Cooperation in International Bankruptcy: A Post-Universalist Approach

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COOPERATION IN INTERNATIONAL BANKRUPTCY: A POST-UNIVERSALIST APPROACH

Lynn M. LoPucki†

ABSTRACT

This Article examines several competing systems proposed for international cooperation in bankruptcy cases and concludes that a cooperative form of territoriality would work best. Universalism, the system that currently dominates the scholarship, diplomacy, and jurisprudence of international bankruptcy, holds that the courts of a bankrupt multinational company's "home country" should have worldwide control and should apply the home country's law to the core issues of the case. Universalism is unworkable, however, because it would require that countries permit foreign law and foreign courts to govern wholly domestic relationships and because the links that define the "home countries" of multinational companies are so ephemeral and manipulable that the resulting system would be unpredictable. Modified universalism, secondary bankruptcy, and Rasmussen's corporate-charter contractualism, each of which will be discussed below, are similarly flawed. Territoriality, a system in which each country has jurisdiction over the portion of the multinational company within its borders, would provide the best foundation for international cooperation. A system of cooperative territoriality is optimal even though it potentially requires multiple filing and prosecution of claims, cooperation among courts and administrators with respect to particular reorganizations and liquidations, and international agreements to control fleeing assets.

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INTRODUCTION

For decades, the scholarship,¹ diplomacy,² and jurisprudence³ of multinational bankruptcy have operated within a universalist para-

¹ See, e.g., André J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 314 (1998) (claiming that "those who support the universality principle have a keener eye for the needs of practice"); U. Drobnig, *Cross-border Insolvency: General Problems*, FORUM INTERNATIONALE, Nov. 1993, at 9, 13 ("From the point of view of insolvency proceedings, the principle of universality is, of course, the only adequate solution."); Todd Kraft & Allison Aranson, *Transnational Bankruptcies: Section 304 and Beyond*, 1993 COLUM. BUS. L. REV. 329, 338 (concluding that "[u]niversality must be our goal"); Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 26 (1997) (asserting that "[t]he preference of most, if not all, academic commentators would be a meta-rule that the 'home' country of the multinational firm provide the single forum, and controlling law, for handling all transnational bankruptcies"); Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 515 (1991) [hereinafter Westbrook, *Avoidance*] (stating that "[u]niversality . . . has long been accepted as the proper goal of international bankruptcy law by leading writers"); Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 461 (1991) [hereinafter Westbrook, *Theory and Pragmatism*] (referring to "nearly unanimous agreement across the world that the financial difficulties of a multinational should be resolved in one central forum, the 'universalist' principle"); Lucian Ayre Bebchuk & Andrew Guzmán, *An Economic Analysis of Transnational Bankruptcies* 3-4 (unpublished manuscript, on file with author) (endorsing universalism as economically efficient).

² See, e.g., MODEL INT'L INSOLVENCY CO-OPERATION ACT cmt. (International Bar Ass'n, Third draft 1988), reprinted in CURRENT ISSUES IN CROSS-BORDER INSOLVENCY AND REORGANIZATIONS app. 1, at 262 (E. Bruce Leonard & Christopher W. Besant eds., 1994) ("Insofar as possible, . . . universality should be the guiding principle of all efforts toward international insolvency cooperation, for it alone is truly compatible with the realisation of equal treatment of all creditors, debtors, assets and liability, and the swift and effective administration of the estate."); Berends, *supra* note 1, at 315 (observing that participants in an UNCITRAL colloquium rated countries as being "in a good position" to the extent they had adopted a universalist approach to cross-border insolvency); Ulrich Drobnig, *Secured Credit in International Insolvency Proceedings*, 33 TEX. INT'L L.J. 53, 66 (1998) (stating that "today almost all countries embrace the principle of universality"); Jay Lawrence Westbrook, *Universal Priorities*, 33 TEX. INT'L L.J. 27, 39 (1998) (noting that "there is relatively little articulation . . . at international conferences of the reasons for favoring [modified territorialism] over some form of universalism").

³ When U.S. courts have conceptualized the choice as between universalism and territoriality, they invariably have opted for universalism or stood neutral. See, e.g., Overseas Inns S.A. P.A. v. United States, 911 F.2d 1146, 1149 n.5 (5th Cir. 1990) (noting that "[s]ome consider the 'universality' theory the modern trend in recognizing foreign bankruptcy proceedings" and referring to the trend as "a movement away from the old 'territorial' approach"); *In re Hourani*, 180 B.R. 58, 63-64 (Bankr. S.D.N.Y. 1995) ("This court leans towards a 'universality' approach to international insolvency proceedings. Indeed, the courts in the United States generally are increasingly supportive of the philosophy underlying universality and are employing the doctrine in an ever growing number of cases and circumstances." (footnote omitted)); *Maxwell Communications Corp. v. Barclays (In re Maxwell Communication Corp.)*, 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994) ("[T]he United States in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism . . ."); Mary Elaine Knecht, Comment, *The "Drapery of Illusion" of Section 304—What Lurks Beneath: Territoriality in the Judicial Application of Section 304 of the Bankruptcy Code*, 13 U. PA. J. INT'L BUS. L. 287, 299 (1992) (pointing out that "the majority of U.S. courts claim to employ universality in dealing with foreign bankruptcy proceedings").

digm.⁴ The core concept of universalism is that a single court should have control over the assets of a bankrupt multinational firm.⁵ This court should apply its nation's laws to decide between reorganization and liquidation and to determine priorities among creditors.⁶ It should control the administration of the assets of the debtor and should make the distributions to creditors worldwide.⁷ The role of other courts should be merely to render assistance to representatives of the home court. Under universalism, one court plays the tune, and everyone else dances.

During this period of universalism⁸ there has been rapid globalization of business and sharp increases in both the number and the size of multinational corporate bankruptcies.⁹ Problems such as cross-filing of claims, choice of law for avoiding powers, and sharp differences in national schemes of priority have become routine, and scholars interested in the realities of multinational bankruptcy—particularly Professor Jay Lawrence Westbrook—have made tremendous strides in identifying and understanding the complexities involved.¹⁰ This Article argues that these scholars' successes have

⁴ This Article refers to universalism as a "paradigm" because it has defined "the legitimate problems and methods of a research field for succeeding generations of practitioners." THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10 (2d ed. 1970).

⁵ See, e.g., Donald T. Trautman et al., *Four Models for International Bankruptcy*, 41 AM. J. COMP. L. 573, 579 (1993) ("Universality . . . refers to the recognition given the decisions of the single jurisdiction."); Westbrook, *Theory and Pragmatism*, *supra* note 1, at 458 (referring to "universalism" as "the resolution of the financial difficulties of a multinational commercial enterprise in one proceeding"). Rasmussen uses the terms "substantive" and "pristine" universalism to refer to a system in which the home court directly exercises extraterritorial jurisdiction, and "procedural universalism" to refer to a system in which the home court exercises extraterritoriality through recognition of its decisions by foreign courts. See Rasmussen, *supra* note 1, at 16-17.

⁶ See Rasmussen, *supra* note 1, at 16-17.

⁷ See *Hong Kong and Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991, 998 (1998) (describing "'universalist' philosophy" as contemplating that "one plenary transnational proceeding completely govern[s] the administration of assets world-wide").

⁸ "Period of universalism" refers to the time in which universalist ideology almost exclusively ruled the scholarship, diplomacy, and jurisprudence of multinational bankruptcy. The international bankruptcy system actually operates with a chaotic blend of universalism and territoriality, in which "secondary bankruptcy," referred to by Westbrook as "modified territoriality," Westbrook, *Theory and Pragmatism*, *supra* note 1, at 458, is probably the dominant strain. See generally *infra* Part III (describing the system of secondary bankruptcy, its claimed advantages, and its problems).

⁹ Few seem to doubt that such increases have occurred. See, e.g., Jay Lawrence Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 563 (1996) ("[T]he reality for many bankruptcy lawyers and judges lies in the growing number of Canadian and Mexican border cases More and more cases in United States bankruptcy courts have an important foreign element . . ."). Depending on the definition employed, as many as one third of all large bankruptcies of publicly-held companies may be international. See *infra* note 147 and accompanying text.

¹⁰ See, e.g., sources cited *supra* notes 1-2.

undermined fatally the universalist paradigm in which they have been working.

Attempting to reconcile their new understandings with the paradigm, universalist scholars have proposed a steadily increasing number of exceptions to universalist principles,¹¹ a phenomenon recognized in the hard sciences as signaling an approaching paradigm-shift.¹² Two other trends also suggest such a shift. First, despite decades of efforts, the major trading nations of the world still do not have treaties or conventions among them.¹³ Second, although courts and lawyers have continually given lip service to universalism in resolving multinational bankruptcy cases, they increasingly have found nonuniversalist solutions to multinational problems.¹⁴ As a result,

¹¹ For example, Drobnig advocates universalism, but adds that "[p]ersonally, I would admit an exception for relationships which are strongly rooted locally, especially for security rights in assets outside the country of the main proceeding and for labour contracts to be performed abroad." Drobnig, *supra* note 1, at 18. Elsewhere, Drobnig describes four competing approaches to the question of what law governs security interests in a universalist system and notes that the question does not arise under territoriality. See Drobnig, *supra* note 2, at 67-69. Three leading universalists acknowledge the unfairness of applying the forum country's rules of priority to unsophisticated creditors in other countries and advocate an exception for these creditors—without specifying who they are. See Trautman et al., *supra* note 5, at 624 ("If cases should arise where the reasonable expectations of unsophisticated creditors . . . might suffer unfairly, there is no reason a special rule cannot be applied in such cases."). Westbrook, an ardent universalist, finds himself advocating various accommodations to territorialism because they "may have the additional virtue of increasing the commercial pressures for universalist approaches." Westbrook, *supra* note 2, at 43. Westbrook also suggests "the possibility of exempting from the universalist rule the claims of consumers and tort victims or of exempting all claims below a certain monetary amount." Westbrook, *Theory and Pragmatism*, *supra* note 1, at 489. With regard to choice of law for the avoidance of transfers made in anticipation of bankruptcy (or "avoiding powers"), Westbrook admits the "pleasant symmetry of this analysis" under territorialism, but rejects it in favor of a convoluted universalist solution "because of the serious disadvantages and anomalies" of territorialism. Westbrook, *Avoidance*, *supra* note 1, at 527. Alwang advocates bankruptcy universalism in the strongest terms, but proposes continuation of the thoroughly territorial regime of debt collection in admiralty as an exception. See Melissa K.S. Alwang, Note, *Steering the Most Appropriate Course Between Admiralty and Insolvency: Why an International Insolvency Treaty Should Recognize the Primacy of Admiralty Law over Maritime Assets*, 64 *FORDHAM L. REV.* 2613, 2642-46 (1996).

¹² See KUHN, *supra* note 4, at 67-68; see also *id.* at 68-76 (giving examples of such paradigm-shifts).

¹³ See, e.g., Thomas M. Gaa, *Harmonization of International Bankruptcy Law and Practice: Is it Necessary? Is it Possible?*, 27 *INT'L LAW.* 881, 897 (1993) (referring to "the dearth of bankruptcy treaties and the failure of recent efforts in this area"); Anne Nielsen et al., *The Cross-Border Insolvency Concordat: Principles To Facilitate the Resolution of International Insolvencies*, 70 *AM. BANKR. L.J.* 533, 534 (1996) ("Only a handful of international bankruptcy treaties espousing a universality-based theory have been successful, and, in these cases, the parties to the treaties usually have had close territorial ties and similar legal, economic, and cultural traditions."). But see Gaa, *supra*, at 883 n.6 (noting the existence of "the Scandinavian Convention between Denmark, Finland, Iceland, Norway, and Sweden, and [the existence of] the Bustamonte Code, which has been ratified by 15 Latin American states").

¹⁴ See, e.g., *Re Bank of Credit and Commerce International, S.A.*, 4 All E.R. 796, 796 (Ch. 1996) (holding that although the English liquidation was "ancillary" to the principal liquidation in Luxembourg, the English courts should apply the English rule of setoff in

universalists have begun to describe their philosophy as an unobtainable ideal¹⁵ and to talk of second-best solutions¹⁶—though still within the universalist paradigm.¹⁷

Territoriality is the antithesis of universalism. In a territorial regime, each country would have jurisdiction over the portion of the bankrupt multinational firm within its borders. In each case, each country's bankruptcy court would decide whether to participate in a transnational effort at reorganization or liquidation or to conduct a local reorganization or liquidation according to local law. The bankruptcy literature generally disparages territoriality¹⁸ and sometimes

favor of English creditors); MIKE SIGAL ET AL., *THE LAW AND PRACTICE OF INTERNATIONAL INSOLVENCIES, INCLUDING A DRAFT CROSS-BORDER INSOLVENCY CONCORDAT 95* (1994) (espousing universalism while setting forth rules for the type of secondary bankruptcy system that Westbrook has referred to as "modified territorialism"); Knecht, *supra* note 3, at 299 (arguing that "while the majority of U.S. courts claim to employ universality in dealing with foreign bankruptcy proceedings, the majority of cases reveal that the courts only apply universality when they have assurance that foreign law will treat U.S. creditors virtually the same way that filing in the United States would have").

¹⁵ See, e.g., Ian F. Fletcher, *International Insolvency: A Case for Study and Treatment*, 27 INT'L LAW. 429, 437 (1993) (describing the first failed proposal for a European Union bankruptcy treaty in the early 1980s as "overambitious" because it essentially employed a universalist approach); Richard A. Gitlin & Evan D. Flaschen, *The International Void in the Law of Multinational Bankruptcies*, 42 BUS. LAW. 307, 322 (1987) (stating that "[i]deally, there would be an international unity of bankruptcy law, so that creditors, debtors, and courts everywhere could respond universally and equitably to the bankruptcy of a multinational debtor," but noting that this "ideal must be tempered by the practical"); Nielsen et al., *supra* note 13, at 549 ("[I]n most cases it is preferable to have one worldwide main insolvency proceeding, with one or more supporting insolvency proceedings. This cannot be assured, however, as there is no treaty among nations requiring this result"); Westbrook, *supra* note 2, at 29 (noting that "[t]he question that faces U.S. policymakers is whether and to what extent to adapt U.S. doctrine to the realities of a world of modified territorialism despite the U.S. conviction that modified universalism is a superior long-term solution"); Alwang, *supra* note 11, at 2616 ("Insolvency experts agree that a treaty that creates a truly universal bankruptcy system is not feasible").

¹⁶ See, e.g., Westbrook, *supra* note 2, at 43 ("It may be that we must shape our reforms in international insolvency to a version of modified territorialism for the present if they are to work efficiently and fairly in the world as it is.").

¹⁷ See *id.* (noting that Westbrook remains "deeply committed to the idea of universalism in insolvency matters").

¹⁸ See Rasmussen, *supra* note 1, at 2 (stating that the "'territorial approach' to bankruptcy law has been criticized for a number of years," leading to "modest reforms"); Trautman et al., *supra* note 5, at 575 (referring to the "tyranny of territoriality"); Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 LAW & POL'Y INT'L BUS. 1037, 1040 (1997) (describing territorialism as "the non-coordination of international insolvency proceedings"); Westbrook, *supra* note 2, at 39 ("[T]here is relatively little articulation in the literature or even in discussions at international conferences of the reasons for favoring [modified territoriality] over some form of universalism. Perhaps the explanation for this silence is that some of the reasons for territorialism are unfashionable and unflattering."); James Garrett Van Osdel, Note, *The Transnational Insolvency Dilemma: Congress Should Emphasize Comity of Nations*, 49 S.C. L. REV. 1327, 1329 (1998) ("[T]he territoriality approach . . . has done little to encourage countries to work toward harmonizing inconsistent domestic bankruptcy laws.").

equates it with a lack of cooperation between countries.¹⁹ Perhaps because of this history, territoriality has failed to emerge as an alternative to universalism as a foundation for ordering the international bankruptcy regime.

Building on the work of Westbrook and other universalist scholars and using a systems methodology, this Article explores the possibility of an international bankruptcy regime grounded in territoriality. The systems approach holds that, because the best resolution of any particular issue of system design depends on how other issues are resolved, the relevant comparison is among comprehensive solutions rather than among resolutions of particular issues.²⁰ Accordingly, this Article compares five possible systems for international cooperation in business bankruptcy cases. Part I examines universalism and rejects it as unworkable. Part II critiques modified universalism, the approach formally adopted by the United States in Bankruptcy Code § 304.²¹ Part III examines secondary bankruptcy, the system that de facto dominates international cooperation in bankruptcy cases throughout most of the world. Part IV considers a system recently proposed by Professor Robert K. Rasmussen in which each firm could select a bankruptcy regime in its articles of incorporation. Part V proposes what I call "cooperative territoriality"—a system for international cooperation in bankruptcy cases grounded in territoriality. This Article concludes that cooperative territoriality is likely to produce the best results.

This Article uses the ability of the system to achieve an accepted set of goals as the criteria for system comparison. To assure the relevance of this analysis to a broad audience, this Article assumes that the goals of the international bankruptcy system are those already identified by universalist scholars.²² First, the system should operate pre-

¹⁹ See, e.g., Daniel M. Glosband & Christopher T. Katucki, *Claims and Priorities in Ancillary Proceedings Under Section 304*, 17 BROOK. J. INT'L L. 477, 481 (1991) (asserting that "[t]erritoriality . . . sacrifices international cooperation"); Trautman et al., *supra* note 5, at 574-75 ("[Territoriality] leads . . . to a grand international free-for-all, with each country claiming plenary power over assets located there and paying no attention to what other countries may say . . ."); Unt, *supra* note 18, at 1040 (referring to territorialism as "the inverse of multinational cooperation"); Westbrook, *Avoidance*, *supra* note 1, at 514 (asserting that the justification for territorialism "seems to be a sigh of despair: bankruptcy is simply too complicated for international cooperation to work").

²⁰ See Lynn M. LoPucki & George G. Triantis, *A Systems Approach to Comparing U.S. and Canadian Reorganization of Financially Distressed Companies*, 35 HARV. INT'L L.J. 267, 340-42 (1994) (describing how U.S. and Canadian reorganization systems reach functional equivalence through different means). See generally, Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479 (1997) (arguing that the systems approach is the most promising and realistic methodology for the analysis of law-related problems).

²¹ 11 U.S.C. § 304 (1994).

²² This Article makes this assumption for two reasons. First, my differences with universalist scholars regarding the system's goals for international cooperation are minimal. Second, by accepting their goals and demonstrating that cooperative territoriality better

dictably so that lenders can price credit accurately.²³ Second, the system should maximize the values of bankruptcy estates in liquidations and facilitate reorganizations²⁴ consistent with the policies of the countries involved. Third, the system should minimize expenses and delays for participants.²⁵ Fourth, the system should minimize conflicts among the nations involved.²⁶ Fifth, writers posit that distributions should be equitable, by which they usually mean pro rata among unsecured creditors.²⁷ In economic terms, all but the last goal are subsumed in the more general goal of "economic efficiency."²⁸

achieves them, this Article addresses their arguments directly. See LoPucki, *supra* note 20, at 502-03 (noting that an analysis based on normative attribution of goals is useful only to those who agree with the attribution).

²³ See, e.g., Rasmussen, *supra* note 1, at 17 (asserting that "universalism provides creditors with a clear set of rules, which allows them to price their loans more accurately"); Westbrook, *Theory and Pragmatism*, *supra* note 1, at 466 (asserting that the greater predictability of universalism "would significantly reduce the costs of borrowing and other credit for multinationals"); Westbrook, *supra* note 2, at 39 ("The great benefits of universalism are predictability and the consequent vindication of expectations, which can be achieved only by applying home-country rules."); Bebhuk & Guzmán, *supra* note 1, at 2 & n.10 (arguing that lenders can better predict their rights on default in a universalist system).

²⁴ See, e.g., Hal S. Scott, *Supervision of International Banking Post-BCCI*, 8 GA. ST. U. L. REV. 487, 504 (1992) ("If U.S. or other country assets of failed foreign banks are not fully consolidated in home-country foreign insolvency proceedings . . . the ability of a foreign receiver to reorganize a failed bank will be severely limited."); Westbrook, *Theory and Pragmatism*, *supra* note 1, at 465 (asserting that under universalism "the preservation of going concern values and the maximizing of liquidation values by integrated sales will likely increase returns to creditors greatly"); Alwang, *supra* note 11, at 2624 (stating that "[u]niversality would maximize returns to creditors" and that "[f]rom both the debtor's and creditor's viewpoints, reorganization works best if a single forum can protect all of a debtor's assets").

²⁵ See, e.g., Drobnig, *supra* note 1, at 12 ("Territoriality demands that as many insolvency proceedings must be opened, conducted and closed as there are countries in which assets of the insolvent debtor are located Plurality of proceedings is apt to multiply costs and expenses, for the courts as well as for the parties."). Universalists sometimes cite finality of result as an independent goal. See, e.g., Gaa, *supra* note 13, at 885. Finality is not, however, an end in itself, but merely a means of minimizing cost and delay and avoiding conflict among the nations involved.

²⁶ See, e.g., Gaa, *supra* note 13, at 884-85 (citing predictability, efficiency, equity, and finality as the necessary means of achieving international insolvency and bankruptcy cooperation); Jay Lawrence Westbrook, *Comment: A More Optimistic View of Cross-Border Insolvency*, 72 WASH. U. L.Q. 947, 947 (1994) (stressing the importance of international cooperation).

²⁷ See, e.g., Drobnig, *supra* note 2, at 66 (referring to "equal and optimal satisfaction of all creditors" as "the main purpose" of insolvency proceedings); Scott, *supra* note 24 at 504 ("The failure to consolidate may also result in the inability of non-U.S. creditors to obtain the same pro rata share of all of the bank's assets that they would have obtained if the assets were consolidated."); Alwang, *supra* note 11, at 2623 (referring to "equal treatment of creditors" as a "benefit[]" of universalism). But see Westbrook, *Theory and Pragmatism*, *supra* note 1, at 466 (describing and criticizing "equality of distribution" as an argument in favor of universalism).

