rules of the Second Restatement of Conflicts, they would have chosen Wisconsin law to govern the issue of stacking.[382] Wisconsin, as the location where Hague's vehicles were garaged, was the location of the insured risk. The conditions at the location of those vehicles would be some of the factors affecting the pricing of the policy.

The analysis of the case study under the prescriptive framework is more satisfying than the analysis under the Second Restatement. The prescriptive framework recognizes Hague as a member of the Wisconsin electorate, which the Wisconsin legislature and its insurance code are accountable to. The prescriptive framework also recognizes Wisconsin's rule about stacking as part of a comprehensive insurance code, the parts of which are interrelated, that extends into the state's economy through managerial practices. Finally, the prescriptive framework recognizes the premiums Hague paid to be part of a finite, composite pool of funds that are specific to claims brought under

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[375] *Id*. § 193. The section includes an exception for the internal law of a state with a more significant relationship to the policy and the parties. *Id*.
[376] *Id*. cmt. a.
[377] *Id*. cmt. b.
[378] *Id*.
[379] *See id.* The Restatement assigns very little weight to the insurance company's state of incorporation or of its principal place of business. *Id*.
[380] *Id*. cmt. c.
[381] *Id*. § 193 cmt. e. When the insured's protection is the product of a statute in the state in which the insured risk is located, the statute will qualify as a fundamental public policy of that state under § 187(2)(b) and override the insurance policy's contractual choice of law. *Id*. § 187(2)(b) cmt. g.
[382] Hague v. Allstate Ins. Co., 289 N.W.2d 43, 46 (Minn. 1979) (applying instead the Leflar better-law approach.

policies regulated by Wisconsin law, a pool that is distinct from the pool of premiums paid under policies regulated by Minnesota's insurance code.

4. Regulated Contracts, the Exception for a Forum's Public Policy, and the Leflar Better-Law Approach.

May a forum state invoke its public policy to eliminate an element of the regulating state's insurance code? It is difficult to imagine anything in an insurance code as being so contentious as to violate the forum's fundamental public policy under the Second Restatement of Conflicts Law[383] or to violate the forum's deeply rooted public policy under the draft Third Restatement.[384]

In addition, it is difficult to imagine a way to adjust the premium paid for the policy ex post facto. Nevertheless, an adjustment would be in order, given that the premium reflects the regulating state's entire regulatory package. Furthermore, the elimination of one element of an insurance code may well affect the interplay of the other elements of the code. The adjustment of the premium to account for the resulting configuration of the remaining elements of the code would also be difficult ex post facto.

Because of the difficulty in re-computing premiums after a risk has already materialized or after an element of a state insurance code has been removed, the prescriptive framework argues against the removal of a single rule from a state's regulatory package because of the forum's fundamental public policy. For an elected judge facing a politically difficult issue with another state's insurance code, the dismissal of the case with leave to refile in the regulating state might be in order.

The Leflar better-rule-of-law approach has the same problem under the prescriptive framework as an exception for the forum's fundamental public policy. In both cases, the forum cannot feasibly recompute the insurance premium. In addition, regulatory codes shape economies and their constituent transactions, so rules of regulatory law ought not to be viewed as independent from or to be shorn of the transactions in an economy. Furthermore, voters are the ultimate arbiters of a state legislature's efforts at economic and social development. Under liberal democratic theory, the people are the source of a government's lawmaking power, and the electorate and the electorate's judicial system discipline their government's exercise of lawmaking power.

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[383] The forum's invocation of public policy in *Paul v. Nat'l Life* (West Virginia) removed a tort liability rule (a guest statute) from another state's otherwise governing law on the grounds of forum public policy, not a loss-shifting rule under an insurance code.

[384] RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.04 cmt. b. (AM. L. INST., Tentative Draft No. 3, 2022) ("A policy difference that warrants invocation of the exception should seldom be found among States of the United States, where the federal Constitution prevents extreme divergences of policy.").