²⁸ See Rasmussen, *supra* note 1, at 4 (describing his approach as "[b]eginning with the assumption that the overall goal of bankruptcy law, at least in the corporate setting, should be efficiency").

This Article's systems analysis reveals two key flaws that render universalism unworkable. First, universalism necessarily gives foreign law and foreign courts ultimate power over wholly domestic relationships, thus enabling the foreign country to export its social and economic policies through its bankruptcy administration. Second, the "home countries" of multinational companies are so ephemeral, and forum shopping renders them so manipulable, that the resulting system would be unpredictable. By contrast, cooperative territoriality relies on traditional principles of international cooperation, including comity, to thwart the export of social and economic policies. Cooperative territoriality requires courts to locate assets rather than identify debtor home countries. Although cooperative territoriality remains vulnerable to forum shopping through the movement of assets, the problem is more easily managed than the types of shopping likely to plague competing systems, making cooperative territoriality more predictable *ex ante*.

I

UNIVERSALISM

A. The System

As stated above, "universalism" refers to a system in which a single bankruptcy court controls the administration of the debtor's assets and makes the distributions to creditors worldwide.²⁹ That single bankruptcy court may be the court of the country designated in the debtor's articles of incorporation,³⁰ the court of the country in which the debtor is incorporated,³¹ the court of the country in which the debtor has its headquarters,³² or the court of the country in which the debtor has the bulk of its assets or operations.³³ However, most universalists specify the court of the "home country" or the "center of the debtor's interests" as the proper forum.³⁴ While they acknowledge the vagueness of their terminology, they assert that the home country

²⁹ See *supra* note 5 and accompanying text.

³⁰ See, e.g., Rasmussen, *supra* note 1, at 32-36 (arguing for the enforcement of provisions in firm's corporate charters that specify the country whose laws would apply to the firm's bankruptcy).

³¹ See *id.* at 35 n.162 (proposing that countries require firms to file for bankruptcy in the jurisdictions in which they are incorporated, as an alternative to his proposal that firms be able to select the jurisdiction in their articles of incorporation).

³² See Trautman et al., *supra* note 5, at 580 (stating that in the "ideal" arrangement, the forum should be at the "principal place of business of the enterprise").

³³ See, e.g., Scott, *supra* note 24, at 492 (suggesting that for international banks, the home country should be the country of principal operations).

³⁴ See, e.g., Trautman et al., *supra* note 5, at 581 (stating that the common market convention specified the "centre of administration of the debtor" as the place having the exclusive right to adjudicate).

of the vast majority of multinational debtors will not be subject to serious dispute.³⁵

In administering the bankruptcy, the home country forum will apply its own law to the central issues of priority among creditors,³⁶ to the terms upon which debtors will be permitted to reorganize,³⁷ and to the avoidance of prebankruptcy transfers as preferences, fraudulent transfers, or the like.³⁸ Under its own choice of law rules, the home country will apply the law of other countries when appropriate. For example, the home country court probably will test the validity and perfection of a security interest under the law of the country where the security interest was created and perfected.³⁹

Under a pure form of universalism sometimes referred to as "unity," the home country court would have jurisdiction over all of the debtor's assets, wherever located, and the sheriffs, marshals, or other law enforcement officers of other countries would enforce that court's orders.⁴⁰ Under the more practical version of universalism, the representative of the estate, appointed by the court of the home country, would petition a court in the local country for assistance in enforcement. The local court then would be obligated to render that assist-

³⁵ See, e.g., Rasmussen, *supra* note 1, at 12 ("In most situations, it will be clear which country is the home of the debtor."); Trautman et al., *supra* note 5, at 582 ("[A]rguments in favor of precision [in specifying the debtor's home country] not only ignore reality but fail to recognize that in the vast majority of cases the test will prove workable."); *id.* at 612 ("[I]n practice the courts have been able to proceed on the basis of whether the enterprise is predominantly an American or foreign one"); Westbrook, *Avoidance*, *supra* note 1, at 529 ("Although circumstances will exist in which determination of the home-country of a corporation will be difficult, it will usually be self-evident.").

³⁶ See, e.g., Trautman et al., *supra* note 5, at 580 (arguing that under universalism, a court should use the law of the forum to determine issues of "whether and to what extent a creditor's interest is a secured interest" and of "priorities among creditors"); Westbrook, *supra* note 2, at 39 ("[A] purely universalist court will always choose home-country law for priorities.").

³⁷ See, e.g., Westbrook, *Theory and Pragmatism*, *supra* note 1, at 482 (noting the difficulty of achieving universalism in the context of reorganization because the laws of potential home countries are so different).

³⁸ See Trautman et al., *supra* note 5, at 580; Westbrook, *Avoidance*, *supra* note 1, at 528-29 (arguing that the court should apply the avoiding rules of the home country in a system of modified universalism).

³⁹ See Roy Goode, *Security in Cross-Border Transactions*, 33 TEX. INT'L L.J. 47, 51 (1998) ("The general conflict of laws principle is that, as a starting position, security rights validly created under the applicable law (typically the *lex rei sitae*) will be recognized [in multinational bankruptcy proceedings]."); Westbrook, *supra* note 2, at 29 & n.14 (explaining that as to secured claims "it is generally assumed that the law of the situs of the collateral is most often chosen for all purposes" and noting that recent "discussions of choice of law for secured claims really focused on the possibility of different choices of law for different issues relating to secured claims"). *But see* Trautman et al., *supra* note 5, at 584 (noting that the common market convention would decide "the rules for determining the validity of secured interests vis-à-vis other creditors" by the law of the single forum).

⁴⁰ See Westbrook, *supra* note 2, at 28 n.4 (noting that "unity" . . . means that one court administers all assets, but that notion is so far from contemporary reality that it is not really part of the working hypothesis of present scholars").

ance. Because the current scholarly agenda includes only the practical form of universalism,⁴¹ this Article evaluates only that form.

Universalism gives all creditors the right to file claims and share in distributions from the bankruptcy estate. Additionally, Westbrook advocates a rule of cross-priority, that is, making priorities specified under the law of the forum available to foreign as well as domestic creditors.⁴² For example, in the Mexican bankruptcy of a Mexican company, an employee who worked for the company in the United States would be entitled to the priority accorded wages under Mexican bankruptcy law, not the priority accorded wages under U.S. bankruptcy law.

Writers describing universalism nearly always assume that the debtor is a single corporation conducting an independent business.⁴³ Thus, they do not address the common situation in which the debtor is a corporate group. Part I.C discusses the problem of corporate groups.

To illustrate the operation of a universalist system, assume that the United States is the home country of a debtor with worldwide operations. The debtor would file for bankruptcy in the United States. The U.S. court would control the assets of the debtor worldwide, determine whether to reorganize or liquidate the company based on U.S. law, and distribute the assets of the company among creditors and shareholders based on their priorities under U.S. law. The courts of other countries would be expected to render assistance to the U.S. court.

B. Claimed Advantages

According to proponents, universalism offers five advantages. First, a universalist system will realize larger proceeds from the liquidation of multinational companies because a single representative will have the authority to sell all of the assets.⁴⁴ This representative can sell them either together or separately, whichever will bring the

⁴¹ See *id.*

⁴² See *id.* at 38 ("[A] home-country court . . . should grant national treatment, or cross-priority, to all claims falling within a defined priority category . . . without regard to nationality, residence, or other indicia of 'foreignness' . . ."). For further discussion of Westbrook's proposal, see *infra* Part V.A.2.

⁴³ For articles endorsing universalism without considering the problem of corporate groups, see Rasmussen, *supra* note 1; Westbrook, *Theory and Pragmatism*, *supra* note 1, at 489 (referring to the "treatment of groups of companies" as an "important issue[] unaddressed in this paper"); Bebchuk & Guzmán, *supra* note 1.

⁴⁴ See, e.g., Rasmussen, *supra* note 1, at 18 ("[A] single proceeding will allow the seller to package the assets in a way that maximizes their value."); Westbrook, *Theory and Pragmatism*, *supra* note 1, at 465 (asserting that "maximizing . . . liquidation values by integrated sales [under a universalist system] will likely increase returns to creditors greatly"); Alwang, *supra* note 11, at 2624 (arguing that "[u]niversality would maximize returns to creditors").

higher price. Thus, universalism assumes that situations frequently arise in which the sale of worldwide operations as a unit will bring a substantially higher price than separate sales of assets in the various countries.

Second, the reorganization of a viable multinational firm often requires the coordinated use of assets located in different countries.⁴⁵ Proponents of universalism argue that unless a single court administers those assets, reorganization will not be possible, and the going concern value of the firm will be lost.⁴⁶ The conventional wisdom regarding reorganization within the United States—that a single court should have jurisdiction over all of the debtor's assets nationwide so that a single representative can coordinate their use—buttresses this argument.⁴⁷ Professor Westbrook adds an additional twist. He argues that, without universalism, creditors would have distorted incentives when choosing between reorganization and liquidation.⁴⁸ This distortion would occur because the creditors in countries with high asset-to-claim ratios would have less incentive to incur the risks of reorganization than creditors in countries with low asset-to-claim ratios.⁴⁹ Westbrook's argument incorrectly assumes, however, that creditors, rather than estate representatives, control the decision to reorganize or liquidate.⁵⁰

Third, proponents of universalism argue that the collection and distribution of assets through a single forum will result in lower costs than collection and distribution through multiple fora.⁵¹ This argu-

⁴⁵ See, e.g., Alwang, *supra* note 11, at 2625 (asserting that "[r]eorganization is unlikely if foreign creditors can attach, in multiple countries, the assets necessary for the debtor to continue operating").

⁴⁶ See Westbrook, *Theory and Pragmatism*, *supra* note 1, at 465 (asserting that "the preservation of going concern values . . . will likely increase returns to creditors greatly"); Alwang, *supra* note 11, at 2624 (arguing that "[f]rom both the debtor's and creditor's viewpoints, reorganization works best if a single forum can protect all of a debtor's assets").

⁴⁷ For example, the Second Circuit has noted:

The automatic stay . . . is designed to prevent a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts. The stay insures that the debtor's affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors' interests with one another.

Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47, 55 (2d Cir. 1976); see also Underwood v. Hilliard (*In re Rimsat, Ltd.*), 98 F.3d 956, 961-62 (1996) ("The efficacy of the bankruptcy proceeding depends on the court's ability to control and marshal the assets of the debtor wherever located . . .").

⁴⁸ See Westbrook, *Theory and Pragmatism*, *supra* note 1, at 465.

⁴⁹ See *id.*

⁵⁰ See *infra* text accompanying notes 291-93.

⁵¹ Rasmussen, for example, wrote that

[e]ven if one propounds a universal regime which entails the use of ancillary courts in countries other than the debtor's home jurisdiction, there will still be administrative savings. While parties may have to hire counsel to

ment is strongest with regard to distributions. In a universalist regime, only a single set of distributions would be necessary. In other regimes, two or more courts would make distributions to creditors.

Fourth, proponents argue that a universal system will be more predictable *ex ante* to lenders contemplating loans to multinational debtors or debtors who in the future might become multinational.⁵² For example, Westbrook argues that "one body of law must be applied to the maximum extent if relative default priorities are to be predicted accurately. The home-country law is the one law that can be most reliably predicted in advance."⁵³ Professors Lucian Bebchuk and Andrew Guzmán make a variant of this argument.⁵⁴ They use economic analysis to demonstrate that, in a purely universal regime, lenders invest based only on the expected return of the project,⁵⁵ while in a partly or fully territorial regime, lenders' incentives will be skewed to investment where the debtor's asset-to-debt ratio is the best.⁵⁶

Finally, proponents argue that universalism results in fairer distributions among creditors.⁵⁷ This argument begins from the premise that within any class of creditors, the fairest basis for distribution is *pro rata*. A universalist regime most easily can achieve a *pro rata* distribution because a single court makes the distribution to all members of the class simultaneously. Universalist scholars generally assert that regimes which permit two or more fora to make distributions to the creditors of a single multinational debtor must find a way to adjust later distributions to take account of inequalities in earlier distributions.⁵⁸

represent them in both the main and ancillary proceedings, the amount of litigation handled by the ancillary proceedings will be less than it currently is under the territorial system.

Rasmussen, *supra* note 1, at 18; see Bebchuk & Guzmán, *supra* note 1, at 2.

⁵² See Westbrook, *Theory and Pragmatism*, *supra* note 1, at 466 (discussing the benefits of increased predictability).

⁵³ *Id.* at 469.

⁵⁴ See Bebchuk & Guzmán, *supra* note 1.

⁵⁵ See *id.* at 18-19.

⁵⁶ See *id.* at 19-24. The argument fails to account for debtors' ability to borrow in one country and deploy the funds in another. To illustrate, assume that in a territorial regime, the debtor seeks to borrow money for a project in country A, but the debtor's asset-to-debt ratio is better in country B. The simple solution is for the debtor to borrow the money in country B and invest it in the project in country A. See, e.g., ALAN C. SHAPIRO, MULTINATIONAL FINANCIAL MANAGEMENT 767-69 (5th ed. 1996) (describing this as the "cost-minimizing" approach to multinational finance and describing the financing of Nestlé as an example of the approach).

⁵⁷ See Drobniig, *supra* note 2, at 66 (asserting that an international bankruptcy proceeding "can only achieve its main purpose of equal and optimal satisfaction of all creditors if all assets of the debtor are covered by the proceeding"). But see Westbrook, *Theory and Pragmatism*, *supra* note 1, at 466 (disputing that "[a] universalist system would be far more fair, and produce more equality of distribution among creditors").

⁵⁸ However, the claim is only partly true. See *infra* text accompanying note 246.

C. Problems

The problems with universalism are overwhelming. The most important problems are that (1) in a universalist system, foreign law and courts govern wholly domestic relationships, confusing domestic markets; (2) the home country standard is indeterminate in many cases; (3) no workable rule can be devised for determining the extent to which the home country is to have jurisdiction over corporate groups; and (4) the home country standard is vulnerable to strategic manipulation.

1. *Foreign Law and Courts Governing Domestic Relationships*

In a universalist system, the forum country applies its own laws and judicial philosophy regarding core bankruptcy issues—the relative priorities of creditors in a distribution, the choice between reorganization and liquidation, and the avoidance of prepetition transfers. Yet the laws of various countries differ widely in resolving these issues.⁵⁹ For example, in some countries, including the United States, tort claims share pro rata with commercial claims.⁶⁰ In other countries, tort claims are subordinated to commercial claims.⁶¹ In still other countries, tort claims are not recognized at all unless they can be framed in contract.⁶² Under U.S. law, judgment lien creditors are secured creditors up to the value of their collateral, but under Spanish law, they are general unsecured creditors.⁶³ Most countries give priority to their own taxes,⁶⁴ but refuse even to enforce the taxes of other countries unless a treaty requires it.⁶⁵ Equitable subordination plays a

⁵⁹ For an excellent comparison of the insolvency priority rules of various countries, see PHILIP R. WOOD, *PRINCIPLES OF INTERNATIONAL INSOLVENCY* §§ 1-14 to -56, at 10-31 (1995).

⁶⁰ See, e.g., 11 U.S.C. § 726(a)(2) (1994) (assigning priority to unsecured claims without regard to whether they arose in contract or tort).

⁶¹ See, e.g., INTERNATIONAL STATEMENT OF MEXICAN BANKRUPTCY LAW 49 (Preliminary Draft No. 3, Aug. 21, 1997).

⁶² See WOOD, *supra* note 59, §1-56, at 30-31. Unliquidated claims are similarly denied recognition in some systems. See *In re Papeleras Reunidas, S.A.*, 92 B.R. 584, 590 (Bankr. E.D.N.Y. 1988) (holding that “Spanish law recognizes only ‘constitutive,’ or liquidated, undisputed claims” in suspension of payments proceedings).

⁶³ See, e.g., *In re Papeleras Reunidas, S.A.*, 92 B.R. at 591 (“Spanish law classifies judgment lien creditors as general unsecured creditors while United States law generally classifies such lien creditors as secured creditors up to the value of the properties to which the liens attach . . .”).

⁶⁴ See, e.g., 11 U.S.C. § 507(a)(8).

⁶⁵ Generally the United States does not enforce foreign tax claims. See NATIONAL BANKR. REV. COMM’N, *BANKRUPTCY: THE NEXT TWENTY YEARS* 364-65 (1997) (recommending that development of the law in this area be left to treaty negotiators and courts); WOOD, *supra* note 59, § 1-54, at 30 (“Many jurisdictions do not permit the claims of foreign revenue authorities or foreign penal demands.”); Westbrook, *supra* note 2, at 37-38 (discussing the disallowance of foreign government tax claims in insolvency proceedings).

key role in U.S. priorities, but it is not recognized in Australia.⁶⁶ Similarly, under Canadian law, creditors secured by different collateral can be classified together, and the majority can outvote the minority⁶⁷—a concept that is appalling to the American bankruptcy community. Finally, Germany will recognize a security interest in an automobile if the debtor granted the interest in France and then moved the car to Germany, but France will not recognize a security interest in the reciprocal situation—the debtor granted the interest in Germany and then moved the car to France.⁶⁸

The priority problem cannot be resolved merely by making a few simple adjustments. Each nation's priority scheme is an integrated system in which each class of creditors' priority depends both on the likelihood that other classes of debt will arise and on the preferences given to them. To illustrate, in Mexico, generous legal entitlements ensure that bankrupt firms are likely to owe substantial amounts to employees for wages, benefits, and potential severance pay.⁶⁹ Mexican law requires that these employment claims be paid prior to the claims of other unsecured creditors and most secured creditors,⁷⁰ making employees the most likely "residual owners" of the bankrupt firm.⁷¹ By contrast, in the United States, employment claims are likely to be small. Statutes limit their priority to \$4,000 per employee and require the claimed wage to be earned within ninety days before the date of the filing of the petition.⁷² In addition, employment claims are subordinated to the claims of secured creditors⁷³ (including those

⁶⁶ See, e.g., *Interpool, Ltd. v. Certain Freights of M/V Venture Star (In re KKL (Kangaroo Line) Pty Ltd.)*, 102 B.R. 373, 379 (D.N.J. 1988) (refusing to recognize an Australian insolvency proceeding because, among other things, Australia did not recognize the doctrine of equitable subordination). Equitable subordination has been referred to as "almost an exclusively US doctrine." WOOD, *supra* note 59, § 1-49, at 28.

⁶⁷ See LoPucki & Triantis, *supra* note 20, at 323.

⁶⁸ See Drobniig, *supra* note 2, at 63-64.

⁶⁹ See INTERNATIONAL STATEMENT OF MEXICAN BANKRUPTCY LAW, *supra* note 61, at 47 & n.160.

⁷⁰ See *id.*

⁷¹ The "residual owner" is the class of investor—whether creditor or owner—that stands to gain or lose from marginal changes in the value of the business. Bankruptcy systems tend to grant control over the debtor and the case to the residual owners. See, e.g., Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 771-76 (1993). A majority of countries give secured creditors priority over wage claims. See INTERNATIONAL LABOUR OFFICE, *THE PROTECTION OF WORKERS' CLAIMS IN THE EVENT OF THE EMPLOYER'S INSOLVENCY* 27-28 (Edward Yemin & Arturo S. Bronstein eds., 1991). But a substantial minority, like Mexico, give priority to wage claims over secured creditors. See *id.* at 29-30 (naming France, Spain, Brazil, Ecuador, Mexico, Peru, Benin, Chad, Côte d'Ivoire, Gabon, Guinea, Algeria, Tunisia, and Philippines as such countries).

⁷² See 11 U.S.C. § 507(a)(3) (1994).

⁷³ See, e.g., DAVID G. EPSTEIN ET AL., *BANKRUPTCY* § 7-10, at 461 (1992) (giving an overview of the U.S. bankruptcy claims hierarchy).

unsecured due to a lack of adequate protection⁷⁴), administrative expenses,⁷⁵ and postpetition lending.⁷⁶ As a result, employment claimants seldom have much power in U.S. bankruptcy cases. Yet in a universalist system, the priority of Mexican workers' employment claims against a U.S. firm operating in Mexico would be determined by U.S. rules of priority—much to the disappointment of the affected Mexican workers.

Some scholars have made broad assertions that creditors contract with reference to the bankruptcy laws of the debtor's home country.⁷⁷ Even if such contracting were practical, however, it would still create a stifflingly complex domestic interface for the international bankruptcy system.⁷⁸ Presumably, sellers would adjust the prices of all goods and services sold on credit in the domestic economy to reflect the bankruptcy priority of the seller under the law of the debtor's home country. Workers who performed the same jobs in the same industry in the same city would be paid varying amounts, depending on the nationality of the firm for which they worked. Suppliers would determine the home countries of firms operating domestically, would calculate their likelihood of recovery under the bankruptcy laws of those countries, and would adjust credit terms accordingly. Workers and suppliers also would want to factor in the possibility that the financial problems of their debtor would be resolved under nonbankruptcy law, which would remain territorial.⁷⁹

As a practical matter, the Mexican employee, the Mexican trade creditor, and even their U.S. counterparts are unlikely to know

⁷⁴ See 11 U.S.C. § 507(b).

⁷⁵ See *id.* § 507(a)(1).

⁷⁶ See *id.* § 364.

⁷⁷ See, e.g., Trautman et al., *supra* note 5, at 618 (urging adoption of "principal place of business" as the test of home country because "debtor[s] and . . . creditor[s] shape their expectations" based on that country's rules). Although this statement is probably true for some relatively sophisticated lenders, most lenders probably have non-country specific expectations based on their past experience with nonpaying debtors. Employees are likely to base their expectations on experience with debtors in the country where the employees are located. Recognizing this source of creditor expectations, later in the same article, Trautman, Westbrook, and Gaillard advocate a special rule for "unsophisticated creditors." *Id.* at 624.

⁷⁸ See, e.g., *id.* at 584 ("Giving effect to unified, home-country rules has costs. The transactional cost is that every party dealing in Belgian land with a German party must consider the possible effects of German bankruptcy law.").

⁷⁹ Even within a single country, the possibility that the financial problems of a debtor might be resolved differently under bankruptcy and nonbankruptcy law has proven difficult to control. See, e.g., Lynn M. LoPucki, *Should the Secured Credit Carve Out Apply Only in Bankruptcy? A Systems/Strategic Analysis*, 82 CORNELL L. REV. 1483, 1485-88 (1997) (describing the debate between Professors Douglas G. Baird and Elizabeth Warren over how to deal with the problem). The difference between bankruptcy and nonbankruptcy law generates strategic activity—a sign that the legal system in question is flawed. See *id.* at 1498-1507.

enough about foreign insolvency laws to adjust to them. Any trade creditor that sells its products to large numbers of customers is selling to debtors from a variety of home countries—even if all of the sales and deliveries are made domestically. Even in a universalist regime, a trade creditor rarely would find it cost-effective to discover the home countries of its corporate customers, let alone to evaluate the insolvency regimes of those countries and to adjust the credit terms accordingly.⁸⁰ The likelihood of the insolvency of any particular customer would be too small. In practice, universalism would be unpredictable to all but the largest creditors of multinational companies. Westbrook correctly states that “[s]imilar laws about distributions, avoidance, and the like are not in principle necessary to the acceptance of universalism, but in practice similarity is very important”⁸¹ and that “[a] general invitation to [universalist] cooperation issued to all countries, regardless of similarity of laws, may not be realistic.”⁸²

The choice between reorganization and liquidation provides another example of the difficulty creditors would face in reaping benefits from the asserted predictability of a universalist system. U.S. law strongly favors the reorganization of business debtors. To achieve reorganization, U.S. law leaves the debtor in control of the business and allows the debtor to risk the expectancy of the unsecured creditors in any reasonable attempt at reorganization.⁸³ By contrast, the laws of most other countries put a representative of the unsecured creditors in charge of the reorganization attempt.⁸⁴ Foreign creditors who fixed the terms of their lending based on expectations regarding local insolvency proceedings would be unpleasantly surprised at their fate under U.S. procedures.

In a universalist system, not only would foreign law apply to relationships created in wholly domestic transactions, but also foreign bankruptcy courts would have jurisdiction to adjudicate many aspects of those relationships. A Mexican worker in a Mexican factory owned by a company whose home country was the United States would file and perhaps litigate his or her claim in a U.S. bankruptcy court. The

⁸⁰ Westbrook admits the difficulty. See Westbrook, *Avoidance*, *supra* note 1, at 534 (“There would be real difficulty in applying Hong Kong preference law to a small United States supplier who was dealing with a local [United States] branch of a Hong Kong debtor in a transaction that was in every way local except for the nationality of the debtor.”). Westbrook and others, however, offer no solution aside from the vague proposal of an exception for “unsophisticated creditors.” See Trautman et al., *supra* note 5, at 624.

⁸¹ Westbrook, *Theory and Pragmatism*, *supra* note 1, at 468.

⁸² *Id.* at 469.

⁸³ See LoPucki & Whitford, *supra* note 71, at 701-04 (contrasting the treatment of secured creditors, who are entitled to adequate protection against the loss of their collateral, with the treatment of unsecured creditors, who are not).

⁸⁴ See WOOD, *supra* note 59, § 18-9, at 302 (“Except in the United States, management is usually displaced in favour of an insolvency representative.”).

Chinese trade creditor that sold to a U.S. company operating in China would do the same. Creditors would be at a severe disadvantage in such litigation. First, they would have to hire lawyers in a foreign country and communicate with them at a distance. Second, the likelihood of prejudice against them in the debtor's home country would be high.⁸⁵ Legal realists understand that such prejudices translate into adverse decisions.⁸⁶

2. Indeterminacy of the "Home Country" Standard

In a universalist system, the determination that one country rather than another is the debtor's home country is crucial. First, as discussed above, the core bankruptcy rules and philosophy of the home country govern the liquidation or reorganization of the debtor worldwide. Second, the liquidation or reorganization of a large company can generate hundreds of millions of dollars in professional fees.⁸⁷ In a universalist system, most of these fees will go to professionals in the home country.

Universalists concede that it is difficult to state a precise rule for determining a debtor's home country.⁸⁸ They take refuge, however, in the belief that the identity of the home country will be obvious in the large majority of cases. The debtor usually will have its headquarters and most of its assets in the country in which it is incorporated.⁸⁹ This answer, however, is hardly adequate. First, even accepting the factual assertion as correct, the home countries of a substantial number of companies remain in doubt. Such companies include, for example, those involved in the two most prominent international bankruptcy cases to date, Maxwell Communication Corporation and BCCI.

⁸⁵ See, e.g., Alwang, *supra* note 11, at 2627 ("A nation's courts favor creditors within that nation's borders."). But see Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122, 1133-35 (1996) (demonstrating empirically that foreigners fare well in adjudicated cases in the United States and speculating that this success occurs because they frequently settle cases on the expectation that prejudice against them will be greater than it actually is).

⁸⁶ See Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1510-21 (1996) (explaining the mechanisms by which written law yields to the oral traditions of lawyers).

⁸⁷ See, e.g., Joe Ortiz, *BCCI Creditors To Get \$2.65 Billion Payment Tuesday*, REUTER EURO. BUS. REP., Dec. 9, 1996, available in LEXIS, Wire Service Stories ("The English liquidators of BCCI, Deloitte & Touche . . . have been paid a massive \$200 million in fees.").

⁸⁸ See, e.g., Jay Lawrence Westbrook, *Developments in Transnational Bankruptcy*, 39 ST. LOUIS U. L.J. 745, 752 n.37 (1995) (acknowledging that negotiations for a U.S.-Canadian bankruptcy treaty "foundered on a dispute over the test for 'home country'").

⁸⁹ See Rasmussen, *supra* note 1, at 12 ("In most situations, it will be clear which country is the home of the debtor."); Trautman et al., *supra* note 5, at 581, 582 (arguing that the "centre of administration of the debtor" test "in the vast majority of cases . . . will prove workable").

Maxwell had its headquarters in the United Kingdom and the bulk of its assets in the United States.⁹⁰ BCCI was incorporated in Luxembourg,⁹¹ spread its assets throughout the world,⁹² and retained only a "brass plate" headquarters in Luxembourg,⁹³ where its bankruptcy proceeded. Shortly before filing bankruptcy, BCCI moved its operational headquarters from London to Abu Dhabi.⁹⁴

When the country of incorporation, the country of headquarters, and the country with the largest share of the debtors' assets are different, the courts and commentators differ widely on which to deem the home country.⁹⁵ Most courts and commentators seem to regard the country of incorporation as having the strongest claim to home country status. English private international law will accord recognition to the foreign dissolution of a company when the dissolution has taken place under the law of the country of incorporation.⁹⁶ In the United States, most bankruptcies of large public companies occur in the jurisdiction of the state in which they are incorporated—usually Delaware—even though they rarely have either headquarters or assets there.⁹⁷ In *BCCI*, the world community had little difficulty accepting

⁹⁰ *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1040 (2d Cir. 1996) ("Although Maxwell was headquartered and managed in England and incurred most of its debt there, approximately 80 percent of its assets were located in the United States, most notably its subsidiaries Macmillan, Inc. and Official Airlines Guide, Inc.).

⁹¹ See Scott, *supra* note 24, at 492 (describing the formal organization of BCCI).

⁹² See Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: An Overview and Comment, with U.S. Interest in Mind*, 23 BROOK. J. INT'L L. 25, 37 (1997) (noting that BCCI's "main operational base was in England"); *BCCI Scandal Tarnishes Luxembourg's Financial Image*, AGENCE FR. PRESSE, July 9, 1991, available in LEXIS, Wire Service Stories (noting that "Luxembourg banking authorities had ordered the BCCI . . . to move its headquarters to London by June 30, 1991 . . . because only one per cent of its turnover was handled [in Luxembourg], making effective control of its operations impossible"); *Luxembourg Court To Rule on BCCI Creditor Compensation Plan*, REUTER LIBR. REP., Oct. 21, 1992, available in LEXIS, Wire Service Stories ("The headquarters of BCCI was in Luxembourg, but . . . most of its operations were in other countries, particularly Britain").

⁹³ See Andrew Hill, *BCCI Debt Proposal Resisted by Creditors*, FIN. TIMES (London), Oct. 8, 1992, at 22.

⁹⁴ See Richard Donkin, *Troubled BCCI Shifts Base to Abu Dhabi*, FIN. TIMES (London), Sept. 20, 1990, at 34 ("Bank of Credit and Commerce International today officially moves its headquarters from London to the United Arab Emirates, leaving behind new question marks about its future."). BCCI collapsed in early July 1991. See *Central Bank Chiefs Vow To Learn Lessons from BCCI Debacle*, AGENCE FR. PRESSE, July 9, 1991, available in LEXIS, Wire Service Stories (noting details of collapse).

⁹⁵ For example, Bankruptcy Code § 304 authorizes deference to bankruptcy cases commenced in the debtor's place of incorporation, headquarters, or location of "principal assets." See 11 U.S.C. §§ 101(23)-(24), 304 (1994).

⁹⁶ See *Felixstowe Dock and Ry. Co. v. U.S. Lines, Inc.*, 2 All. E.R. 77, 93 (Q.B. 1988) (noting that "the English practice is to regard the courts of the country of incorporation as the principal forum for controlling the winding up of a company"); IAN F. FLETCHER, *THE LAW OF INSOLVENCY* 760-61 (2d ed. 1996).

⁹⁷ See Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. (forthcoming May 1999) (manuscript at 1, on file with author).

Luxembourg as the main forum for the company's liquidation, even though BCCI's sole ties to the jurisdiction were incorporation and a "brass plate" headquarters.⁹⁸ Both the Bankruptcy Treaty of the European Union⁹⁹ and the new model law promulgated by UNCITRAL to govern international bankruptcy¹⁰⁰ establish presumptions that a debtor's country of incorporation is the debtor's home country.¹⁰¹

But the notion that a debtor's country of incorporation should be considered the debtor's home country is not universally accepted. The National Bankruptcy Review Commission recently recommended that the U.S. Congress delete place of incorporation as a sufficient basis for venue in domestic bankruptcy cases¹⁰² because it is "contrary to the spirit of all the federal venue provisions[, and] it lets the initiating party look at factors most convenient to itself and pick the jurisdiction it wants without regard to the other parties to the action."¹⁰³ If Congress acts on the recommendation, Delaware, which currently is the venue chosen for the majority of large public company bankruptcies, no longer would be even a permissible venue for the vast majority of them. Professor Westbrook, the leading American commentator on international bankruptcy and co-leader of the U.S. delegation that negotiated the UNCITRAL model law, interprets that law as directing the courts to consider the country where the debtor's headquarters are located as its home country.¹⁰⁴ Consistent with that interpreta-

⁹⁸ The Luxembourg liquidators eventually recovered \$4.6 billion, enough to pay 46 cents on the dollar to BCCI's general creditors. See, e.g., Jon Ashworth & Richard Miles, *BCCI Dividend Cheers Creditors*, THE TIMES (London), June 5, 1998, at 41 (describing the dividend to be paid).

⁹⁹ Convention on Insolvency Proceedings, Nov. 23, 1995, Art. 3.1, 35 I.L.M. 1223 ("[T]he place of the [debtor's] registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary").

¹⁰⁰ The model law provides for recognition of foreign proceedings as "main" proceedings if they occur "where the debtor has the centre of its main interests." UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY Art. 2(b) (1997). Article 16(3) provides that "[i]n the absence of proof to the contrary, the debtor's registered office . . . is presumed to be the centre of the debtor's main interests." *Id.* Art. 16(3).

¹⁰¹ During negotiation of the UNCITRAL model law, some delegates sought to designate the bankruptcy in the country of incorporation as the "main" proceeding. See Berends, *supra* note 1, at 330; see also Rasmussen, *supra* note 1, at 35 n.162 (suggesting that, as an alternative to his proposal—that firms be able to select the jurisdiction of filing in their articles of incorporation—countries require firms to file for bankruptcy in the jurisdiction in which they are incorporated).

¹⁰² See NATIONAL BANKR. REV. COMM'N, *supra* note 65, at 770.

¹⁰³ *Id.* at 783.

¹⁰⁴ See Memorandum from Jay L. Westbrook to the National Bankruptcy Review Commission (July 29, 1997), in NATIONAL BANKR. REV. COMM'N, *supra* note 65, app. E-1 at 7 (referring to "the centre of its main interests" as "a concept taken from the European Union Convention on Insolvency and akin to concepts like 'principal place of business' or 'chief executive office.'"). Taken literally, "principal place of business" might be understood to refer to actual operations rather than headquarters, but U.S. courts have interpreted the phrase as a term of art referring to headquarters. See Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of*

tion, Westbrook deemed the United Kingdom the "center of gravity" of Maxwell Communication¹⁰⁵—a term not dissimilar to the "center of its main interests" test adopted by UNCITRAL¹⁰⁶—even though "most of the debtor's assets were in the United States."¹⁰⁷

Universalists have regarded the location of the debtor's operations as probably the weakest basis for home country status.¹⁰⁸ In many cases, a company's operations will be spread among several countries so that none has a majority. In some cases, the principal assets will be either mobile or outside the boundaries of any country.¹⁰⁹ Today both the United States and Canada assert worldwide jurisdiction over the assets of debtors on the flimsy basis that those debtors have *some* assets in the country—assertions that should be disconcerting to universalists.¹¹⁰

The greatest uncertainty as to the meaning of "home country" results from the fact that most large firms are not single entities, but corporate groups.¹¹¹ Each entity in a corporate group may have its own country of incorporation, its own headquarters, and its own principal asset location different from those of its parent or the group as a whole. To date, no court or commentator has addressed directly the

Large, Publicly Held Companies, 1991 Wis. L. Rev. 11, 18. Professor Westbrook has expressed reservations elsewhere about home country status based merely on place of incorporation. See Westbrook, *Theory and Pragmatism*, *supra* note 1, at 486 ("I think that the U.S. is only one of the jurisdictions that would be very hesitant to permit the laws of some tax haven to govern the default of an enterprise whose commercial life was centered in New York, London, or Frankfurt.").

¹⁰⁵ Jay Lawrence Westbrook, *The Lessons of Maxwell Communication*, 64 FORDHAM L. REV. 2531, 2538 (1996).

¹⁰⁶ UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY Art. 16.3 (1997).

¹⁰⁷ Westbrook, *supra* note 105, at 2537.

¹⁰⁸ But see Draft of United States of America-Canada Bankruptcy Treaty, at Art. 15(2) (Oct. 29, 1979) (on file with author) (indicating that the countries choose an asset-based test to determine jurisdiction).

¹⁰⁹ See, e.g., *Underwood v. Hilliard (In re Rimsat, Ltd.)*, 98 F.3d 956, 959 (7th Cir. 1996) (involving a debtor whose primary assets were leases in satellites orbiting the earth).

¹¹⁰ See *In re McTague*, 198 B.R. 428, 431-32 (Bankr. W.D.N.Y. 1996) (retaining jurisdiction of Canadian debtor's bankruptcy filing in the United States over the objection of the trustee on the sole ground that the debtor had \$194 in a bank account in the United States); Jeremy V. Richards, *The Long Arm of Canadian Insolvency Law and a Tale of Three Jurisdictions*, 17 AM. BANKR. INST. J. 12 (1998) (discussing a worldwide stay issued by Canadian bankruptcy court against enforcement of a license entered into in England between two English companies domiciled in England, governed by English law, and which was to be performed exclusively in England); Cassels Brock & Blackwell, *The CCAA Goes International . . . Again*, NEWSLETTER: BUSINESS REORGANIZATION GROUP, June-July 1995, at 1-2 (describing the unreported opinion in *In re Cadillac Fairview U.S. Inc.*). In that opinion, a Canadian bankruptcy court took jurisdiction over a Delaware corporation that had the vast majority of its assets and operations in the United States on the basis that it had assets in Canada: \$200,000 apparently deposited in a Canadian bank account for the purpose of conferring jurisdiction on the Canadian court. See *id.*

¹¹¹ The problem is long-standing. See, e.g., Heinrich Kronstein, *The Nationality of International Enterprises*, 52 COLUM. L. REV. 983, 993 (1952) (advocating a realist approach to the problem).

critical question of whether the home country that administers the multinational bankruptcy case is determined once for the entire corporate group, separately for each member of the group, or for the financially distressed entities of the group as a whole.¹¹²

To illustrate the problem, assume that *U*, the U.S. parent corporation of a corporate group that operates under a single trademark, is financially sound. *C*, a Canadian company with relatively minor operations in Canada, and *F*, a French company with major operations in France, are subsidiaries of *U*. Both *C* and *F* are in financial difficulty. *C* has a subsidiary, *G*, that has extensive operations in Germany. *G* is not in financial difficulty. If *C* files bankruptcy, universalists might conclude that any of the four countries involved should be the home country. First, one might argue that this integrated group should be regarded as a single debtor whose home country is the United States. Under this view, the parent should be considered in determining the home country, even though it is not in financial difficulty, because its assets might be needed for reorganization or unified sale.¹¹³ If so, the fact that the corporate group is headquartered in the United States probably would make the United States the home country, even though most of the operations are abroad.¹¹⁴

Second, one might argue that even though a group analysis is appropriate, a nonfiling parent should be ignored.¹¹⁵ This approach

¹¹² See, e.g., SIGAL ET AL., *supra* note 14, at 95 (referring to "a tension between the economic and legal organization of business activities which has generally not been adequately dealt with in traditional insolvency processes"); Westbrook, *supra* note 9, at 567 (noting that "[t]he coordination process in a transnational bankruptcy is often complicated by the presence of subsidiaries and affiliates in the various concerned countries" and that "[a]greement on the basic principles of commercial responsibility and the principles that would govern jurisdiction within a corporation group would save considerable time and expense and reduce the general confusion"). But see Jacob Ziegel, *Corporate Groups and NAFTA Insolvencies*, in TRANSNATIONAL INSOLVENCY PROJECT: PROCEDURES FOR COOPERATION IN INTERNATIONAL INSOLVENCY CASES WITHIN NAFTA (American Law Inst. ed., Preliminary Draft No. 1, 1998) (describing the problem but proposing no solution).

¹¹³ For a discussion of *Bramalea*, a case in which a Canadian court proceeded under this view, see *infra* notes 119-25 and accompanying text.

¹¹⁴ Aside from the fact that the U.S. parent was not in financial difficulty, the case would be almost identical to *Maxwell*. See Westbrook, *supra* note 105, at 2534 (describing *Maxwell* as having "its true 'seat' in London . . . but with its principal assets in the United States"). The BCCI bankruptcy buttresses the argument that courts should consider the characteristics of the controlling parent. In *BCCI*, the world deferred to the bankruptcy court of Luxembourg because it was the country of incorporation of the parent entity. See, e.g., *In re Bank of Credit & Commerce Int'l S.A.* (No. 10), 2 W.L.R. 172 (Ch. 1997) (deferring to Luxembourg as main forum, even though the parent entity was largely just a shell, but nevertheless applying English law to matter in issue). The BCCI parent corporation owned two subsidiaries. See Scott, *supra* note 24, at 492. The subsidiaries owned the numerous sub-subsidiaries that constituted the corporate group. See *id.* One of the subsidiaries was also incorporated in Luxembourg, but the other was incorporated in the Cayman Islands. See *id.*

¹¹⁵ For example, the court ignored the parent in the *Allied Stores/Federated Department Stores* case. *Allied* and *Federated*, both U.S. companies, were subsidiaries of *Campeau*, a

would point to Canada as the home country.¹¹⁶ Third, one might argue that the home country decision should be based solely on the location of the distressed entities. Because *F* is the larger of the two distressed entities, France should be considered the group's home country under this view. Lastly, one might argue that in the absence of a filing by *U*, the Canadian/German and French firms should be regarded as separate groups, each with its own home country. Using this approach, Germany should be regarded as the home country of the Canadian/German group because the group carries on the bulk of its operations in Germany. The fact that the German subsidiary is not in financial distress is irrelevant because its assets are in effect the assets of the debtor.¹¹⁷ Thus, even in the relatively simple example considered here, the home country test proves almost entirely indeterminate.

3. *The Extent of Jurisdiction over Corporate Groups*

Principal rationales for the adoption of the universalist approach require that the home country bankruptcy court take jurisdiction over other members of the group whose operations are integrated with those of the debtor. This jurisdiction may need to include members of the corporate group that are financially sound. Otherwise, the bankruptcy court of the home country may not control all of the assets necessary to reorganize the business or to liquidate it for the best price.¹¹⁸

Bramalea, an unreported case in the Ontario Court of Justice, illustrates some surprising consequences of such an extension of jurisdiction. In a Canadian filing by a Canadian parent company, a Canadian bankruptcy court not only imposed a global stay of proceedings,¹¹⁹ but also assumed jurisdiction over U.S. subsidiaries that had

Canadian firm that did not file. See *Campeau Subsidiaries File for Chapter 11*, PR NEWswire, Jan. 15, 1990, available in LEXIS, Wire Service Stories. Allied filed in Cincinnati, Federated filed in San Francisco, and the court transferred the latter case to Cincinnati for joint administration. See *id.* Apparently no party argued that the case should proceed in Canada.

¹¹⁶ The precedents of *Maxwell* and *BCCI* suggest that once *C* files in Canada, the Canadian court should have jurisdiction over *G*, the German subsidiary, as well.