5. Transfers of Risks Between Economies and Their Insurance Codes.

In *Clay v. Sun Insurance Office, Ltd.,* the holder of a multi-year worldwide insurance policy for personal property moved to a new state of residence two years before he suffered a loss, a loss that occurred in the new state.[385] The policy included a one-year limitation on filing a claim, which was a valid limitation under the insurance code of Illinois, his first state of residence, but was invalid under the insurance code of Florida, his subsequent state of residence. The insurance carrier was registered to do business in both states.

The policyholder filed his claim more than one year following his loss but before two years had elapsed. The U.S. Supreme Court permitted the application of the Florida code against constitutional challenges brought by the insurer. We do not know whether the insurer adjusted the premiums after the policy holder moved to Florida.

Under the prescriptive framework, the forum may properly apply the Florida insurance code to the policy. The policyholder had become a part of the Florida economy, and the insurer was already a part. The annual premiums the policyholder paid once he acquired a Florida address should have reflected the Florida insurance code. The insurance company was seeking a windfall by invoking the Illinois insurance code after it had repriced its risk (or ought to have repriced its risk) under the Florida insurance code.

May an insurer choose another insurance code to govern its policy when the location of the customer's insured risk hasn't changed? The next section addresses that question.

6. Contractual Choice-of-Law Provisions: Choosing Regulatory Regimes.

May the issuer of an automobile insurance policy choose a regulatory regime of another state to govern the policy? As a general rule under the Second Restatement of Conflicts, if the default body of law doesn't prohibit the choice of another state's law, the forum will follow the contract's direction.[386] In addition, even if a choice-of-law provision is impermissible under the default body of law, the contract's direction will still be followed by the forum if the provision is not contrary to a fundamental policy of the default state and there is a reasonable basis for the parties' choice.[387] If a choice-of-law provision is contrary to a fundamental policy of the default state, the forum is then free to disregard a contract's choice-of-law clause.

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[385] Clay v. Sun Ins. Off., Ltd., 377 U.S. 179, 180 (1964).

[386] RESTATEMENT (SECOND) OF CONFLICT OF LS.§§ 186, 187(1) (AM. L. INST. 1934). Judges prefer parties to a contract to designate the applicable law. Peter Hay and his co-authors describe § 187 as "one of the Restatement's most successful and popular provisions." HAY ET AL., *supra* note 2, at 75.

[387] RESTATEMENT (SECOND) OF CONFLICT OF LS. § 187(2) (AM. L. INST. 1934).

However, the Second Restatement of Conflicts Law provides a more specific rule for casualty insurance policies. Section 193 of the Second Restatement won't recognize a contractual choice-of-law provision in an insurance policy if the insured receives less protection under the chosen law than he would under the internal law of the state where the insured risk is located.[388] When the insured's protection is the product of a statute in the state in which the insured risk is located, the statute will qualify as a fundamental public policy of that state under § 187(2)(b) and override the insurance policy's contractual choice of law.[389] Thus, a state insurance code that prohibits insurers from choosing another state's insurance code to govern their policies for risks located in that state is effective when that state's law governs in the absence of a contractual choice-of-law provision.

The current draft of the Third Restatement of Conflicts hasn't reached choice-of-law clauses yet. However, a reporter's note elsewhere in the draft does discuss state insurance codes that include a mandatory conflict-of-laws provision that requires the code to be the governing law in the event of a conflict with the laws of another state. The reporter's note gives examples of state insurance codes that stipulate that, in case of a conflict with the laws of another state, the code is given priority.[390] Such a statutory determination of priority would be binding on the forum only when the forum is the state that enacted the code.[391] In contrast, a statutory determination of scope would be binding on a forum in any state.[392] If the policy chose another state's law to govern the policy, the contractual choice-of-law provision would not be enforced by the forum if the forum is the state that enacted the statutory rule of priority. Any other forum would be free to enforce the contractual choice-of-law provision if the forum's own conflicts rules permit.