¹¹⁷ Many, if not all, of Maxwell's U.S. assets were financially sound subsidiaries. See *Maxwell Communication Corp. v. Barclay's Bank (In re Maxwell Communication Corp.)*, 170 B.R. 800, 802 (Bankr. S.D.N.Y. 1994). The parent, Maxwell Communication Corporation, filed the U.S. Bankruptcy and is the same entity that filed in the United Kingdom. Macmillan Publishing, one of the American subsidiaries, did file chapter 11, but only late in the *Maxwell* case and only to facilitate its sale. See *In re Macmillan, Inc.*, No. 93-45625 (Bankr. S.D.N.Y. filed Nov. 10, 1993).

¹¹⁸ See *supra* notes 45-50 and accompanying text.

¹¹⁹ See R. Gordon Marantz, *The Reorganization of a Complex Corporate Entity: The Bramalea Story*, in CASE STUDIES IN RECENT CANADIAN INSOLVENCY REORGANIZATIONS 1, 30 (Jacob S. Ziegel ed., 1997) (setting forth the text of paragraph 13(e) of the court order).

not filed bankruptcy in either jurisdiction.¹²⁰ As a result, "in some very clear instances, loans by U.S. lenders to U.S. single-asset subsidiaries which owned U.S. real estate projects and carried on business in the U.S., were made subject to modification in the Canadian proceedings."¹²¹ Not only did the court take jurisdiction over wholly U.S. subsidiaries, it consolidated the entire Bramalea group into a single estate—without making the requisite findings to justify consolidation under U.S. law. As one commentator described it:

Creditors were assigned to [six] classes without particular reference to the subsidiary or affiliate against which they held their claim. . . . When Bramalea filed a plan which substantively consolidated its creditors and assets, it eliminated the boundaries between its subsidiaries and affiliates. Most lenders with exposures to subsidiaries found themselves with exposures to the Bramalea group as a whole.¹²²

Assuming that Canada was Bramalea's home country, such a broad exercise of jurisdiction was consistent with the argument for universalism. To assure the reorganization of an "integrated" multinational enterprise, the home court needed jurisdiction over the entire enterprise.¹²³ However, such a broad exercise of jurisdiction subjected lending transactions that occurred between U.S. lenders and still-solvent U.S.-based and U.S.-incorporated subsidiaries of Bramalea to Canadian jurisdiction solely because the subsidiaries were owned by and "integrated" into a Canadian-based business. In such circumstances, the universalists' argument that U.S. creditors—presumably including trade creditors—should have anticipated an assertion of jurisdiction by Canada reaches the level of absurdity.¹²⁴ The universalists would expect creditors entering into entirely domestic transactions to discover and take into account not just the nationality of their debtors, but also the nationality of the present and future owners of their debtors.¹²⁵

The *Bramalea* court applied neither an entity nor an enterprise test to determine the appropriate reach of its home country powers. Instead, it premised its jurisdiction over particular entities on the "in-

¹²⁰ See *id.* at 15.

¹²¹ SIGAL ET AL., *supra* note 14, at 95-96.

¹²² *Id.* at 96.

¹²³ See *supra* notes 45-50 and accompanying text.

¹²⁴ See, e.g., Marantz, *supra* note 119, at 17. ("In making loans to such [single-asset] subsidiaries, [U.S.] lenders would usually assume that they had successfully insulated themselves from the risk of any financial decay that might occur higher up in the Bramalea empire at its head office in Canada.")

¹²⁵ See *id.* ("The Bramalea reorganization could be (and was) perceived to involve an exercise of extraterritorial jurisdiction by the Canadian court in a manner inconsistent with U.S. bankruptcy policy and in a manner prejudicial to the rights of U.S. creditors.").

tegration" of those entities into Bramalea's business.¹²⁶ Presumably, if some U.S. subsidiaries were integrated and others were not, the Canadian court would have asserted jurisdiction only over the former and permitted the latter to file bankruptcy petitions in the United States.

While this "integration" test may make sense as a matter of bankruptcy administration, it wreaks havoc with *ex ante* predictability. If a universalist system employed the integration test, lenders could predict which country's law would govern a subsidiary's bankruptcy only by first predicting whether the subsidiary was "integrated" into the business of its parent.

Yet to reject the integration test would leave the universalists with only three remaining options, none of which is viable. First, they could advocate that the home country of the entity that is the subject of the bankruptcy case have jurisdiction only over that entity. But in some cases, limiting the jurisdiction in this manner would leave foreign portions of the enterprise necessary for reorganization or efficient liquidation—including related corporations in bankruptcy in other jurisdictions—beyond the reach of the home country bankruptcy court. Second, they could suggest that the home country of the corporate group have jurisdiction over the entire group, solvent or insolvent, integrated or not. But such expansive jurisdiction would inject international bankruptcy considerations into wholly domestic transactions between solvent, independent firms for the sole reason that they now happen to be owned by a foreign parent or might someday be acquired by one. Third, they could propose a flexible test that looks to the home country of the entity or the group, as appropriate in the particular case. But that would invite strategic manipulation by debtors in their choice of courts in which to file. It would also expose the unpredictability of universalism.

4. *Strategic Manipulation of the "Home Country" Standard*

Even if one could identify the debtor's home country at the time the bankruptcy case was filed, strategic manipulation of the home country standard would remain a problem. Debtors who anticipated filing bankruptcy would change their attributes to assure jurisdiction over their cases in debtor-friendly countries. In short, they would forum shop.

Large corporate debtors engage in rampant forum shopping among bankruptcy courts in the United States.¹²⁷ In recent years, well over half of all cases have proceeded in a locale other than that of the

¹²⁶ See SIGAL ET AL., *supra* note 14, at 95 ("The Court accepted Bramalea's contention that it was, by and large, a single integrated business . . .").

¹²⁷ See Eisenberg & LoPucki, *supra* note 97 (manuscript at 1); LoPucki & Whitford, *supra* note 104, at 12.

company's headquarters¹²⁸—the locale that universalist standards most likely would identify as the home country.¹²⁹ Although the courts in which the cases are filed have the authority to transfer them, transfers are rare.¹³⁰ In part, this infrequency of transfers results from judges' reluctance to transfer cases that would otherwise bring tens or even hundreds of millions of dollars in business to local professionals.¹³¹ Bankruptcy is an industry for which local communities compete.¹³² Not surprisingly, debtors take full advantage of this competition.

Under universalism, the reasons to expect forum shopping internationally considerably exceed the reasons to expect it within the United States. The uniformity of both bankruptcy law and bankruptcy procedure in the United States limits the rewards of a successful shop within the United States. The rewards are so subtle that some scholars believe they are nonexistent.¹³³ A successful international shop, however, could offer much greater rewards. Because the shop would change the debtor's home country, the shop might change the priorities among creditors, render security interests invalid, or change the law governing avoiding powers. Shops might take cases to countries with corruptible judges, different languages, different treaty relationships, or locations inconvenient to creditors.

Just as Delaware competes as a "haven" for domestic bankruptcy cases, Bermuda, Luxembourg, and the Cayman Islands stand ready to compete as havens for international bankruptcies.¹³⁴ One easily could imagine a universalist world of the near future in which over half of all large multinational bankruptcy cases are filed in Bermuda, just as more than half of all large U.S. bankruptcy cases today are filed in Delaware.¹³⁵ In that world, the Bermuda legislature would set the relative bankruptcy priorities of creditors throughout the world.

¹²⁸ See Eisenberg & LoPucki, *supra* note 97 (manuscript at 1).

¹²⁹ See *supra* notes 104-07 and accompanying text.

¹³⁰ See *infra* notes 142-43 and accompanying text.

¹³¹ See, e.g., LoPucki & Whitford, *supra* note 104, at 37-38.

¹³² See, e.g., David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1 (1998) (applauding the competition).

¹³³ Compare Eisenberg & LoPucki, *supra* note 97 (manuscript at 30) (arguing that preferences regarding judges motivate forum shopping), with Robert K. Rasmussen & Randall S. Thomas, *Improving Corporate Bankruptcy Law Through Venue Reform* 23 (1997) (unpublished manuscript, on file with author) (arguing that speed and efficiency motivate forum shopping).

¹³⁴ For example, Bermuda will host Insol's "Conference of the Americas" in April of 1999. Insol, based in London, is the leading organization of international insolvency professionals. Bermuda has a population of only 62,000. WALL STREET JOURNAL ALMANAC 373 (1999).

¹³⁵ See Eisenberg & LoPucki, *supra* note 97 (manuscript at 1).

Debtors could accomplish shops by a variety of means. The most obvious means would be to move the company's headquarters¹³⁶ to the preferred country before filing the case. Contrary to the assertions of some universalists, moving the headquarters of a large company is neither difficult nor unusual.¹³⁷ Such moves were made on the eves of several major domestic bankruptcies.¹³⁸ While an international move theoretically might be more difficult, they are hardly unknown. For example, BCCI moved its headquarters from London to Abu Dhabi shortly before filing its bankruptcy case in Luxembourg.¹³⁹ Dreco Energy moved its headquarters and its center of gravity from Canada to the United States on the eve of its bankruptcy and then moved it back afterwards.¹⁴⁰ To do this, Dreco divested itself of Canadian properties and Canadian employees before filing its bankruptcy case in Houston, Texas, and then it did the opposite after concluding its case.¹⁴¹

If, as seems likely, courts determine a corporate group's home country only by reference to the locations of entities filing bankruptcy (and their subsidiaries), corporate groups will have additional forum-shopping opportunities. As several commentators have noted, venue once invoked is difficult to change.¹⁴² The cases "grow roots" as the courts take control: the representatives of the estates begin making and executing business decisions, and creditors, shareholders, and others arrange for representation at the forum. Within days, it becomes difficult to move a case; within weeks, it becomes unthinkable.¹⁴³

Most entities have some flexibility as to when they file. Successive filings—filings by one or more members of the group followed later

¹³⁶ As previously noted, neither the location of a company's assets nor its jurisdiction of incorporation likely carries nearly as much weight in the determination of the home country as the location of the company's headquarters. See *supra* notes 95-110 and accompanying text.

¹³⁷ See LoPucki & Whitford, *supra* note 104, at 18-19 (presenting data on the frequency of such moves).

¹³⁸ Headquarter relocations occurred prior to the bankruptcy filings by Amdura, Baldwin United, Continental Airlines, Evans Products, Memorex, Michigan General, Tacoma Boatbuilding, and the Wickes Companies. See Lynn M. LoPucki, Bankruptcy Research Database (1999) (unpublished database, on file with author).

¹³⁹ BCCI moved its headquarters from London to Abu Dhabi in September 1990. See Donkin, *supra* note 94. It collapsed in July 1991. See *id.*

¹⁴⁰ See LoPucki & Whitford, *supra* note 104, at 28 n.63.

¹⁴¹ See *id.*

¹⁴² See GORDON BERMANT ET AL., CHAPTER 11 VENUE CHOICE BY LARGE PUBLIC COMPANIES 7 (1997) (noting that "the longer the original district retains [a] case, the more rational it becomes to retain it"); Eisenberg & LoPucki, *supra* note 97 (manuscript at 28); LoPucki & Whitford, *supra* note 104, at 24 (relaying that "the likelihood of a change of venue in the . . . cases we studied was small").

¹⁴³ See Eisenberg & LoPucki, *supra* note 97 (manuscript at 28-29).

by filings of other members—are common.¹⁴⁴ If the courts respected venue in the home country of the filing entity, corporate groups could manipulate the venues of their bankruptcies by manipulating the order in which group members filed. For example, assume that a group consists of a U.S. parent corporation and a German subsidiary. If only the subsidiary files and the case is in Germany, Germany will be regarded as the home country. If the U.S. parent files weeks later in the United States, the universalist dilemma will be whether to consolidate the two cases in Germany or to allow them to proceed separately. Consolidation in the United States, the likely result under universalism if both corporations filed at the same time, will be out of the question because the German court will be well along in administering the first case.

The particular brand of universalism practiced by the United States and some other countries adds to the possibility of such manipulations. These countries not only assert jurisdiction over all of a debtor's assets worldwide but also enjoin everyone involved from filing bankruptcy proceedings involving those assets in other countries. Thus, if the parent of a corporate group files in the United States, U.S. law will bar creditors who believe that Canada is in fact the home country from filing a bankruptcy case there.¹⁴⁵ As a result, the United States will have the power to determine the home country of the debtor for the sole reason that the first case was filed in the United States. If would-be bankruptcy havens adopt the same rule and debtors file first in those havens, U.S. creditors may find it difficult to challenge the havens' decisions that they are the home countries.¹⁴⁶ In effect, the debtor will determine which country determines the debtor's home country.

5. *The Unpredictability of a Universalist Approach*

Universalist writers have not yet faced the choice they ultimately must make among international systems based on home country of entity, home country of group with jurisdiction over the entire group,

¹⁴⁴ Successive filings occurred in the following major U.S. cases: *Allegheny International*, *Allied Stores/Federated Department Stores*, *American Carriers*, *Baker Industries*, *Buttes Gas & Oil*, *SLM International, Inc.*, and *TSL Holdings*. See LoPucki, *supra* note 138 (fieldhead "Related Filings").

¹⁴⁵ See *Underwood v. Hilliard* (*In re Rimsat*), 98 F.3d 956, 961 (7th Cir. 1996) (holding that the automatic stay in a U.S. bankruptcy case barred a debtor from obtaining an order from a foreign bankruptcy court); *Nakash v. Zur* (*In re Nakash*), 190 B.R. 763, 767-69 (Bankr. S.D.N.Y. 1996) (holding that the official receiver of the State of Israel appointed for an insolvent bank violated the automatic stay by filing an involuntary bankruptcy petition against its debtor in Israel while that debtor was in bankruptcy in the United States).

¹⁴⁶ One need only imagine the bankruptcy court of the Federation of Saint Kitts and Nevis doing to the United States precisely the same thing that the Seventh Circuit did to the Federation of Saint Kitts and Nevis in *In re Rimsat*. See *In re Rimsat*, 98 F.3d at 956.

or home country of group with jurisdiction only over the "integrated" portion. Without a clear resolution of this issue, lenders could not predict the home country of any bankrupt entity that was a member of a multinational corporate group. Hence they could not predict what country's law would govern the distribution. Universalism would be unpredictable.

That lack of predictability would infect not just the small number of bankruptcies considered "multinational" today, but about a third of all large corporate bankruptcy cases. That is, nearly a third of U.S.-based, large, publicly held companies own property in foreign countries,¹⁴⁷ and these companies usually separately incorporate those foreign holdings in the particular foreign countries.¹⁴⁸ Uncertainty regarding whether the home country of the entity or of the group controls would render the home country—and thus the applicable law—uncertain in all of these cases.

Foreign administration of foreign subsidiary bankruptcies is the norm today. For example, TSL Holdings, Inc. filed for reorganization in Santa Barbara, California in March 1993.¹⁴⁹ TSL made three successive announcements over a period of five weeks in July and August of that year: (1) its German subsidiary filed for bankruptcy in Germany; (2) its French subsidiary filed for bankruptcy in France; and (3) its Netherlands subsidiary filed for bankruptcy in the Netherlands.¹⁵⁰ Under current practice—basically territoriality—this case presented no problem. Each country supervised the bankruptcy of the entity located within its borders. Had the United States been committed to universalism based on the possible need to administer all the assets of a corporate group together, however, the U.S. court would have been forced to assert its jurisdiction over the foreign subsidiaries' assets, or at the very least, it would have had to make an inquiry into the need

¹⁴⁷ An examination of cases in the Bankruptcy Research Database reveals that of 266 large, public companies filing for bankruptcy reorganization in the United States from 1980 through 1997, 83 (31%) indicated in their 10-Ks that they owned property outside the United States. See LoPucki, *supra* note 138 (fieldhead "states of operation").

¹⁴⁸ Of the 68 companies in the Bankruptcy Research Database with foreign property that disclosed where their subsidiaries were incorporated, 64 (94%) named one or more foreign countries. See *id.* Of the 65 that indicated the number of foreign countries involved, 49 (75%) had corporations in at least the number of countries in which they had property. See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ See New Generation Research, The Bankruptcy DataSource, *available in* LEXIS, Bankruptcy DataSource—Company Profiles, News and Reorganization Plans (recording that on July 6, 1993, TSL's German subsidiary filed for bankruptcy and on August 13, 1993, TSL's French and Netherlands units filed for bankruptcy). Apogee Enterprises provides a more recent example. On March 24, 1998, Apogee announced that four of its six French subsidiaries commenced liquidation proceedings in France, and its U.K. subsidiary filed liquidation proceedings in the United Kingdom. The announcement gave no suggestion that the U.S. parent was in financial difficulty or that it had commenced bankruptcy proceedings in the United States.

for unified administration before the foreign courts were too far along in their proceedings. The problem would have been even more severe if the subsidiaries filed and the foreign courts began administration before the parent filed in the United States.¹⁵¹

Finally, a universalist system would be vulnerable to filings strategically made in countries with little claim to home country status. In one particularly egregious case, an English company filed in Canada and persuaded the Canadian court to enter a worldwide stay of the enforcement of a license. Although the stay was of doubtful validity in the United States, it was sufficient to force a U.S. purchaser of the license to settle with the representative of the Canadian estate.¹⁵²

The preceding discussion should make it apparent that universalism would fail to achieve its most highly touted "advantage"—ex ante predictability. More likely, universalism would reduce further the already low level of predictability that exists in international bankruptcy today. Worse yet, it would interject international bankruptcy considerations into entirely domestic transactions and give debtors the ability to manipulate bankruptcy distributions by manipulating their home countries. Furthermore, universalism would not offer any real hope of unifying control over foreign assets to permit worldwide reorganizations or liquidations. The supposed advantages of universalism are in fact unattainable.

II

MODIFIED UNIVERSALISM

Given the problems with universalism, it should not be surprising that no country has ever adopted it in its pure form. Instead, courts, commentators, and governments give lip service to pure universalism while pursuing watered-down versions. Westbrook dubbed the U.S. version of universalism, described in Bankruptcy Code § 304, "modified universalism."¹⁵³

A. The System

When a multinational debtor or its creditors file a bankruptcy petition, the bankruptcy court of the forum country appoints a representative. This representative takes possession of the debtor's assets and

¹⁵¹ Most scholars and courts recognize the impracticality of a bankruptcy court surrendering jurisdiction in the midst of a case. See, e.g., BERMANT ET AL., *supra* note 142, at 7.

¹⁵² See Richards, *supra* note 110, at 12-13 (describing the case).

¹⁵³ See, e.g., Westbrook, *supra* note 105, at 2533 ("'[M]odified universalism' . . . is best represented by the case law that has emerged under section 304 of the United States Bankruptcy Code." (footnote omitted)); Westbrook, *supra* note 2, at 28 ("Universalism, in a modified form, is the fundamental concept underlying U.S. approaches to cross-border insolvency. . . .").

either sells them or uses them to reorganize. Most national bankruptcy systems, including those of the United States, Canada, and the United Kingdom, claim jurisdiction over the assets of a filing debtor wherever located, including assets located in other nations.¹⁵⁴ The representative under such a law can take possession of, and sell or use, assets in other nations, just as a purchaser from the debtor could in the absence of bankruptcy. However, if the representative encounters resistance in the other nations—from a sheriff who has seized the assets on behalf of a local creditor, from an administrative agency that refuses to register the estate's title, or from a potential buyer concerned with the marketability of the title—the representative may need the assistance of a local court.

Bankruptcy Code § 304 authorizes the qualified representatives of foreign bankruptcy estates to seek such assistance by filing ancillary proceedings in the United States.¹⁵⁵ For the foreign representative to qualify, the foreign bankruptcy must take place in a country "in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding."¹⁵⁶ This standard is similar to the standard for proper venue in domestic bankruptcy cases.¹⁵⁷ In effect, under the modified universalism contemplated by Bankruptcy Code § 304, the debtor or creditors filing the case determine which country will serve as the main forum. Although the U.S. standard for recognition constrains the choice of a country, this standard may leave a particular debtor free to choose among several countries.

When a qualified foreign representative files such an ancillary proceeding, Bankruptcy Code § 304 authorizes, but does not require,

¹⁵⁴ See WOOD, *supra* note 59, §§ 14-19 to -20, at 240-41 (listing England, the United States, Argentina, Denmark, Finland, Norway, and Sweden as claiming all assets globally and only Japan as limiting proceedings to territorial property).

¹⁵⁵ See 11 U.S.C. § 304 (1994).

¹⁵⁶ *Id.* § 101(23).

¹⁵⁷ The domestic standard, set forth in 28 U.S.C. § 1408, approves filing in the district:

(1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or

(2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

Id. Two important differences exist between the domestic standard for proper venue and the standard for recognition of foreign proceedings. First, the domestic standard requires the debtor's presence in the district for some minimum period before the debtor can file while the foreign standard permits recognition of proceedings filed in a country to which the debtor has just moved. Second, the domestic standard expressly addresses the entities problem while the foreign standard ignores it.

the U.S. bankruptcy court to protect the U.S. assets of the foreign estate from actions by U.S. creditors and to order turnover of the U.S. assets to the foreign representative in certain circumstances. In deciding whether to turn over the U.S. assets, the bankruptcy court is to be

guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claimholders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity¹⁵⁸

Unless the foreign representative can obtain the assistance of the U.S. bankruptcy court, creditors remain free to proceed against and liquidate the debtor's U.S. assets to satisfy their own claims. In deciding whether to assist the foreign representative, the U.S. bankruptcy court evaluates the bankruptcy system of the main forum. If that system would distribute the assets "substantial[ly] in accordance with the order prescribed by [the U.S. Bankruptcy Code],"¹⁵⁹ the U.S. bankruptcy court can order the surrender of U.S. assets to the foreign representative.¹⁶⁰ If not, the U.S. bankruptcy court can either refuse cooperation and allow the struggle over the U.S. assets to proceed under U.S. law, or it can offer to surrender the assets to the foreign representative in return for assurances that the representative will make a special distribution of those assets that protects the rights of the U.S. creditors under U.S. law.¹⁶¹

To illustrate the operation of a worldwide system of modified universalism, assume that the United States is the home country of a debtor with worldwide operations. As under pure universalism, the

¹⁵⁸ 11 U.S.C. § 304(c).

¹⁵⁹ *Id.*

¹⁶⁰ Some commentators argue that courts should balance the requirement to act consistently with "comity" against the requirement to act consistently with the distribution required under the U.S. Bankruptcy Code. See, e.g., Van Osdell, *supra* note 18, at 1328-29 (advocating balancing and characterizing it as the majority view). However, no balancing should be necessary because no tension exists between the two requirements. "[T]he well-recognized rule between states and nations . . . permits a country to first protect the rights of its own citizens in local property before permitting it to be taken out of the jurisdiction for administration in favor of those residing beyond their borders." *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 582 (1908).

¹⁶¹ See Knecht, *supra* note 3, at 306-14 (discussing decisions in which U.S. bankruptcy courts "have conditionally deferred to foreign insolvency proceedings").

debtor would file for bankruptcy in the United States. The U.S. court would have the right to administer the assets of the debtor worldwide, to determine whether to reorganize or liquidate the company based on U.S. law, and to distribute the assets of the company among creditors and shareholders based on their priorities under U.S. law. In contrast to pure universalism, however, the courts of each foreign country involved would decide whether to render assistance to the U.S. court based on factors such as those in Bankruptcy Code § 304. As a result, foreign countries refusing to cooperate could constrain the U.S. court's power to administer the assets worldwide.

B. Claimed Advantages

Probably the most important advantage of modified universalism over pure universalism is the ability to refuse cooperation that would prejudice U.S. creditors. Under modified universalism, the U.S. court can examine or even negotiate the treatment of U.S. creditors in the foreign proceeding before surrendering U.S. assets to the foreign tribunal. This power confines the universalist aspect of modified universalism to the type of bankruptcy system for which it is appropriate—those in which all jurisdictions distribute assets according to essentially the same priorities and recognize the claims of foreign creditors on essentially the same basis as those of domestic creditors.

Limiting the systems with which the United States will cooperate also reduces the advantage to be gained through forum shopping. Thus, even though the particular brand of modified universalism adopted by the United States may give the multinational debtor a choice of forum, the choice is restrained by the future willingness of a U.S. bankruptcy court to accede to it.

Under modified universalism, a court is likely to be active in every country in which the debtor has substantial assets. However, in many cases only one court must determine claims and make a distribution. This determination by a single court eliminates the necessity for country-by-country filing and determination of claims and arguably enhances the ability of the system to achieve a worldwide pro rata distribution of assets.

C. Problems

In contrast to pure universalism, modified universalism relieves courts of the non-forum country from the obligation to sacrifice their own creditors' interests for the benefit of foreigners. In doing so, however, it sacrifices nearly all of the supposed advantages of universalism.

Universalism is touted as predictable from the lender's viewpoint because the lender needs to know only the debtor's home country to

know what bankruptcy regime would apply.¹⁶² Assuming this predictability, universalists argue that interest rates would be lower in such a system.¹⁶³ Modified universalism introduces two additional uncertainties, however, that make predictability untenable. First, the regime or regimes that will ultimately distribute the debtor's assets may depend on the country in which the assets are located at the time of bankruptcy. To illustrate, assume that Debtor Corporation, a Swiss corporation, has \$1 million in assets. If those assets are located in Switzerland at the time of the bankruptcy, Swiss law will govern the distribution. If they are located in the United States, the choice of law will depend on whether the Swiss distribution would be substantially different than the U.S. distribution. If it would, the United States will refuse to surrender the assets. Ultimately, those assets will be distributed under U.S. law. Second, for the lender to predict the regime applicable to distribution at the time of the loan, the lender must guess what intercountry differences in bankruptcy law the forum court will consider substantial.

The universalist envisions a single court administering the bankruptcy worldwide. Reducing the number of courts participating in the bankruptcy and the complexity of the issues would reduce transaction costs. But modified universalism could generate a bankruptcy proceeding in every country in which the debtor has assets, and perhaps even more.¹⁶⁴ To decide whether a home country's bankruptcy law would distribute the local assets substantially in accordance with the local bankruptcy code, the ancillary court must determine how the home country's court would distribute the assets. To make this determination, the ancillary court must hear testimony on the foreign law.¹⁶⁵ If it then decides to surrender the assets conditionally, it must negotiate an agreement with the court of the home country. If it instead decides not to surrender the assets, it either may distribute the assets itself or let another local court distribute them. For a debtor that operates in dozens of countries, modified universalism may necessitate dozens of complex proceedings.¹⁶⁶

Experience under Bankruptcy Code § 304 indicates that foreign law distribution of U.S. assets frequently would prejudice U.S. credi-

¹⁶² Part I.C.5 argues that such predictability would not actually exist.

¹⁶³ See, e.g., Bebchuk & Guzmán, *supra* note 1, at 21.

¹⁶⁴ For example, a creditor or trustee might initiate proceedings in the United States to obtain discovery here, even though the debtor has no assets in the United States.

¹⁶⁵ See *Philadelphia Gear Corp. v. Philadelphia Gear De Mexico, S.A.*, 44 F.3d 187, 193 (3d Cir. 1994) (discussing the necessity for testimony on foreign law in deciding whether to defer to foreign bankruptcy proceedings).

¹⁶⁶ For an illustration of this point, see, for example, *In re Bank of Credit and Commerce International, S.A.*, 4 All E.R. 796 (Q.B. 1966) (describing the U.K. proceedings in the *BCCI* case).

tors. Even the relatively minor differences between the bankruptcy laws of the United States and those of Canada¹⁶⁷ and Australia¹⁶⁸ have proven sufficiently prejudicial in some circumstances to warrant refusals to cooperate. Given the wide differences in bankruptcy regimes throughout the world, modified universalism will often, if not usually, lead to a refusal to cooperate.

The vague standard specifying when cooperation is required invites disingenuity. As Westbrook has pointed out, the provisions of Bankruptcy Code § 304 "can easily be construed to prevent deferral in every case that matters."¹⁶⁹ Some believe the courts generally have so construed them.¹⁷⁰

Although modified universalism lowers the stakes in international bankruptcy forum shopping, it does not address the core problem of identifying the home country. All of the mischievous incentives that afflict a purely universalist system also would afflict a modified universalist system, but at lower levels. This reduction in stakes should not give much comfort, however. Far lower stakes have generated rampant forum shopping in the United States.¹⁷¹ Even if no differences in distributions existed, countries still would compete for the billion-dollar-a-year business of reorganizing multinational companies. The version of modified universalism currently embodied in Bankruptcy Code § 304 allows the debtor or creditor filing a petition to choose among countries,¹⁷² making it particularly subject to strategic manipulation.

Foreign representatives can bypass the modified universalism of Bankruptcy Code § 304 by seeking cooperation in a different U.S. court or in a different kind of proceeding.¹⁷³ For example, while

¹⁶⁷ See *In re Toga Mfg. Ltd.*, 28 B.R. 165, 170 (Bankr. E.D. Mich. 1983) (involving a U.S. court's denial of a Canadian bankruptcy trustee's request for an injunction against U.S. proceedings).

¹⁶⁸ See *Interpool, Ltd. v. Certain Freights of M/V Venture Star (In re KKL (Kangaroo Line) Pty Ltd.)*, 102 B.R. 373, 380 (D.N.J. 1988) (involving a U.S. court's denial of relief to an Australian bankruptcy trustee).

¹⁶⁹ Westbrook, *Theory and Pragmatism*, *supra* note 1, at 472.

¹⁷⁰ For example, Knecht argues that:

[T]he majority of the cases in which the courts have advocated unitary bankruptcy proceedings serve only as a "drapery of illusion"—an outward commitment to international comity that disguises the protectionism lurking beneath. As soon as the foreign proceedings slightly compromise the interests of United States creditors, most United States courts quickly discard this drapery and reveal their strong commitment to protecting their principal concern, U.S. creditors.

Knecht, *supra* note 3, at 288.

¹⁷¹ See *supra* notes 127-33 and accompanying text.

¹⁷² See *supra* notes 157-59 and accompanying text.

¹⁷³ For example, Bankruptcy § 303(4) authorizes the filing of an involuntary bankruptcy case "by a foreign representative of the estate in a foreign proceeding." 11 U.S.C. § 303(4) (1994). For discussion of a case in which a foreign representative successfully

Maxwell Communication's case was pending in the United Kingdom, the debtor filed a second case under Chapter 11 of the Bankruptcy Code. The U.S. bankruptcy court then appointed an examiner who negotiated an agreement with the British administrators.¹⁷⁴ The result was to give U.S. cooperation without a determination that it was appropriate under Bankruptcy Code § 304. In *BCCI*, the representative of the Luxembourg bankruptcy estate blatantly evaded § 304 by negotiating an agreement with two U.S. prosecutors who claimed the U.S. assets.¹⁷⁵ Together, the prosecutors and the representative took the agreement to a United States District Court for approval under RICO.¹⁷⁶ The District Court allowed the representative to take \$275 million out of the United States over the objection of the U.S. creditors.¹⁷⁷ The court did not apply the standard of Bankruptcy Code § 304, which Luxembourg probably did not satisfy.¹⁷⁸

A modified universalist system might avoid such "back doors," but the establishment of a system that legitimizes the claims of foreign representatives to assets in the United States encourages foreign representatives, U.S. prosecutors, and others to invent them. Such back doors likely will plague any system based on universalism.

Most bankruptcy regimes empower an estate representative to avoid as preferential or fraudulent various transactions that the debtor entered into before the filing of the case,¹⁷⁹ but the nature and scope

used this provision as an alternative to § 304, see Henry Lewis Goodman et al., *Use of United States Bankruptcy Law in Multinational Insolvencies: The Axona Litigation—Issues, Tactics, and Implications for the Future*, 9 BANKR. DEV. J. 19 (1992). Although no data exist on the number of secondary bankruptcies filed in the United States, data on the number of § 304 proceedings filed and anecdotal evidence on the frequency of secondary bankruptcies suggest that bypass is common. Only 25 proceedings were filed in the United States under § 304 in the year ending in September 1996. See LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 262 n.* (1996).

¹⁷⁴ *Maxwell Communication Corp. v. Barclay's Bank (In re Maxwell Communication Corp.)*, 170 B.R. 800, 802 (Bankr. S.D.N.Y. 1994).

¹⁷⁵ See Hal S. Scott, *Multinational Bank Insolvencies: The United States and BCCI*, in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 733, 738-39 (Jacob S. Ziegel ed., 1994) (describing the U.S. BCCI litigation). The agreement is properly characterized as an evasion of Bankruptcy Code § 304 because, absent the agreement, the § 304 standard would have governed the U.S. surrender of funds to Luxembourg, while pursuant to the agreement, the courts approved surrender of the funds to Luxembourg without requiring adherence to the § 304 standard. See *Smouha v. Sturge (In re Smouha)*, 136 B.R. 921, 925 (S.D.N.Y. 1992) (noting U.S. creditor's argument that the forfeiture provision of the Plea Agreement "eviscerates the [section 304 proceeding]" (quoting Appellant's Brief at 16)).

¹⁷⁶ See *In re Smouha*, 136 B.R. at 924.

¹⁷⁷ See Scott, *supra* note 175, at 739.

¹⁷⁸ See *In re Smouha*, 136 B.R. at 929 (approving the settlement); Scott, *supra* note 175, at 738-39.

¹⁷⁹ See Wood, *supra* note 59, § 4, at 72-84 (describing the national systems for preference avoidance in general terms).

of this empowerment differs among regimes.¹⁸⁰ Courts and commentators differ as to which country's avoiding powers a multinational bankruptcy should recognize.¹⁸¹ Bankruptcy Code § 304 does not address the problem.

Professor Westbrook devised an elegant solution to the problem in the context of pure universalism. He observes that the purpose of avoiding powers is to rebalance a distribution improperly skewed by some prepetition transfer. Under universalism, the imbalance occurs with reference to the priority law of the home country, so the avoiding powers of the home country—which probably were devised to complement that priority law—should be applied.¹⁸² When universalism is modified, however, the priority laws of other nations come into play and Westbrook's solution fails.¹⁸³ Modified universalism remains without a coherent doctrine governing avoiding powers.

III

SECONDARY BANKRUPTCY

A. The System

In a "secondary bankruptcy" system, bankruptcy proceedings simultaneously can go forward in each country in which the debtor has a substantial presence.¹⁸⁴ As with modified universalism, the proceeding in the debtor's home country serves as the "main" proceeding to which the courts of other jurisdictions are expected to surrender assets for distribution.¹⁸⁵ But in contrast to the ancillary proceedings of modified universalism, which function only in aid of the main proceeding, the secondary bankruptcies are the same proceedings that would be filed even if no foreign proceedings were pending. They can, and do, reorganize or liquidate the local assets of the debtor.

¹⁸⁰ See *id.* § 7, at 122-36 (comparing the preference rules of major jurisdictions).

¹⁸¹ Westbrook lists five possible choices of avoidance rules. See Westbrook, *Avoidance*, *supra* note 1, at 525.

¹⁸² See *id.* at 508-10.

¹⁸³ Westbrook does not concede this failure. He does agree, however, that his rationale does not apply under modified universalism "unless the United States court is ultimately going to turn over the proceeds of avoidance to the foreign court or distribute in accordance with a worldwide distribution under the guidance of that court." *Id.* at 536. In other words, he admits that his rationale does not hold unless the particular brand of modified universalism yields an *unmodified* universalist distribution.

¹⁸⁴ The test of significant presence that courts most commonly employ asks whether the debtor has an "establishment" in the country. See, e.g., UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY ART. 2(c) (1997) (describing a "foreign non-main proceeding" as one "taking place in a state where the debtor has an establishment").

¹⁸⁵ See John K. Londot, Note, *Handling Priority Rules Conflicts in International Bankruptcy: Assessing the International Bar Association's Concordat*, 13 BANKR. DEV. J. 163, 173 (1996) ("In secondary bankruptcy practice, a country distributes local assets to local creditors according to its own priority system, and delivers any remainder to the administrative forum for distribution to remaining creditors, according to the administrative forum's priorities.").

For example, when creditors filed against Maxwell in the United Kingdom, Maxwell responded by filing a case under Chapter 11 of the U.S. Bankruptcy Code.¹⁸⁶ This Chapter 11 case was a "secondary bankruptcy" rather than an ancillary proceeding because it was a type of proceeding that could alone reorganize or liquidate the company.

Maxwell's Chapter 11 case differed from the Bankruptcy Code § 304 proceeding contemplated under modified universalism in two respects. First, Maxwell could not have filed a § 304 proceeding because Maxwell was not the representative of a foreign bankruptcy court.¹⁸⁷ The right to file under Bankruptcy Code § 304 belonged only to the administrators that the English bankruptcy court was about to appoint. Second, the sole purpose of the § 304 proceeding would have been to aid the English proceeding. The U.S. bankruptcy court either could have granted or denied aid under § 304, but could not have independently reorganized or liquidated Maxwell's U.S. assets.¹⁸⁸

In a secondary bankruptcy case, the court reorganizes or liquidates the debtor's local assets and makes distributions necessary to protect creditors entitled to priority under local law.¹⁸⁹ The court then transfers the balance of the proceeds to the estate of the main case for distribution according to the priority rules of the home country.¹⁹⁰ In this respect, the secondary bankruptcy system is a hybrid of universalism and territoriality; part of the assets is distributed according to local priorities, but the balance is distributed according to home country priorities.

To illustrate the operation of a secondary bankruptcy system worldwide, assume again that the United States is the home country of a debtor with worldwide operations. This debtor would file bankruptcy in each of the countries in which it had operations. Its U.S. filing would be the "main" case, and the others would be "secondary." The secondary bankruptcy courts initially would assume jurisdiction over the local assets, would determine whether to cooperate in a multinational reorganization or liquidation, and would distribute the assets of the company among creditors to the extent of priorities specified under local law. The secondary courts then would surrender any remaining assets to the U.S. court.

¹⁸⁶ See *Maxwell Communication Corp. v. Barclay's Bank (In re Maxwell Communication Corp.)*, 170 B.R. 800, 802 (Bankr. S.D.N.Y. 1994).

¹⁸⁷ See 11 U.S.C. § 304(a) (1994) ("A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative."); *id.* § 101(24) ("[F]oreign representative' means duly selected trustee, administrator, or other representative of an estate in a foreign proceeding . . .").

¹⁸⁸ See *id.* § 304(b).

¹⁸⁹ See *Londot*, *supra* note 185, at 173.

¹⁹⁰ See *id.*

B. Claimed Advantages

As was previously noted, priority rules differ widely among countries.¹⁹¹ As a result of these differences in priority, distributions under universalism would produce shockingly unfair results. The priority of a Mexican employee's claim for wages, severance pay, and other benefits might be fully protected or not protected at all, depending on where the employer's bankruptcy was administered. The same would be true of tax and many other kinds of claims that are given different priorities in different countries. Even the most ardent universalists acknowledge that purely universalist distributions are, at least under current circumstances, unthinkable.¹⁹² To date, all universalist writers favor a "public policy" or equivalent exception to the requirement that assets be surrendered to the home country.¹⁹³

Secondary bankruptcy provides an orderly mechanism for giving effect to local public policy, including policies embodied in rules of distribution. Instead of refusing to surrender assets to the home country, or conditioning their surrender on the home country's commitments regarding distribution, the local court can make the distributions to local creditors that it considers necessary as a condition to cooperation. The secondary court then can surrender the balance of the debtor's assets to the home court.

C. Problems

The principal problem with secondary bankruptcy is that the exception for local creditors swallows the rule. Bankruptcy proceedings distribute the large bulk of assets to creditors with special priorities.¹⁹⁴

¹⁹¹ See *supra* notes 59-68 and accompanying text.

¹⁹² See, e.g., Westbrook, *Theory and Pragmatism*, *supra* note 1, at 470 (admitting that "it will not be possible to apply the home-country law to all aspects of a company's insolvency. We will stifle reform at the outset if we refuse to recognize that fact").

¹⁹³ As two universalist authors wrote:

Ideally, following the principle of universality in its purest form, the substantive law of the foreign court would govern the entire proceedings However, the constraints of public policy or strongly supported local bankruptcy principles in the Court's own jurisdiction, may require that this basic principle be modified and, in some instances, that local substantive law be applied.

Chin Kim & Jimmy C. Smith, *International Insolvencies: An English-American Comparison with an Analysis of Proposed Solutions*, 26 GEO. WASH. J. INT'L L. & ECON. 1, 28 n.176 (1992) (quoting MODEL INT'L INSOLVENCY CO-OPERATION ACT § 4 cmt. (International Bar Ass'n 1989)).

¹⁹⁴ See Fletcher, *supra* note 92, at 44-45 ("In practice, no doubt, the limited pool of assets comprising the available estate in the secondary bankruptcy will, in many cases, be exhausted when payment has been made to those creditors whose claims enjoy preferential status according to local insolvency law."). In U.S. business bankruptcy liquidations, secured creditors capture more than 95% of the assets distributed. See Robert M. Lawless & Stephen P. Ferris, *Professional Fees and Other Direct Costs in Chapter 7 Business Liquidations*, 75 WASH. U. L.Q. 1207, 1217 tbl.3 (1997) (reporting that 4.6% of the distributions resulting

Although one easily can identify priorities of other countries that do not seem to rise to the level of "public policy" that overrides the universalist obligation, one seldom can identify such priorities in the laws of one's own country. Every priority denied is a legitimate expectation denied. Not surprisingly, a secondary bankruptcy system—arguably the dominant system in international bankruptcy today—results in local assets being distributed locally and the universalist obligation being honored only nominally.

To the extent that local priorities absorb less than the entire estates of bankruptcy debtors, in a secondary bankruptcy system each country has an incentive to expand those priorities. Failure to expand them results in the export of assets with no assurance of a corresponding return. Thus, over the long run, secondary bankruptcy will have a corrupting effect on the rules governing bankruptcy priorities within nations.

Another problem with secondary bankruptcy, shared by modified universalism and territoriality, is an inevitable delay between the filing of the bankruptcy cases and the availability of local assets for international administration by the home country. Before the foreign bankruptcy court can employ the assets in a worldwide liquidation or reorganization, the representative of each local estate must assess the situation, arrange protection for creditors entitled to local priority, and negotiate with the representative of the main bankruptcy for the latter's use of the assets pending a final resolution of the case. This delay can prevent the achievement of system objectives in two situations in which the advantages of universalism have been touted: (1) when a company needs immediate control of both its domestic and foreign assets to reorganize, and (2) when a higher price can be realized by liquidating the domestic and foreign assets together.¹⁹⁵

To illustrate, assume a U.S. debtor-in-possession needs cash from its foreign operations to finance its reorganization. The foreign representatives might be unwilling to surrender that cash for fear that the

from business bankruptcy liquidations in five representative U.S. districts go to unsecured creditors). Furthermore, about 40% of the distributions to unsecured creditors go to priority unsecured creditors. See U.S. GEN. ACCOUNTING OFFICE, CASE RECEIPTS PAID TO CREDITORS AND PROFESSIONALS 39 tbl.III.2 (1994) (showing that 21.8% of Chapter 7 estates go to priority unsecured creditors and 36.4% go to general creditors). Thus, only about 2% of the distributions in U.S. bankruptcy liquidations go to general unsecured creditors. In discussing secondary bankruptcy under the proposed Strasbourg Convention, Westbrook observed that "[t]hese secondary proceedings would permit local distribution to priority ('preferential') creditors and secured creditors, and would distribute any surplus to the main bankruptcy. As in U.S. bankruptcies, there will rarely be much surplus to forward after priority claims are paid." Westbrook, *Theory and Pragmatism*, *supra* note 1, at 487. The Strasbourg Convention is "a draft proposal for international cooperation in insolvency matters" discussed by the Council of Europe. *Id.*

¹⁹⁵ See *supra* notes 44-50 and accompanying text.

reorganization attempt will consume it to the detriment of local priority creditors. Similarly, the foreign representative of a liquidating debtor may be reluctant to agree to a joint sale of foreign and domestic assets until an agreement has been reached on a division of the proceeds.