The prescriptive framework argues against the enforceability of contractual choice-of-law provisions in consumer casualty insurance policies, regardless of whether the consumer's state insurance code or state case law prohibits such clauses. As regulated contracts, consumer insurance policies are embedded in a regulatory regime that is part of the social contract between the state government and its electorate, including its resident policyholders. Resident policyholders aren't members of the electorate of other states. In addition, the reasons for consumer protection laws also apply to consumer casualty insurance policies. Among those reasons, consumers are unable to evaluate the financial soundness of insurers given the transaction costs of time and lack of knowledge. Furthermore, consumer protection laws assist a state's

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[388] *Id*. § 193 cmt. e.
[389] *Id*. § 187(2)(b) cmt. g.
[390] RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.02, Reporter's Note 2 (AM. L. INST., Tentative Draft No. 3, 2022) (listing Maryland and Texas).
[391] *Id*. § 5.02(b) cmt. b.
[392] *See id*.

economic and social development by preserving the personal financial resources of consumers, allowing consumers to save for education, training, business formation, and retirement.

Business casualty insurance policies are another matter. If the state insurance code expressly permits contractual choice-of-law provisions, the code is expressly authorizing competition among insurance codes with the pricing of coverage to vary accordingly. Such a code provision may be cheaper in terms of legislative resources than overhauling the state insurance code to provide the various options for business policyholders that are reflected in the choice among state codes. In addition, a business may be working through an insurance broker whose industry acumen may well include the assessment of the financial soundness of insurers and access to independent rating agencies' assessment of an insurer's claims-paying ability. When a state code authorizes contractual choice-of-law provisions, the chosen regulatory regime should govern the policy in all respects, including the regulation of the financial condition of the issuer.

The distinction between consumers and businesses as policyholders is made in other contexts. New York has a statute that guarantees that New York law will govern a contract if three requirements are met: the contract includes a choice-of-law provision designating New York law, the amount in controversy meets a threshold amount, and the litigation is brought in New York courts. However, the statute does not apply to contracts for labor or consumer services.[393] Other states have similar laws.[394]

7. Conclusion of the Case Study.

The prescriptive framework argues against the removal by a forum state of one or more rules from a regulating state's insurance code, whether or not the forum state then replaces the removed rule with a substitute rule from its own or another state's insurance code. The pricing of risk must proceed ex ante and reflect all components of a regulating state's insurance code. The transactions in state economies depend on it.

If a policyholder moves its insured risk to another state's economy, the new state's insurance code should govern the policy after a reasonable time to permit the issuer to reprice the risk.

In addition, the prescriptive framework argues against the enforceability of contractual choice-of-law provisions in consumer casualty insurance policies, regardless of whether the consumer's state insurance code or state case law prohibits such clauses.

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[393] N.Y. LAW § 5-1402 (McKinney 2018).

[394] LEA BRILMAYER ET AL., CONFLICT OF LAWS: CASES AND MATERIALS 699 (7th ed. 2015) (listing California, Delaware, Florida, Illinois, and Texas as examples).

V. CONCLUSION

This Article proposes an additional framework for the analysis of conflicts of law. The framework draws on international prescriptive jurisdiction, as well as on the institutional analysis of decision-making by lawmakers and others. The Article refers to the additional framework as the prescriptive framework.

The goal of the prescriptive framework is the identification of conflicts rules that serve the objectives of economic and social development. Economic and social development is a joint effort of state legislatures with conflicting and overlapping decision-making authority and conflicting and overlapping programs of development. Under the prescriptive framework, prescriptive comity expressed through conflicts rules addresses those conflicts and overlaps. The prescriptive framework also recognizes the effect of regulatory lawmaking in shaping state economies and the embodiment and extension of that lawmaking in the contracts of actors in an economy.

The prescriptive framework incorporates the institutional analysis of decision-making. Under an institutional analysis, decision-making recognizes an overall goal set by a state's electorate, provides for the equal authority of decision-makers charged with the achievement of the overall goal in their respective societies, respects standards for and limitations on the decision-makers' exercise of discretion to reduce the abuse of their discretion, and fosters the creation of new social norms to address problems in collective action by decision-makers on the same plane of authority.