Universalists attempting to put the best face on a bad situation sometimes tout secondary bankruptcy as a way station on the road to universalism.¹⁹⁶ In fact, however, the two systems do not mix well. Universalism requires both cooperation from the non-home country and a worldwide assertion of jurisdiction by the home country. Although cooperation from non-home countries has been slow in coming, a number of countries, including the United States, have enthusiastically asserted worldwide jurisdiction by imposing a worldwide stay against the institution of foreign proceedings.¹⁹⁷ The bankruptcy courts of these countries are powerless to punish foreign courts that ignore their assertions of extraterritorial jurisdiction, but they can punish participants in the foreign proceedings who are unfortunate enough to have to appear in both the home country and the foreign proceedings. Thus, U.S. courts have held that persons violate an extraterritorial U.S. automatic stay by commencing what amounts to a secondary bankruptcy elsewhere.¹⁹⁸ This problem has a solution. In a secondary bankruptcy world, no country should claim the right to stay the institution of foreign proceedings except pursuant to treaty. But, until the aggressively universalist nations back away from their claims of worldwide jurisdiction, only outlaws can implement secondary bankruptcies.

One also should note that secondary bankruptcy assumes some means of determining the debtor's home country—where the foreign bankruptcy court must send excess proceeds of a liquidation—but offers no workable rule or standard for making that determination. Finally, like modified universalism, secondary bankruptcy is incompatible with Westbrook's solution for determining which country's avoiding powers should be applied in multinational bankruptcies. As discussed above, Westbrook's solution depends on a close link between the choice of avoidance laws and of distributing courts.¹⁹⁹ Such a link is impossible to maintain in a secondary bankruptcy system, however, because secondary bankruptcies involve more than one distributing court.

¹⁹⁶ See Westbrook, *supra* note 2, at 43-44 (referring to a secondary bankruptcy system as modified territorialism).

¹⁹⁷ See *supra* note 145 and accompanying text.

¹⁹⁸ See cases cited *supra* note 145.

¹⁹⁹ See Westbrook, *Avoidance*, *supra* note 1, at 525.

IV

RASMUSSEN'S CORPORATE-CHARTER CONTRACTUALISM

A. The System

In a recent article, Professor Robert K. Rasmussen advocated a system in which firms would be allowed to specify in their corporate charters the country or countries that would administer their bankruptcies. The courts of all countries would be bound to enforce those provisions unless the results would be "unreasonable and unjust."²⁰⁰ Under Rasmussen's proposal, the debtor not only could select a country or countries, but also could determine the system for cooperation among them.²⁰¹ Rasmussen would limit the debtor's choice only by preventing the debtor from directing a country to apply another country's bankruptcy law.²⁰²

To illustrate the operation of Rasmussen's "corporate-charter contractualism," assume that the United States is the home country of a debtor with substantial operations in Canada and Mexico. If the debtor's charter provided that the firm's bankruptcy would be held in Luxembourg, a country in which the debtor had negligible operations or perhaps none at all and with which the debtor had no other relationship, the debtor would file for bankruptcy there.²⁰³ The Luxembourg court would administer the assets of the debtor worldwide, would determine whether to reorganize or liquidate the company based on Luxembourg law, and would distribute the company's assets based on priorities under Luxembourg law. The courts of other countries would be expected to render assistance to the Luxembourg court unless the forum selection was "unreasonable and unjust."²⁰⁴

B. Claimed Advantages

Rasmussen claims that his system provides a single, all-encompassing advantage: it encourages the debtor to file in the country with the most efficient bankruptcy law.²⁰⁵ This selection will maximize the

²⁰⁰ Rasmussen, *supra* note 1, at 32-35 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

²⁰¹ Rasmussen is not entirely clear on this point. He specifically states that the debtor can choose either a "country's or countries' insolvency laws" suggesting a possible choice of territoriality. *Id.* at 32. He demonstrates that "one cannot identify which meta-rule—territoriality or universalism—better maximizes social welfare," suggesting that his purpose is to allow the parties to choose between them. *Id.*

²⁰² *See id.* at 34.

²⁰³ While Rasmussen is not specific on this point, he appears to limit the choice of bankruptcy law to the "laws of the various countries in which [the company] operates." *Id.* at 35.

²⁰⁴ *Id.* at 35 (quoting *Zapata*, 407 U.S. at 15).

²⁰⁵ *See id.* at 20-21.

value of the firm at its inception and will provide more value to distribute among its investors.

Rasmussen's system also would alleviate the problem of forum shopping.²⁰⁶ His system would fix the country with bankruptcy jurisdiction at the time the company was incorporated and identify that country on the public record. The company could make changes only with the consent of all creditors, and any change would also appear on the public record.²⁰⁷

C. Problems

Rasmussen's proposal for international bankruptcy is an application of a more general idea he initially proposed,²⁰⁸ which is now popular among bankruptcy scholars who adhere to the law and economics approach.²⁰⁹ The idea, sometimes referred to as "contract bankruptcy," is that the debtor and its creditors should select the applicable bankruptcy regime by contract.²¹⁰

The system Rasmussen proposes for international bankruptcy suffers from the same two problems that render contract bankruptcy problematic. First, the cost of contracting would be sufficiently high to effectively exclude many interested parties from meaningful participation in the contracting process. Second, involuntary creditors do not have the opportunity to contract. Either problem can lead to the misallocation of resources.

1. *Cost of Contracting*

Rasmussen describes the assumptions underlying his proposal as follows:

The possibility that a firm may encounter financial distress is known to all who voluntarily deal with the firm. Lenders decide the terms of loans based on the possibility of repayment. Bankruptcy rules determine payouts when the firm encounters financial distress, and thus form part of the calculus when lenders make lending decisions.²¹¹

²⁰⁶ Rasmussen himself makes no claim in this regard because he considers the problem of forum shopping insignificant. *See id.* at 10-12.

²⁰⁷ *See* Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 118 (1992) (noting that amendments to the corporate charter would be permitted only "with the consent of all the creditors").

²⁰⁸ *See id.* at 53.

²⁰⁹ *See, e.g.,* Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1810-11 (1998).

²¹⁰ *See* Rasmussen, *supra* note 207, at 54 (arguing "that bankruptcy law should be thought of in terms of the contract between a firm and its creditors").

²¹¹ Rasmussen, *supra* note 1, at 20.

To take account of bankruptcy rules, however, each lender would have to (1) obtain the debtor's corporate charter from the public record, (2) analyze the possibly complex provisions of the charter governing bankruptcy, (3) determine the priority of the creditor's claim under the law of the forum country or countries specified, and (4) evaluate the "efficiency" of the country's bankruptcy system as it actually operates. The typical multinational firm probably has thousands of creditors and shareholders, so these determinations must be made thousands of times for every firm—including those firms that will never file for bankruptcy. In practice, cost will preclude determinations by all but the largest creditors.

Under such a system, some countries might be expected to modify their laws to compete for multinational bankruptcy cases. They will appeal to those with the power to select their country as a forum—debtors and their largest creditors. As a result, the countries most likely to be chosen will not be those with the most efficient bankruptcy laws, but those with the bankruptcy laws most favorable to debtors and their largest creditors.²¹²

2. *Involuntary Creditors*

Rasmussen recognizes that some creditors do not achieve their status by contract and that their interests would not be protected in the contracting process.²¹³ The ultimate danger is the same as that arising from the cost of contracting: the existence of would-be havens with rules of priority and processes hostile to involuntary creditors.²¹⁴ One easily can imagine tort-prone U.S. firms scouring the world for jurisdictions in which personal injury verdicts are low, tort theories are undeveloped, procedures are hostile to tort plaintiffs, or plaintiff's attorneys are unavailable. Indeed, some such firms might select forums simply for their inconvenience to involuntary creditors. Given, for example, the predilection for taxicab companies to organize a corporate subsidiary for each cab to defeat tort liability,²¹⁵ one can expect them to welcome the opportunity to select a country inconvenient to tort plaintiffs as their bankruptcy forum.

²¹² Cf. Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1954-58 (1994) (critiquing the economic theory of secured financing for allowing "the modeler to charge all participants in a market with knowledge that only some have").

²¹³ See Rasmussen, *supra* note 1, at 34-35.

²¹⁴ For a discussion of the harm that might follow, see LoPucki, *supra* note 212, at 1896-1902.

²¹⁵ See, e.g., *Goldberg v. Lee Express Cab Corp.*, 634 N.Y.S.2d 337, 338 n.1 (Sup. Ct. 1995) (noting that "'what appears to be a rather common practice in the taxicab industry of vesting the ownership of a taxi fleet in many corporations, each owning only one or two cabs[,] . . . remains a common practice in the taxicab industry to this day") (quoting *Walkovszky v. Carlton*, 223 N.E.2d 6 (N.Y. 1966))), *aff'd*, 642 N.Y.S.2d 292 (1996).

To address the problem, Rasmussen proposes that U.S. courts "only enforce a forum-selection clause as applied to the involuntary creditor, where the law of that court provides a priority at least . . . equal to the priority that the creditor would receive in the U.S. court and where that court provides an effective means to resolve the claim."²¹⁶ Under such a standard, each sizeable multinational bankruptcy case might begin with hearings in every country where involuntary creditors were located to determine whether the forum selected by the debtor was less favorable to the involuntary creditors than their home forum, and if so, whether the forum selection was therefore "unreasonable and unjust."²¹⁷ Presumably, Rasmussen's system would tolerate some net disadvantage to tort creditors.²¹⁸ A debtor's optimal choice of forum might deviate from "efficiency" to the extent of that disadvantage.²¹⁹

To make such an evaluation, the bankruptcy courts of the plaintiffs' countries would have to do exactly what Rasmussen seeks to have them avoid—apply the bankruptcy laws of other countries.²²⁰ To illustrate the necessity for such an evaluation, consider the following example. Plaintiff has filed suit for patent infringement against Multifirm in country A. Multifirm files for bankruptcy in country B, the country specified in its charter. Assuming the scheme most amenable to Rasmussen's proposal, both countries give patent infringement claims priority as general creditors. As would usually be the case, each country recognizes numerous types of claims, including secured claims, as having priority over general creditors, but the lists are not the same. Finally, the trustee might be able to avoid some security interests and prepetition transfers under the laws of one of the countries but not the other. To determine whether application of the forum selection clause disadvantaged Plaintiff and therefore should be denied enforcement, the bankruptcy court of country A might be forced to calculate how country B would liquidate and distribute Multifirm's estate.

²¹⁶ Rasmussen, *supra* note 1, at 35.

²¹⁷ *Id.* (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

²¹⁸ National priority schemes are sufficiently complex that virtually no two schemes would treat tort creditors precisely the same way. Thus, as between any two systems of priority, the selection by the debtor of one rather than another would impose some net disadvantage on tort creditors. If a forum selection were considered "unreasonable and unjust," *id.*, simply for imposing any net disadvantage, Rasmussen's system routinely would lead to multiple refusals of cooperation with home country proceedings.

²¹⁹ That is, to capture the benefit associated with the disadvantage to involuntary creditors, a debtor might select a forum that was not the most efficient.

²²⁰ See *id.* at 33 ("Bankruptcy rules are notoriously complex. It is fanciful to expect a court to apply the bankruptcy law of a foreign country with anything approaching an acceptable degree of accuracy.").

Rasmussen does not specify the consequences of a country's refusal to enforce a forum selection clause. Presumably, the debtor's bankruptcy would go forward in the forum selected by the debtor despite nonenforcement by other countries. However, those nonenforcing countries would not lend assistance or surrender assets to the forum. To illustrate the kinds of inefficiencies that might result, consider the example of a multinational company with high tort risk in the United States and assets located throughout the world. By specifying an antitort haven as its bankruptcy jurisdiction, the debtor could give that country control of all its assets located outside the United States. If the U.S. assets were insufficient to compensate the plaintiffs—perhaps because the U.S. assets were fully encumbered by secured creditors or held in subsidiaries not reachable by the tort creditors²²¹—U.S. refusal to enforce the forum selection clause would not benefit the tort creditor.

A country's reluctance to cooperate with foreign bankruptcy courts in order to protect its domestic tort creditors could cause debtors to select inefficient jurisdictions for reorganization. To illustrate the possibility, assume that (1) *X* is an integrated multinational company that would need all its assets worldwide to reorganize,²²² and (2) countries tend to cooperate only to the extent legally required at the time of bankruptcy.²²³ *X* might feel compelled to select as its prospective bankruptcy forum the country with the most stringent protections of involuntary creditors, regardless of the efficiency of that country's bankruptcy laws. Only that selection could assure the availability of all the company's assets in the event reorganization became necessary.²²⁴ This example illustrates the broader point that selection by the debtor and its voluntary creditors of a particular forum would only prove that their selection was an efficient response to the prevailing international regime, not that the regime itself was efficient.

Finally, the possibility of nonenforcement as a remedy for domestic tort creditors would threaten the universalist aspect of Rasmussen's

²²¹ The former technique tends to be used by smaller companies, the latter by larger, but they amount to the same thing. See Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 20-21 (1996) (explaining the parent-subsidiary strategy to avoid tort liability).

²²² The assumption that such companies exist is a working premise of universalism. See *supra* Part I.B.

²²³ Of course, countries that have not bound themselves in advance to cooperate in the handling of multinational bankruptcies may choose to cooperate at the time of the case. But in the cases where such cooperation actually occurs, both universalism and territorialism will reorganize and liquidate companies equally well.

²²⁴ Based on these assumptions, cooperative territoriality would produce an even worse result—reorganization would be impossible. The case for cooperative territoriality rests upon different assumptions: (1) integrated multinationals that need their assets worldwide to reorganize are relatively uncommon, and (2) in cases involving such multinationals, cooperation at the time of bankruptcy would be highly likely.

proposal. Nonenforcement in any country would thwart the world-wide jurisdiction over the debtor's assets that universalism seeks to promote.

V

COOPERATIVE TERRITORIALITY

"Territoriality," as the term is commonly used in the field of international bankruptcy, refers to a system in which each country administers the assets within the country's own territory and recognizes other countries' rights to do the same. But "territoriality" has developed such bad connotations in the world of international bankruptcy that the word is sometimes used loosely to refer to any failure to cooperate, and it occasionally is used simply as a pejorative.²²⁵ Perhaps as a result, courts and commentators generally attempt to portray their actions or proposals as some form of "universality."²²⁶

I use the word "territoriality" in describing the system I propose because that is essentially what it is—a system in which each country would administer the assets located within its own borders. The territoriality I advocate is "cooperative" in two senses. First, even with the country of administration settled, a variety of other matters remain upon which countries will need to cooperate through treaty or convention. Second, the proposed system is designed to serve as a foundation for, and to encourage, mutually beneficial cooperation by the representatives of particular bankruptcy estates.

A. The System

Under the cooperative territoriality system I propose, the bankruptcy courts of a country will administer the assets of a multinational debtor within the borders of that country as a separate estate.²²⁷ If a debtor had significant assets in several countries, several independent bankruptcy cases might result. None would be main, secondary, or ancillary. Each of the courts would decide, according to local law and practices, whether the assets within its country's borders would be re-

²²⁵ See *supra* notes 18-19 and accompanying text.

²²⁶ See, e.g., Nielsen et al., *supra* note 13, at 534 (describing the system referred to above as "secondary bankruptcy" as "modified universality, or qualified universality"). Secondary bankruptcy is probably best described as "modified territoriality" because it more closely resembles territoriality than universalism, but only Westbrook has described it in this manner. See Westbrook, *supra* note 2, at 30.

²²⁷ Some assets are not located in any country. These assets would include ships and aircraft while en route, oil drilling platforms on the high seas, and objects in orbit around the earth. See, e.g., *Underwood v. Hilliard (In re Rimsat)*, 98 F.3d 956, 963 (7th Cir. 1996) (finding U.S. bankruptcy jurisdiction over orbiting satellites because the debtor's "principal place of business" was in the United States). In accordance with the principle of sovereignty, the same government that has jurisdiction over the property for other purposes should have bankruptcy jurisdiction over such property.

organized or liquidated. If a court chose to liquidate the assets, it would distribute the proceeds according to its own rules of priority.

To illustrate the worldwide operation of a cooperative territorial bankruptcy system, assume again that the United States is the home country of a debtor with worldwide operations. The debtor would file bankruptcy in each of the countries in which it had operations. Each of the filings would be of equal dignity. Each of the bankruptcy courts would assume jurisdiction over the local assets, would determine whether to cooperate in a multinational reorganization or liquidation, and in the event of liquidation, each would distribute the assets of the company among creditors and shareholders under local law.

The dearth of attention to territoriality in the literature has left unanswered questions about how territoriality would work. In the four subsections that follow, I suggest how a territorial system should fix the location of assets, prioritize foreign creditors, choose applicable law on avoiding powers, and order case-level cooperation.

1. *Location of Assets*

A cooperative-territoriality system would determine the location of assets for bankruptcy purposes with reference to sovereign power. The system would not deem assets "located" within a country unless that country had *de facto* power over them. For example, an account would be deemed located in a country only if the parties had sufficient presence in the country that the country could enforce its determinations regarding the account.

Often more than one country will have such power, necessitating further agreement to fix a single location.²²⁸ Making *de facto* power a prerequisite to jurisdiction, however, will reduce the number of conflicting claims over assets. Under the rule proposed here, a bankruptcy estate in a country could include only property that the government had the sovereign power to marshal without the assistance of other nations.

Metaphysical difficulties in fixing a single location for intangible assets cause many to scoff at the idea of permitting legal rights to depend on the location of intangibles.²²⁹ But for reasons including reg-

²²⁸ For example, a country has such *de facto* power over any account allegedly owed by a company that does sufficient business or has sufficient tangible property within its borders because the country can disrupt the business or seize the property if the company does not pay the account. Marantz notes this kind of exercise of power in the context of extraterritorial stays in bankruptcy. See Marantz, *supra* note 119, at 7 (noting that all but a handful of lenders to Bramalea's U.S. entities also carried on business in Canada, rendering them vulnerable to the Canadian stay even for acts committed entirely within the United States).

²²⁹ See, e.g., U.C.C. § 9-103 cmt. 5(a) (1995) ("There is a considerable body of case law dealing with the situs of choses in action such as these. This case law is in the highest

ulation, taxation, and international relations generally, the international community often has fixed locations for bank accounts,²³⁰ debts, franchises, leases, and every other kind of intangible property. The arbitrariness of the locations thus fixed has not prevented the international community from fixing them successfully. Although the locations of these assets are mere conventions, they are generally regarded as facts.²³¹ Their extension to international bankruptcy probably would go unopposed, if not unnoticed.

2. *Treatment of Foreign Creditors*

In the present system of international bankruptcy, discrimination against foreign creditors is both permissible and common.²³² Professor Westbrook advocates a change in the system to make bankruptcy priorities "universal"—by which he means available "without regard to nationality, residence, or other indicia of 'foreignness.'"²³³ Universal priorities could exist within an otherwise territorial system. Assuming that the countries involved were in agreement, a system in which jurisdiction over assets was entirely territorial could permit the filing of claims by or on behalf of creditors anywhere in the world and could entitle foreign creditors to the priorities available to similarly situated domestic creditors. Such entitlements would, however, be undesirable.

Discrimination against foreign creditors, like other discrimination, can be *de jure* or *de facto*. *De jure* discriminations—laws that expressly single out foreigners for disadvantageous treatment—are ap-

degree confused, contradictory and uncertain: it affords no base on which to build a statutory rule."); Westbrook, *supra* note 2, at 42 ("[S]itus rules are notoriously difficult and arbitrary in application."). *But see id.* at 40-43 (defending the use of the situs-of-collateral rule in an international system based on modified territorialism).

²³⁰ For example, despite the surreal nature of the problem of determining the country location of a bank account owing from a bank that does business in two countries to a debtor who does business in both countries, the circuit court in *Maxwell* had no difficulty in solving it. The banks apparently denominated each account, not only by currency, but also by country of "location," either the United States or United Kingdom. *See* Maxwell Communication Corp. v. Societe Generale (*In re Maxwell Communication Corp.*), 93 F.3d 1036, 1040-41 (2d Cir. 1996) (describing the transactions with reference to the countries involved). *See generally* Joseph H. Sommer, *Where Is a Bank Account?*, 57 MD. L. REV. 1 (1998) (explaining the location of bank accounts).

²³¹ *See, e.g.,* Sommer, *supra* note 230, at 3-4, 24-27.

²³² *See* Westbrook, *supra* note 2, at 29 ("[T]he conventional assumption is that foreign creditors would not be given the benefit of priorities under local law."). For examples of priorities given locals, see 11 U.S.C. § 507(a)(5)(B) (1994) (creating a priority under U.S. law available only to "persons [sic] . . . engaged as a United States fisherman"); Kurt H. Nadelmann, *Discrimination in Foreign Bankruptcy Laws Against Non-Domestic Claims*, 47 AM. BANKR. L.J. 147, 150 (1973) (noting that Argentine law gives priority to claims payable in Argentina).