The prescriptive framework supplements the framework of the First Restatement of Conflicts in three important ways. First, the prescriptive framework recognizes lawmakers' accountability to their electorates through social contract theory and positivist legal theory, which raises the visibility of statutes as relevant law for disputes. Second, the prescriptive framework expands the bases for prescriptive jurisdiction beyond that of a state's territory to include all bases recognized by public international law. Third, the prescriptive framework restores prescriptive comity to American conflict of laws as a means of reconciling conflicts and overlaps among those bases for prescriptive jurisdiction. The First Restatement relies on localization rules to prevent conflicts and overlaps from arising in the first place, at the expense of Joseph Story's earlier transmission of comity to American conflict of laws from private international law.

The prescriptive framework supplements the Legal Realist framework of the Second Restatement of Conflicts with the recognition of comprehensive regulatory codes, the delegation of lawmaking power within the administrative state to government agencies and courts, and the delegation to companies of responsive managerial policies and procedures. Those additions emphasize the need to choose among whole regulatory codes as the governing

law for a dispute and the drawbacks of severing relevant codes from the underlying transactions in the economy.

Policy analysts may use the prescriptive framework to understand conflicts in the law-making needed for economic and social development. Expert rule drafters may then use the prescriptive framework as they transform policy analysis into usable conflicts rules for judges and actors in the economy.

Based on a case study of casualty insurance contracts as an example of regulated contracts, the Article proposes specific considerations for policy analysts and rule drafters for conflicts dealing with those contracts. The case study shows the value of the prescriptive framework's extension of the bases of prescriptive jurisdiction to the regulation of contracts, where public law regulates private law mechanisms. Future research based on the prescriptive framework could profitably include case studies in the areas of regulated relationships, such as the employer-employee relationship as regulated by worker compensation laws and other safety nets.

More generally, the prescriptive framework shows the value of employing the bases for international prescriptive jurisdiction in the analysis of private law and not just in the analysis of public law and in the analysis of civil law and not just the analysis of criminal law.[395] In addition, the prescriptive framework has direct application to nations with federal or devolved systems of government. The framework would also support the European Union's regulations on conflict of laws. The framework might be useful to nations that plan for economic development without a linkage to political rights.

Elaborations of the prescriptive framework could include treaties to coordinate nations' overlapping spheres of law-making power when the overlap threatens to impede the development of their national economies. The framework has already been applied to an analysis of bilateral tax treaties and their division of prescriptive jurisdiction between the two treaty parties for purposes of economic development, with the recommendation that end markets be viewed as source countries for purposes of income taxation.[396]

This Article proposes to reframe the debate over American conflict-of-law rules in terms of the allocation of law-making power to promote the development of economies and the material aid that those economies can give to support human capabilities. The allocation of law-making power through

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[395] There is no consensus within customary international law about whether the bases of prescriptive jurisdiction should apply to private law or even to public law outside of criminal law. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 407, cmt. f. (AM. L. INST. 2018). The Fourth Restatement of Foreign Relations Law argues that the bases of prescriptive jurisdiction should apply to private law and not just to public law. *Id.* § 407, cmt. f and Reporters' Note 5.

[396] Laity, *Competence of Nations*, *supra* note 90.

prescriptive comity is a key insight of international prescriptive jurisdiction and is worthy of translation into American conflict-of-law rules.

Conversely, the Article proposes to introduce into international prescriptive jurisdiction the approach that national courts determine the priority of application among conflicting national laws relevant to the disputes before them. A court's analysis ought not to stop with the determination that a dispute does or doesn't fall within the scope of forum law; the court should select the governing law from among the relevant conflicting national laws. Such national courts include the federal courts of the United States. Federal courts should not end their analysis with the conclusion that a federal statute does or doesn't include a multinational transaction or event within its scope. Federal courts should continue their analysis by determining the governing law among the relevant conflicting national laws. This is a key insight of the American law of conflict of laws.