²³³ Westbrook, *supra* note 2, at 38 (advocating such "cross-priority" under territorialism); *see also* Rasmussen, *supra* note 1, at 29 ("Few, if any, argue that foreign creditors should be treated differently from domestic creditors based solely on their nationality.").

parently rare,²³⁴ but de facto discriminations—those ostensibly based on some factor other than foreignness but which have the effect of preferring local creditors—are more common and of far greater economic significance.²³⁵

An example of de facto discrimination would be Bankruptcy Code § 545,²³⁶ which by negative implication gives priority to a vast array of state-created statutory liens, including construction liens, artisan's liens, agricultural liens, hospital liens, attorney's charging liens, garage keeper's liens, and employee's liens for unpaid wages.²³⁷ Each

²³⁴ An example of this type of discrimination is 11 U.S.C. § 507(a)(5)(B), which creates a priority for "United States fishermen." Experts in the local systems have almost uniformly reported, however, that the claims of foreigners were recognized on an equal footing with the claims of nationals. See, e.g., Dianna P. Kempe, *Insolvency in Bermuda*, in *Multinational Commercial Insolvency* at A-1, C-12 (Daniel M. Glosband & E. Bruce Leonard eds., 1993); Ralph D. McRae & Liza Kessler, *Multinational Commercial Insolvency in Canada*, in *MULTINATIONAL COMMERCIAL INSOLVENCY*, *supra*, at E-33; Jonathan E.F. Rushworth, *Foreign and Multinational Business Insolvency in England*, in *MULTINATIONAL COMMERCIAL INSOLVENCY*, *supra*, at I-32; Laurent Gaillot, *Foreign and Multinational Business Insolvency—France*, in *MULTINATIONAL COMMERCIAL INSOLVENCY*, *supra*, at J-35; Paul H. Baris, *Foreign and Multinational Business Insolvency in Israel*, in *MULTINATIONAL COMMERCIAL INSOLVENCY*, *supra*, at L-27; Agustín Berdeja-Prieto, *Debt Collateralization and Business Insolvency: A Review of the Mexican Legal System*, in *MULTINATIONAL COMMERCIAL INSOLVENCY*, *supra*, at O-22; Jan Schjotvet, *Foreign and Multinational Business Insolvency in Norway*, in *MULTINATIONAL COMMERCIAL INSOLVENCY*, *supra*, at Q-23-24; James G. Birtell, *Foreign and Multinational Business Insolvency—Scotland*, in *MULTINATIONAL COMMERCIAL INSOLVENCY*, *supra*, at S45-46; Odd Swarting, *Principal Features of Swedish Insolvency Law*, in *MULTINATIONAL COMMERCIAL INSOLVENCY*, *supra*, at U-20; Robin Phelan, *Foreign and Multinational Business Insolvency in the United States*, in *MULTINATIONAL COMMERCIAL INSOLVENCY*, *supra*, at W-18; Carlos J. Sarmiento-Sosa, *Arrears and Bankruptcy Under Venezuela's Commercial Code*, in *MULTINATIONAL COMMERCIAL INSOLVENCY*, *supra*, at X-11; Makoto Ito, *Report for Japan*, in *CROSS-BORDER INSOLVENCY: NATIONAL AND COMPARATIVE STUDIES* 178, 181 (Ian F. Fletcher ed., 1992). Only a few exceptions have been reported. Argentina discriminates on the basis of whether the claim was payable in Argentina or abroad. See Guillermo E. Matta y Trejo, *Insolvency Legislation in Argentina*, in *MULTINATIONAL COMMERCIAL INSOLVENCY*, *supra*, at A-22 ("[I]f the creditor filing his claim is connected with a bankruptcy adjudicated in a foreign country, Argentine legislation confines said creditor, allowing him to collect once every creditor whose credits are payable in Argentina have collected."). The Australian expert reported discrimination against foreign creditors with "claims of a penal or revenue nature." See John Stumbles, *Foreign and Multinational Business Insolvency in Australia*, in *MULTINATIONAL COMMERCIAL INSOLVENCY*, *supra*, at B-49. The German expert reported "no fiscal claim of a foreign public authority is privileged." Hans-Jochem Luer & Hans-Gerd Jauch, *Foreign and Multinational Business Insolvency in Germany*, in *MULTINATIONAL COMMERCIAL INSOLVENCY*, *supra*, at K-11. The Netherlands expert reported that "[a] claim having preference or priority under foreign law may only be recognized as a general *pari passu* claim." Ronald De Ruuk, *Foreign and Multinational Business Insolvency—The Netherlands*, in *MULTINATIONAL COMMERCIAL INSOLVENCY*, *supra*, at P-12.

²³⁵ See Kurt H. Nadelmann, *Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company*, 52 N.Y.U. L. REV. 1, 1 (1977) ("[F]or reasons which are sometimes clear and sometimes obscure, local creditors often obtain more than an equal share from the local assets.").

²³⁶ 11 U.S.C. § 545 (1994).

²³⁷ See LYNN M. LOPUCKI & ELIZABETH WARREN, *SECURED CREDIT: A SYSTEMS APPROACH* 738-45, 751 (2d ed. 1998) (describing the variety of statutory liens).

of these liens, by its nature, arises only in favor of persons providing goods or services within the jurisdiction that authorized the lien. A Martinique national can obtain a statutory lien under Missouri law by furnishing labor or materials for the construction of a building in Missouri. In the vast majority of cases, however, the building for which a Martinique national furnishes labor or materials will be in Martinique. Priorities under the Missouri lien law go primarily to U.S. nationals.

One cannot answer the charge of discrimination by saying that the Martinique national who furnishes labor or materials to the same debtor for construction of a building in Martinique can have priority in that building under the Martinique lien law. Each country giving its own nationals priority in property within its own borders is the very evil Westbrook sought to address with his "universal priorities."²³⁸

Professor Westbrook realizes that statutory liens are so woven into the fabric of bankruptcy jurisprudence that they cannot be removed merely to facilitate a system of international bankruptcy. He does not propose that his principle of antidiscrimination reach statutory liens.²³⁹ By limiting his proposal in this manner, however, he assures its ineffectiveness. Nations will remain free to grant *de facto* priorities to their own nationals with respect to any type of claim simply by designating the priority as a "lien."²⁴⁰ "Universal priorities" would be universal in form, but not in substance.

The adoption of such a superficial antidiscrimination regime would do little good. It could do much harm by upsetting the internal balance of national systems of priority. For example, the Mexican system gives wage claims priority over most kinds of secured claims, ensuring that Mexican workers receive full payment in most cases. Unless Mexico responded to Westbrook's proposed system by granting those employed in Mexican facilities a statutory lien for wage claims in place of their priority for wage claims, universal priorities would disappoint the expectations of Mexican workers by diluting the priority of their claims. For the American workers employed by the Mexican firm, who in all likelihood knew nothing of Mexican bankruptcy priority until their employer filed bankruptcy, their priority in the Mexican bankruptcy probably would come as a windfall.

²³⁸ Westbrook, *supra* note 2, at 28.

²³⁹ See *id.* at 36 (using a Martinique supplier of rivets for a building located in the United States as an example of such a lien).

²⁴⁰ Many statutory liens are limited to specific property improved by the lienor and for the amount of the improvement, but many others are not. See, e.g., CAL. CODE CIV. PROC. § 1205 (West 1997) (giving unpaid wages of employees earned within 90 days prior to the sale or transfer of a business priority in the proceeds of the transfer). Instead of granting employees a bankruptcy priority, countries that wished to discriminate could grant them a statutory lien against the debtor's means of production. Instead of granting a bankruptcy priority to those advancing expenses of administration, the country could grant them a statutory lien against the estate.

Scholars working from an economic perspective often assume that expectations will change to meet whatever rules are in place.²⁴¹ On that basis, one might conclude that the Mexican employees should not have expected to have the Mexican wage priority to themselves, but should instead have discounted their own claims for the foreign dilution. As I have explained at length elsewhere, however, such market "learning" is imperfect, and the effect of adopting a nonintuitive rule is often to extract a perpetual subsidy from the persons in the position here occupied by the Mexican workers.²⁴² In this instance, at least, the better course would be to craft law that gives effect to existing expectations.

The "national treatment" that Professor Westbrook advocates also might upset the legitimate expectations of defendants in personal injury cases. For example, assume that a bankrupt firm manufactured a product that inflicted injuries on both Americans and foreigners. The debtor proposes a reorganization plan that would pay fixed amounts of money for specified injuries. Under the plan, the amounts to be paid to foreigners are only thirty-five percent to sixty percent of the amounts to be paid to Americans. The debtor justifies this treatment by pointing out that each claimant will be receiving the amount that the courts of their respective countries would grant in nonbankruptcy litigation.²⁴³ Westbrook's proposal of national treatment in U.S. bankruptcy presumably would bar the confirmation of such a plan. Yet confirmation may be appropriate on the ground that the result will be consistent with the remainder of the international system for

²⁴¹ See LoPucki, *supra* note 212, at 1954-56. Other scholars sometimes make the same assumption. See Westbrook, *supra* note 2, at 36-37 (seeming to assume that the Mexican landlord of a U.S. company would anticipate application of the rent cap in U.S. Bankruptcy Code § 502(b)(6)). But see Ronald J. Mann, *The First Shall Be Last: A Contextual Argument for Abandoning Temporal Rules of Lien Priority*, 75 TEX. L. REV. 11, 32-42 (1996) (demonstrating empirically that the assumption does not reflect the reality of construction contracting).

²⁴² See LoPucki, *supra* note 212, at 1956-58 (illustrating the limits on market learning).

²⁴³ This example is not entirely fanciful. Thousands of foreigners injured by breast implants filed claims against Dow Corning. The debtor proposed a plan that in many instances would pay fixed amounts for scheduled injuries. In recognition of the lower values of the foreign plaintiffs' claims in the courts of their home countries, Dow Corning proposed to pay 35% to 60% of the scheduled amounts to foreign claimants. See Debtor's Response to Tort Committee's Motion to Modify Exclusivity To Permit Filing of Tort Committee Plan at 10, *In re Dow Corning Corp.*, 1995 WL 495978 (Bankr. E.D. Mich. 1995) (No. 95-20512) (noting that "[t]he Amended Plan offers improved treatment of foreign tort claims, increasing the range of payment to between 35%-60% of payments for domestic tort claims"). In other words, foreign women will receive less for precisely the same injuries. A personal injury claim is "foreign" under the plan if it "(a) is held by a Person who, at the time the Claim arose, was residing or domiciled outside the Greater U.S., or (b) arises from a medical procedure performed outside the Greater U.S." Second Amended Plan of Reorganization of Dow Corning Corporation ¶ 1.54, *In re Dow Corning Corp.* (No. 95-20512).

compensating personal injury.²⁴⁴ The point is not that such a plan necessarily should be confirmed, but merely that confirmation of such a plan would be a legitimate exercise of sovereignty that should not be constrained wholesale by international law.

Little evidence exists that discrimination against foreign lenders is a problem.²⁴⁵ Market forces are the probable explanation. Foreign lenders are unlikely to lend to debtors in jurisdictions that do not afford those lenders a recovery in bankruptcy. The indirect benefits to a country from the availability of foreign lending likely outweigh the direct benefits from discriminating against foreign lenders in bankruptcy cases. Part V.C.4 below discusses discrimination against foreign involuntary creditors, a problem more likely to occur.

Once one recognizes the chimerical nature of "equality of distribution" in the international context,²⁴⁶ it becomes apparent that no principle of justice requires adjustment of the recoveries of creditors in one territorial proceeding for the amounts they recover in another. The courts only need to follow the priority law of each jurisdiction with respect to the assets within the jurisdiction and to prevent creditors from recovering more than the entire debts owed to them. The resulting distribution will be a composite of the priority laws of the countries involved, weighted by the proportion of assets in each.

3. *Avoiding Powers*

As previously noted, Professor Westbrook has proposed an elegant solution to the otherwise perplexing problem of which country's avoiding statutes to apply.²⁴⁷ His solution is to apply the avoiding powers of the country whose estate would be augmented by avoidance.²⁴⁸ One can adapt his solution to a territorial regime by making one simple adjustment: treat international movements of debtor's assets as if they were transfers to a separate entity in the destination country. The rationale for such treatment is that, in cases reaching bankruptcy under a territorial regime, the effect of the debtor moving property to another country would be the same as the effect of the

²⁴⁴ If the case arose after foreign courts entered judgments in favor of the foreign claimants, the U.S. court should confirm the plan. The only alternative would be to second-guess foreign courts in all personal injury cases. To allow the foreign creditor's recovery to vary depending on whether a judgment had been entered would generate unproductive strategic activity. See LoPucki, *supra* note 20, at 491-96 (noting that particular results are sometimes necessary to the functioning of a law-related system). I do not mean to assert that only one outcome is reasonable in this hypothetical, but only that "national treatment" may not be appropriate in this, or similar instances.

²⁴⁵ See sources cited *supra* note 234.

²⁴⁶ See Wood, *supra* note 59, § 1-14, at 10 ("In practice even the most cursory examination of bankruptcy internationally shows that the *pari passu* rule is nowhere honoured.").

²⁴⁷ See text accompanying *supra* note 182.

²⁴⁸ See text accompanying *supra* note 182.

debtor transferring property to another entity. The movement would place the asset in the debtor's estate in the destination country. That estate *would be* another entity.

The facts of *Maxwell* illustrate how Westbrook's solution can be modified to work under a territorial regime. Maxwell, a British company, owned subsidiaries in the United States.²⁴⁹ Needing funds to repay its debts to British and French banks, Maxwell sold two of the U.S. subsidiaries.²⁵⁰ The proceeds were paid to Maxwell in the United States, and Maxwell deposited the funds in its U.S. bank accounts. Maxwell then transferred the funds to its British bank accounts, from which it paid the money it owed the banks.²⁵¹ If U.S. law applied to these payments, the trustee could have avoided them as preferences. However, the U.S. court held that British law applied,²⁵² and under British law, the trustee could not, as a practical matter at least, avoid the payments.²⁵³

Assuming that the assets sold were located in the United States at the time of the sale, the rules I propose would reach a different result. U.S. law would govern the transfer of funds from Maxwell's U.S. account to its British account. This transfer would be constructively fraudulent because Maxwell's U.S. estate would not have received reasonably equivalent value. However, British law would govern the avoidance of the payments made to creditors from Maxwell's British assets because recovery of the payments would augment the British estate. That is, absent avoidance the preferential payments would deplete Maxwell's British estate and ultimately reduce the recovery of Maxwell's creditors claiming against that estate. British law deliberately approved the payment to creditors on the eve of bankruptcy—American law did not. British claimants should have borne the loss.²⁵⁴

Implementing this rule would necessitate treaties that require the return of fleeing assets, but negotiating these treaties should not be difficult. Every country would be vulnerable to eve-of-bankruptcy removal of assets that would threaten distributions to local creditors. No country could hope to profit systematically by establishing itself as a destination for these transfers because the source countries and the creditors within them would anticipate and prevent the transfers.²⁵⁵

²⁴⁹ See *Maxwell Communication Corp. v. Societe Generale (In re Maxwell Communication Corp.)*, 93 F.3d 1036 (2d Cir. 1996).

²⁵⁰ See *id.*

²⁵¹ See *id.* at 1040-41.

²⁵² See *id.* at 1051.

²⁵³ See *id.* at 1043 (stating that the intent requirement for preference avoidance under English law "apparently would be a significant or insurmountable obstacle for the administrators were they to litigate the preferences question in London under English law").

²⁵⁴ In *Maxwell*, both the U.S. and British creditors bore the loss together because the distribution from the single depleted estate was presumably pro rata. See *id.* at 1042.

²⁵⁵ See *infra* Part V.C.3.

4. *Cooperation*

Cooperative territoriality, as this Article has described it, eliminates the tension between countries by vesting each with bankruptcy power congruent with its sovereignty. No nation need recognize foreign authority over domestic assets or sacrifice the interests of local debtors or creditors in particular cases. The elimination of that universalist tension provides the foundation for cooperation among courts and representatives that will be mutually beneficial in each case. Among the kinds of cooperation contemplated are the following: (1) the establishment of procedures for replicating claims filed in any one country in all of them;²⁵⁶ (2) the sharing of distribution lists by representatives to ensure that later distributions do not go to creditors who have already recovered the full amounts owed to them; (3) the joint sale of assets, when a joint sale would produce a higher price than separate sales in multiple countries or when the value of assets within a country is not sufficiently large to warrant separate administration; (4) the voluntary investment by representatives in one country in the debtor's reorganization effort in another; and (5) the seizure and return of assets that have been the subject of avoidable transfers.

A cooperative territorial system and a universalist one will differ less in practice than in theory. When multinational companies operate in foreign countries through local subsidiaries, when each subsidiary owns assets in only a single country, and when the courts recognize the subsidiaries as separate entities, territoriality and universalism yield the same results. Each entity's assets are administered separately in the country where that entity has both its assets and its home, and that country's law governs. One can think of cooperative territoriality as a simplification of universalism in which multinationals conclusively are presumed to do what they usually do—incorporate separately in each country.²⁵⁷ A regime of cooperative territoriality would reinforce the already strong tendency for multinational corporations to keep their operations in various countries separate.²⁵⁸ Separate incorporation would eliminate in most cases the troublesome aspects of cooperative territoriality, such as the mass filing of claims in multiple jurisdictions.

²⁵⁶ For example, if the prerequisites of a priority wage claim differed from one jurisdiction to another, the representatives might devise and distribute a form that would be effective in all jurisdictions.

²⁵⁷ See *supra* note 148 and accompanying text.

²⁵⁸ But see Rasmussen, *supra* note 1, at 31 (asserting the existence of a "trend . . . toward more integrated transnational operations").

B. Advantages

As discussed above,²⁵⁹ universalism would not work in a world in which businesses are comprised of corporate groups. The two main rationales for universalism—facilitating worldwide reorganization and worldwide sale of assets—require that the home country exercise jurisdiction over the entire group in at least some cases. Such “group” jurisdiction would broaden bankruptcy jurisdiction beyond acceptable limits.²⁶⁰ In most cases, the home country’s jurisdiction over the entity’s assets would suffice to capture the benefits of universalism. But permitting the courts to determine on a case-by-case basis whether jurisdiction should extend to the group or merely to the entity would sacrifice predictability.

Cooperative territoriality solves the corporate group problem by severing the firm at the national border. Severance is unlikely to do much damage because the large majority of multinationals already compartmentalize themselves by country. A regime of cooperative territoriality would provide multinationals with an even greater incentive to compartmentalize by country, thereby further reducing the damage.

Cooperative territoriality offers greater predictability to lenders than universalism. Lenders know which entities are indebted to them. In a cooperative territorial regime, the only additional information lenders would need to predict their treatment in bankruptcy would be the countries in which their debtors’ assets were located and the distributional priorities of those countries. Although the international movement of assets could alter the calculation,²⁶¹ lenders could protect themselves in most instances by controlling those movements.²⁶²

In place of universalism’s complex domestic interface,²⁶³ cooperative territoriality offers transactional simplicity. Domestic law would govern wholly domestic transactions. Parties who dealt domestically would litigate in domestic bankruptcies regardless of the debtor’s na-

²⁵⁹ See *supra* Part I.C.

²⁶⁰ See *supra* Part I.C.3.

²⁶¹ See, e.g., Trautman et al., *supra* note 5, at 604. Trautman, Westbrook, and Gaillard predict that the administration of moveables under situs law

will produce lots of pre-bankruptcy shenanigans and an occasional absurdity, like the application of French law to a shipment of Spanish goods to Hamburg, where the truck full of goods was on the outskirts of Paris when the insolvency proceeding was initiated. For intangibles, like bank accounts, the electromagnetic maneuvering will be even more elaborate and the decisions even more arbitrary and unpredictable.

Id. To a French creditor who seized the goods on the outskirts of Paris before the bankruptcy case was commenced elsewhere, the application of foreign law that universalism requires would be the absurdity.

²⁶² See *infra* notes 297-99 and accompanying text.

²⁶³ See *supra* notes 77-79 and accompanying text.

tionality. Employees and trade creditors would have the same recourse to their debtors' assets whether those debtors resolved their financial problems in or out of bankruptcy. Foreign creditors concerned about their status as foreigners could domesticate themselves by incorporating local subsidiaries to lend within the country.

Universalism requires the bankruptcy courts of those countries with actual control of assets to surrender that control by exporting the assets. They are expected to do so in the faith that other courts will do the same with sufficient frequency to produce what Westbrook calls a "Rough Wash."²⁶⁴ Not surprisingly, some courts have been reluctant to surrender control,²⁶⁵ engendering further suspicions on all sides.²⁶⁶ By yielding bankruptcy power over an asset to the country that in fact has power over that asset, a territorialist regime would minimize the tensions between cooperating countries. As the international bankruptcy system currently operates, aggressively universalist countries continuously risk international confrontation by their unilateral claims of extraterritorial jurisdiction. By contrast, cooperative territoriality validates no claims of extraterritorial jurisdiction and requires no wholesale surrender of sovereign power.

Territoriality also comports with the prevailing regime of admiralty law. Admiralty law is strictly territorial.²⁶⁷ That is, a country's law only governs when a ship or aircraft is in that country.²⁶⁸ The admiralty system generates relatively few conflicts because admiralty law is relatively uniform throughout the world, and admiralty judgments receive international recognition.²⁶⁹ If the international insolvency regime is also territorial, the same country's law will govern the ship or aircraft—whether the matter is dealt with in admiralty or bankruptcy—and the international harmony achieved by admiralty law will

²⁶⁴ Westbrook, *Theory and Pragmatism*, *supra* note 1, at 464-65.

²⁶⁵ See Knecht, *supra* note 3, at 314 (stating that "in several cases the U.S. courts have found that a transfer of the assets would violate the interests of the U.S. claimholders").

²⁶⁶ See *In re Bank of Credit and Commerce Int'l, S.A.*, 4 All E.R. 796 (Q.B. 1996) (applying English set-off rules before remitting funds to Luxembourg, despite Luxembourg court's claim to entire funds); Westbrook, *Theory and Pragmatism*, *supra* note 1, at 480-81 (noting suspicions regarding reciprocity that contributed to lack of international cooperation in the reorganization of U.S. Lines in *Felixstowe Dock & Ry. Co. v. U.S. Lines, Ltd.*, 2 Lloyd's Rep. 76 (1987)).

²⁶⁷ See William Tetley, Q.C., *Conflicts of Law Between the Bankruptcy Courts in Admiralty: Canada, United Kingdom, United States, and France*, 20 TUL. MAR. L.J. 257, 259-60 (1996) ("The International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, May 27, 1967 (1967 Convention), at Article 2, assigns 'all matters relating to the procedure of enforcement' to the 'law of the State where enforcement takes place.'" (citations omitted) (quoting International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, May 27, 1967, art. 2, *reprinted in* THE RATIFICATION OF MARITIME CONVENTIONS Item No. 4.20, at I.4-4 to -6 (Institute of Maritime Law, Univ. of Southampton, England ed., 1990)).

²⁶⁸ See Alwang, *supra* note 11, at 2628-29.

²⁶⁹ See *id.* at 2628.

continue. If the international insolvency regime is universal, conflicts will arise between admiralty law and bankruptcy law whenever the ship or aircraft is in a country other than the debtor-owner's home country. These conflicts will render the universalist system less predictable to lenders, delay the enforcement of admiralty liens, increase the expense of the insolvency, and add to the uncertainty of reorganization.²⁷⁰

Perhaps the greatest advantage of cooperative territoriality is that implementation would require only minimal changes in current practices. Despite their protestations to the contrary, most countries have in most cases acted territorially with regard to assets within the country at the time of the bankruptcy filing. To achieve worldwide cooperation under territoriality, aggressively universalist countries such as the United States, Canada, and the United Kingdom need only to drop their claims of worldwide jurisdiction and to adopt domestic laws authorizing narrow forms of cooperation directly benefiting their own citizens.²⁷¹

C. Problems

The principal weaknesses of cooperative territoriality would be (1) the possible need for creditors to file and prosecute claims in all jurisdictions in which bankruptcy proceedings were pending against their debtors, (2) the need for cooperation among courts and representatives to effect a multinational liquidation or reorganization, (3) the possibility of strategic removal of assets from the country on the eve of bankruptcy, and (4) the need for protection of involuntary creditors. Despite the seriousness of these problems, cooperative territoriality remains the best of the five systems discussed in this Article.

1. *Multiple Filing and Prosecution of Claims*

The system for establishing claims in bankruptcy cases works essentially as follows. Upon filing the case, the debtor furnishes a list of all creditors and the amounts owed to each.²⁷² In liquidation cases, the system distrusts the debtor's list because an insolvent debtor has no interest in the funds being disbursed.²⁷³ Apparently, the fear is that debtors will list bogus claims so that distributions will be made to persons who are not bona fide creditors. To prevent bogus claims,

²⁷⁰ See *id.* at 2635-42.

²⁷¹ See Gaa, *supra* note 13, at 897 (noting that nations are more likely to agree on narrow issues than on a universal bankruptcy regime).

²⁷² See EPSTEIN ET AL., *supra* note 73, §7-3, at 455.

²⁷³ In a reorganization under U.S. law, even an insolvent debtor ordinarily has an interest in the funds being disbursed; perhaps for that reason the law does not require proofs for debts listed by the debtor as undisputed. See 11 U.S.C. § 1111(a) (1994).

each creditor is required to file a "proof" of its claim.²⁷⁴ Usually a statement of the circumstances giving rise to the debt is sufficient as a proof of claim, but in any particular jurisdiction, the system may impose formal requirements.²⁷⁵ Once the claim is filed, the estate's representative and the creditors have the opportunity to object to it.²⁷⁶ If someone does object, the court summarily decides the dispute.

Under cooperative territoriality, a creditor could reach all of its debtor's assets only by filing claims in each country where the debtor had assets. Two problems would arise with regard to the establishment of those claims. First, the creditors, who for a large multinational debtor often number in the thousands, might each have to grapple with local procedures, in each country where the debtor has assets, regarding the proof of their claims. Second, the parties may have to litigate a disputed claim in each of the proceedings in which the creditor has filed that claim.

The first problem is essentially clerical. Although filing a proof of claim is in most countries a simple matter that does not require the assistance of an attorney, in some countries it may be more difficult. Individual creditors are unlikely to master procedures for filing foreign claims without assistance. The obvious source for that assistance would be either the local court or the representative of the local estate.²⁷⁷ In large cases, computers could be used to automate the process. Over time, countries may agree to exchange lists of locally filed claims, deem them filed in each court, and allow those to which no one lodges an objection.²⁷⁸

Clumsy as multiple filing of proofs of claim may be, a territorial system with multiple filing of claims may work more smoothly than the single filing system of universalism. In that single filing system, no local court may be available to assist creditors in filing in the home country. Each creditor would have to cross the barrier of legal culture—and perhaps also language—alone.²⁷⁹

²⁷⁴ See *id.*

²⁷⁵ See *id.*

²⁷⁶ See *id.*

²⁷⁷ In other words, the creditor would make a local filing, and the court or representative would assist the creditor in replicating the filing in each jurisdiction in which the debtor is in bankruptcy.

²⁷⁸ The European Union Convention has adopted a system in which "[e]ach liquidator in an insolvency proceeding in an EU country may file claims on behalf of all the creditors in that proceeding in each other EU-member proceeding involving the same debtor." Westbrook, *supra* note 2, at 30. Westbrook refers to such a system as "universal cross-filing." *Id.*

²⁷⁹ See SIGAL ET AL., *supra* note 14, at 107 (discussing Principle 2(G), which provides that foreign creditors must file claims in the local forum, in local language, and abide by the formalities of local law).

The second problem is potentially more serious. Assume, as a worst-case scenario, a mass-tort bankruptcy in which hundreds of thousands of individuals make claims against the debtor for personal injury. In the asbestos and breast implant cases, for example, the necessity to reduce so many claims to a specific dollar amount overwhelmed the U.S. federal court system.²⁸⁰ Because of its greater flexibility to promote settlement, the bankruptcy system is better suited to the task, but even the bankruptcy system may be challenged by some mass torts. For instance, if a multinational company that is a defendant in mass tort cases were to file bankruptcy in several countries, the case management problem would be multiplied. Each claim potentially might have to be relitigated in each country.

Probably the best solution to this problem is the one set forth in the Cross-Border Insolvency Concordat.²⁸¹ Local claimants would request that the foreign bankruptcy courts permit their claims to be liquidated in the local bankruptcy court.²⁸² One trial would be held for each claim, and the result would bind all of the bankruptcy courts.²⁸³ The foreign court could refuse to permit local liquidation of claims, but the pressure on the foreign court to allow the requests—the possibility that the foreign court would have to try all of the cases again if it did not allow them—would be enormous. Another possible resolution would be for the claimant to liquidate its claim in the local bankruptcy court and then seek recognition of the judgment in the other bankruptcy courts under the rule of comity.

At first glance, universalism appears to offer a better solution to the problem of resolving disputed claims. In a universalist system, the bankruptcy court of the home country would resolve disputed claims. Only one resolution of each claim would be necessary. On closer examination, however, this seemingly elegant solution proves facile. It assumes that nations will do in bankruptcy what they consistently have been unwilling to do in other contexts—grant judgments of foreign courts the equivalent of full faith and credit.²⁸⁴ Universalism essen-

²⁸⁰ See, e.g., Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 816-17 (1992) (describing the extent of the problem created by the asbestos litigation).

²⁸¹ See SIGAL ET AL., *supra* note 14, at 107-08 (Principle 2(I)).

²⁸² See *id.*

²⁸³ Personal injury claims may have sharply different values in different countries. See *supra* note 243 and accompanying text. If local courts determine the value of each claim, and those values serve as the basis for a pro rata distribution, claimants from countries where personal injury claims have high values will recover more than claimants from other countries. The problem is difficult, but it is neither caused by nor unique to territoriality.

²⁸⁴ See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 228 (1895) (refusing comity to a French judgment and stating that "[i]f we should hold this judgment to be conclusive, we should allow it an effect to which, supposing the defendants' offers to be sustained by actual proof, it would, in the absence of a special treaty, be entitled in hardly any other country in Christendom, except the country in which it was rendered."). But see Russell J. Weintraub,

tially would require as much because the non-forum country must surrender assets to satisfy claims adjudicated solely by the forum country.²⁸⁵

2. *Cooperation Needed for Reorganization or Liquidation*

In a universalist system, the bankruptcy court of the home country could sell the assets of the company in a single, worldwide package if that would bring the best price. The bankruptcy courts of other countries would be *obligated* to assist. In a territorial system, achieving the same result would require voluntary cooperation from those other countries. Westbrook doubts that such cooperation would be forthcoming. By way of explanation, he posits an example in which X company

had an integrated manufacturing, distribution and marketing system in several countries, divided into divisions by product type. The assets are evenly distributed in X, the U.S., and the U.K., but the asset/local-debt ratio is greatest in the U.S., so that U.S. creditors would do better in a local distribution at any given level of return from sale of assets or businesses. Sale of assets will bring US\$33 million in each country. Sale of the divisions across national lines as going concerns will bring \$200 million worldwide, in part because of trademarks that have much greater value on a worldwide basis.²⁸⁶

Westbrook concludes that

[i]f the local asset/local-debt ratio is sufficiently skewed to the U.S., it will be in the interest of U.S. creditors to press for local distribution despite the lower returns on piecemeal sale of assets. If the grab rule [territoriality] were applied in the U.S., the U.S. courts would favor that local interest.²⁸⁷

First, note that Westbrook's example assumes that the U.S. court would not permit foreign creditors to file claims in the U.S. proceeding.²⁸⁸ Such a refusal represents a possible form that territoriality might take, but not a likely one.²⁸⁹ Westbrook also assumes that the U.S. creditors must suffer delay or risk their \$33 million expectancy to participate in the worldwide attempt to get \$200 million.²⁹⁰ That is generally, but not invariably, true. Finally, Westbrook supposes that

How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away To Get It?, 24 BROOK. J. INT'L L. 167, 178-80 (1998) (pointing out that some countries have begun to recognize foreign judgments).

²⁸⁵ See *infra* Part V.C.4.

²⁸⁶ Westbrook, *Theory and Pragmatism*, *supra* note I, at 465.

²⁸⁷ *Id.*

²⁸⁸ If foreign creditors could file claims in all countries and share on the same basis as local creditors, all creditors would have identical incentives.

²⁸⁹ See *supra* Part V.A.2.

²⁹⁰ If the U.S. creditors did not suffer risk or delay, the U.S. creditors would want the U.S. estate to join in the worldwide sale simply because they would gain from it.

the U.S. court would decide whether to join in the worldwide sale based solely on the interests of local creditors.

Even under these restrictive assumptions, the non-U.S. creditors should have no difficulty enticing the U.S. creditors to participate in a worldwide sale if the payoff justifies the risk. They could compensate the U.S. creditors for the added risk by granting them a priority for their \$33 million expectancy or, if necessary, by paying them a premium.

In a bankruptcy case, no creditor may recover more than the full amount owing to it. For that reason, the U.S. creditors would lack incentives to cooperate in the rare case in which the U.S. creditors were already certain of a 100% recovery from the U.S. assets. Bankruptcy law bars the deal that would maximize wealth—the trustee's surrender of the U.S. assets to the U.S. creditors who then join in the sale in return for a greater than 100% recovery—because bankruptcy distributions traditionally can be made only in cash, not in property.²⁹¹ But the bankruptcy system has anticipated the problem. The trustee, not the U.S. creditors, decides whether to join in the sale. The trustee represents not the unsecured creditors, but just all parties with an interest in the U.S. estate. Here, the trustee must protect the debtor's interest in the residual of the estate.²⁹² Under U.S. law, the trustee in the 100% recovery hypothetical should risk the U.S. creditors' expectancy by joining in the worldwide sale because that course maximizes the estate.²⁹³ Like the current system, a territorial system would obligate the U.S. representative to impose risk on the U.S. creditors to benefit the debtor, and the representative probably would comply. Thus, Westbrook's assumption that in a territorial system the U.S. courts would refuse to join in the sale is doubtful.

The delays involved in commencing a proceeding in each country, obtaining the appointment of a representative in each, and contracting among those representatives may prevent some reorganizations or advantageous liquidations. But this problem is not unique to territoriality. In fact, the problem is likely to be more severe under the most commonly considered types of universalism. In those types, the representative of the estate appointed in the main proceeding must file ancillary proceedings in each of the countries involved and must win a surrender of the assets before the reorganization or liquidation could go forward.²⁹⁴

²⁹¹ See, e.g., 11 U.S.C. § 704(1) (1994) (imposing on the trustee the duty to "collect and reduce to money the property of the estate").

²⁹² See *id.* § 726(a)(6).

²⁹³ See, e.g., *In re Central Ice Cream Co.*, 836 F.2d 1068, 1072 (7th Cir. 1987) (stating that the duty of a trustee is "to maximize the value of the estate, not of a particular group of claimants").

²⁹⁴ See *supra* notes 40-41 and accompanying text.

3. *Strategic Removal of Assets from the Country Before Bankruptcy*

The problem of strategic removal of assets on the eve of bankruptcy would be more severe under territoriality than universalism.²⁹⁵ As noted above, the problem would necessitate treaties to insure the return of fleeing assets to the country in which they were located during the relevant period preceding the bankruptcy filing.²⁹⁶ Unless such returns were routinely made, debtors and their favored creditors would have the incentive to remove assets, and such removals might become common.

However, the problem of strategic removal probably would not be great. Large creditors could contract for nonremoval and enforce the contract by monitoring the debtor and filing a bankruptcy before the threatened removal occurs. Local law could criminalize the most egregious removals. For example, U.S. creditors commonly contract with their debtors to prevent the removal of collateral,²⁹⁷ and some U.S. jurisdictions criminalize removals that violate security agreements.²⁹⁸ Arrangements such as "blocked accounts" could prevent international movements of cash.²⁹⁹

Most countries will share a common interest in the repatriation of fleeing assets. Their creditors will be beneficiaries in some cases, but they will be victims in others. Countries will experience more pressure to prevent the expectancy losses from outgoing transfers than to seek the windfalls from incoming transfers.

Some countries might benefit systematically from fleeing assets and therefore be reluctant to enter into treaties requiring their return. They might, for example, be havens that cater to debtors and their dominant creditors by permitting use of the fleeing assets in

²⁹⁵ The problem would continue to exist in a universalist regime with regard to assets removed from the home country. The home country court theoretically would control those assets but after removal would need the cooperation of the transferee-country's court to exercise that control.

²⁹⁶ See *supra* text accompanying note 255.

²⁹⁷ See, e.g., LOPUCKI & WARREN, *supra* note 237, at 300-01 (reprinting a security agreement according to which a debtor is in default for keeping collateral at any location other than that specified in the agreement); 14 BRADFORD STONE, WEST'S LEGAL FORMS 703 (2d ed. 1985) (providing that "debtor will not remove the collateral from the State without the written consent of the secured party").

²⁹⁸ See, e.g., N.Y. PENAL LAW § 185.05 (McKinney 1988) (criminalizing the "withholding" of collateral by a person who has no right of sale or other disposition under the security agreement); WIS. STAT. ANN. §943.25(2) (West 1996) (making concealment of personal property in which one knows that another has a security interest a felony).

²⁹⁹ In a "blocked account arrangement," a line of credit, rather than funds on deposit, serves as the debtor's working capital. All revenues are deposited to the "account" as payments on the line loan. The debtor can draw on the line only by specifying an amount and a payee. See, e.g., LOPUCKI & WARREN, *supra* note 237, at 260-62 (discussing lines of credit). In such an arrangement, the debtor could make an international transfer of funds only by persuading the bank to write the check.

worldwide reorganization efforts. They also may be countries where few assets are located but whose laws give priority to local creditors.³⁰⁰ However, these problems are not unique to cooperative territoriality. Potential havens would have the same incentives to refuse cooperation in a universalist system.

4. *Protection of Involuntary Creditors*

As noted above, market forces would tend to protect foreign lenders, but not foreign involuntary creditors, against discrimination in a territorial system.³⁰¹ In a territorial system, countries might choose to protect foreign involuntary creditors either because they agree with the foreign policies that led to the judgments or because they seek reciprocity with regard to their own policies. But for such reciprocity to come about, the countries granting the judgments realistically would have to negotiate for it.

Countries should be involved in these negotiations. Every claim of an involuntary creditor is the direct product of some country's social policy. In other words, the claim exists because the country authorized the involuntary creditor to bring the action and perhaps also adjudicated it. To require a second country to recognize that claim exports the social policy of the first.

When the two countries follow similar policies and procedures, the recognition of foreign claims has produced few problems. But often the policies or procedures differ. One country would award child support in an amount much greater than another; one country would recognize a particular cause of action, but another would not; one country sharply limits verdicts for personal injury while another gives juries full rein.

Territoriality offers no easy solution to this problem, but neither does universalism. The idea that countries will surrender control of domestic policies over such issues as family law, products liability, labor relations, or intellectual property rights simply because the debtor's "home country" is elsewhere represents wishful thinking on the part of universalists. Territoriality recognizes that the problem requires specific adjustment between countries rather than moralizing about international cooperation.

³⁰⁰ While such a country might not be inclined to return fleeing assets, one has difficulty imagining why assets would flee to it.

³⁰¹ See *supra* text accompanying notes 245-46.

CONCLUSION

Territoriality provides the soundest basis for international cooperation in multinational bankruptcy. Three advantages of territoriality over universalism dominate the comparison.

First, territoriality permits the local country to effectuate its rules of priority to the maximum extent of its sovereignty. By contrast, universalism requires that countries sacrifice not only their sovereignty, but also particular creditors' priority rights in deference to priorities granted by the home country to others. This distinction between the two systems is important because priorities differ significantly from country to country, and most extenders of credit likely will contract in anticipation of local priorities, even in a universalist system.³⁰²

Second, territorial distributions offer greater predictability than universalist distributions. The territorial distribution depends on the location of assets at the time of the bankruptcy filing. In nearly all instances, the country in which an asset is located will be easy to determine. Creditors can control the country in which an asset is located at bankruptcy by contracting for a particular location and monitoring the indicia of location. To supplement that control, countries can deal with eve-of-bankruptcy strategic removals by negotiating treaties providing for return of transferred assets.

By contrast, universalist distributions depend on the home country of the debtor at the time of the bankruptcy filing. The home country of truly multinational companies defies easy identification because of the lack of international consensus on two issues. The first is whether the home country is determined for a corporate group, a particular entity, or an "integrated" business. The second is whether the home country of an entity is the country of incorporation, headquarters, or operations. Courts too easily manipulate vague standards such as the "center of its interests" or the "center of gravity" when the future of local businesses, the priorities of local creditors, and millions of dollars in professional fees hang in the balance. Debtors could alter their centers of gravity on the eve of bankruptcy, and local courts could yield to national self-interest by ruling opportunistically.

Finally, even if one could identify the bankrupt's home country with precision at the time of bankruptcy, complexity would still cripple the predictability of a universalist system. To fix the terms of credit, any extender must begin with an understanding of its rights on default. To reach that understanding in a universalist system, the extender must know the home country of its borrower and the country's

³⁰² Major lenders such as banks and insurance companies probably will contract in anticipation of whatever priorities the law in fact enforces. But they are far outnumbered by minor lenders, trade creditors, employees, and others for whom the expense of discriminating among debtors on the basis of nationality would be prohibitive.

system of priorities—not merely as law on the books, but as it operates in practice.³⁰³ Determining these things at the time of the loan would prove impractical in most cases. The problem would afflict not just banks engaged in international lending, but every extender of credit in every nation—from the Mexican employee of a U.S. company in Mexico to the U.S. supplier of a piece of equipment to a Canadian firm. Globalization and its attendant increase in international extensions of credit will only exacerbate the problem.

The principal weaknesses of territoriality—the necessity for each creditor to file a claim in each country and perhaps to relitigate the claim in each—can be overcome. The first problem is essentially clerical—replicating claims filed in one country to others. Computerization makes technological solutions to clerical problems easy to imagine. The second problem, the possible necessity for relitigation of claims in multiple fora, persistently troubles international law. This problem results partly from fear that other nations might abuse the system by exaggerating local claims if their judgments were entitled to the equivalent of full faith and credit. It also results partly from fear that enforcement will abrogate the enforcing country's social policies in favor of the foreign country's. The traditional solution is comity—the recognition of foreign judgments when the local forum determines that they are neither abusive nor contrary to the policies of the forum. Comity is the likely solution in a territorial international bankruptcy system as well. The universalist “solution” to this problem requires the foreign country to surrender all the assets to the home country and then permits the home country to resolve both foreign and domestic claims. This solution effectively would allow the policies of the debtors' home countries to prevail worldwide. As a result, it is not truly a solution, but one of the many reasons why countries have been unwilling to accede to universalism.

The globalization of business and the resulting increase in the frequency and importance of multinational corporate bankruptcy in the past decade have highlighted the previously obscure problem of multinational bankruptcy. With a procession of high visibility cases as their laboratory, scholars of international bankruptcy have made great

³⁰³ For example, the law on the books in the United States would postpone the payment of wages owing to employees at the time a bankruptcy reorganization case is filed until the effective date of the plan. *See, e.g.,* Official Comm. of Equity Sec. Holders v. Mabey, 832 F.2d 299, 302 (4th Cir. 1987) (barring distributions to prepetition unsecured creditors on a piecemeal basis prior to the approval of a plan). Nevertheless, courts commonly have authorized payment in the ordinary course of business in first-day orders, ultimately leading to an “emergency doctrine” to justify them. *See, e.g.,* Michigan Bureau of Workers' Disability Compensation v. Chateaugay Corp. (*In re Chateaugay Corp.*), 80 B.R. 279, 285 (Bankr. S.D.N.Y. 1987) (upholding early payment of worker's compensation benefits under the doctrine of necessity).

strides in understanding the intricate problems of choice of law and choice of forum. As I hope I have demonstrated in this Article, however, the universalist paradigm in which those scholars have been working has impeded progress at the systems level. Countries must cooperate if they are to solve the problems of international bankruptcy, but universalism has no monopoly on cooperation. Because territoriality gives greater recognition to sovereignty, it limits the need for international cooperation to the kinds of issues with which cooperation has been most successful in the past—those that do not redistribute entitlements. The time has come to recognize that universalism is the problem, not the solution, and to put universalism behind us.