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# **The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty**

*John J. Chung*<sup>\*</sup>

## **I. INTRODUCTION**

The reform of the Bankruptcy Code, pursuant to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act"), has attracted much attention due to the dramatic reform of bankruptcy law relating to individual debtors under Chapters 7 and 13. Much less attention has been paid to the landmark introduction of the new Chapter 15 under the Act. Chapter 15 governs transnational bankruptcies. It applies in every bankruptcy of a multinational corporation that is an American corporation or a foreign corporation with assets or operations in the United States.

According to its proponents, this new structure was long overdue in light of the increasingly global nature of economic activity and the reach of multinational companies. The push for internationalization has been provided by a group of international legal scholars, judges and lawyers, whose efforts were instrumental to the enactment of Chapter 15. They describe Chapter 15 as a means to promote global economic activity and growth and a needed device to enable different courts around the world to communicate and cooperate with each other in the administration of a bankrupt estate with assets and creditors in different countries. Such admirable goals are difficult to quibble with, and Congress enacted Chapter 15 in the spirit of economic growth and global cooperation.

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At first glance, Chapter 15 seems harmless enough, with its emphasis on international cooperation and communication. Few would object to such benign goals. The reality, however, is that Chapter 15 is more than a device to promote cooperation. In their most restrained interpretation, its backers view it as a vehicle to push the United States toward a universalist approach to transnational bankruptcies. So what is this universalism? Universalism, in short, is about one court in one country taking control of a multinational bankruptcy and applying its domestic bankruptcy law to all of the debtor's assets and creditors worldwide. Chapter 15 moves in that direction by, among other things, requiring an American court to defer to the jurisdiction of a foreign bankruptcy proceeding under certain circumstances.

So what is wrong with universalism? Its supporters claim that it is an inevitable and desirable outgrowth of and catalyst to global economic growth. However, at its heart, universalism is about the displacement of national law in favor of foreign law. The intended effect and ultimate goal is to remove entire classes of people and transactions from the protection of their national law and subject them to foreign law. Under universalism, an American citizen whose transactions are exclusively within the United States will be forced into a foreign court applying foreign law in the event of bankruptcy by a foreign counterparty—even if the parties expected local law to apply.

Moreover, universalism's claimed benefits are largely hypothetical, abstract, and unproven. Its proponents promise overall economic gains and efficiencies, but there is little proof that such benefits are actually generated. In contrast, the economic harms are much more certain. Even if one assumes *arguendo* that it does generate benefits, the question needs to be asked: benefits for whom? Like the benefits, the beneficiaries are hypothetical, but the injured parties are real and easily identifiable.

For those whose expertise and interests lie outside of bankruptcy law, it may seem that the debate surrounding Chapter 15 involves arcane and highly technical issues of interest only to bankruptcy professionals. Actually, the debate should be of interest to anyone who cares about fundamental social issues and policies. This is because universalism can only work if countries relax their exercise of national sovereignty. Universalism requires countries to cede authority over fundamental social choices. Regardless of whether one supports strong or weak national sovereignty, any discussion on this topic is necessarily about deeply held societal norms, and Chapter 15 is no different.

If Chapter 15 and universalism offer uncertain benefits but certain harms, why have their principles gained such a following? One explanation is that Chapter 15 is part of today's growing trend to internationalize American law. Much like the inclination of some Supreme Court Justices to look to foreign law for guidance, it appears many bankruptcy scholars, judges, and practitioners have developed a taste for international trendiness.

This article contends that the debate surrounding Chapter 15 in bankruptcy circles is a variation of the ongoing national debate regarding the citation of foreign law in Supreme Court opinions. This internationalism is a manifestation of an elite whose members congregate at conferences where admission is limited to those who share the view that an international approach to any issue is automatically better than the provincialism of national interest. Chapter 15 is one of the accomplishments of this elite.

There is a major difference, however, between Chapter 15 and the appearance of foreign citations in Supreme Court opinions. No one, not even the Justices, asserts that foreign law controls constitutional interpretation. No one has been deprived of rights or property because a Justice wanted to display his or her affinity for foreign sources. Chapter 15, on the other hand, is designed to permit the direct application of foreign law within the United States and permits the loss of rights and property as decided by a foreign court under foreign law—even for those who have never ventured outside of the country and whose transactions have been entirely within the country. Thus, the debate surrounding Chapter 15 is about the actual erosion of national sovereignty and the actual loss of rights and property. And as would be expected, the consequences of the policies promulgated by the transnational elite are borne in large part by everyday people (the ones who cannot afford international airfare) whose interests are conveniently ignored.

It is questionable whether Congress was presented with a full picture of the potential ramifications of Chapter 15. There apparently was little, or no, opportunity for its critics to present their concerns, and Congress instead received a uniformly happy prognosis for the law. Alternatively, perhaps Congress believes that the judiciary will be able to sort out any problems lurking in Chapter 15 by utilizing the safety valves built into the legislation. The law does contain safety valves, but their use obviously depends on judges who will recognize the problems. Regardless of which governmental branch needs to guard against adverse consequences, there are plenty of reasons for concern over the new law.

If an internationalist approach is in fact beneficial, it should be subjected to more scrutiny than a reflexive embrace based more on trend and fashion than thorough examination. It seems reasonable to ask that international policies be measured against the cost to actual people and national interests. National interests are not a product of random, uninformed choices by backward interests, and there is no reason to think that the abstract rationalizations of an international elite produce better policies. This article explores these issues and recommends a narrow application of Chapter 15 to protect fundamental social choices and policies.

Part II of this article begins by defining basic terms that need to be understood in order to discuss Chapter 15. The enactment of Chapter 15

arose in the context of the debate over “territorialism” and “universalism” as the appropriate models for a bankruptcy regime, and Part II discusses these terms. Part III of this article summarizes some of the significant changes to the Bankruptcy Code as a result of Chapter 15, and compares it to the prior law. It also examines the genesis of Chapter 15, which is based on a Model Law developed by the United Nations Commission on International Trade Law. Part IV examines the purpose of Chapter 15. The scholarship in this area reveals that it is more than just a statutory device to promote international cooperation. Its ultimate purpose is to move the countries that enact the Model Law toward a full universalist approach to bankruptcy law. Part V discusses how Chapter 15 and universalism compel an erosion of national sovereignty, and explains why erosion of national sovereignty in the bankruptcy arena matters in the larger context of national interests. Part VI examines the problems created by universalism. This section argues that universalism’s inherent weakening of national sovereignty is not balanced by the supposed benefits, and that the only certainties of universalism are the generated harms (including potential constitutional problems). Part VII then presents the larger context in which the debate over universalism has developed. American law in general is being increasingly marked by a movement toward internationalism, and perhaps the most visible debate is occurring over the Supreme Court’s growing reliance on foreign authorities to guide constitutional interpretation. This article contends that the same forces and trends exhibited by the Supreme Court’s fascination with foreign law are the motivating factors behind the push for universalism. This article questions whether such forces and trends should be the basis for law making, and contends that any movement toward internationalization should be tested against the real world effects on those who are unable to participate in the process in the same way as the transnational elite. Part VIII closes the discussion by arguing that the safety valves in Chapter 15 should be broadly construed and liberally applied in order to protect national interests and the interests of the small participants in transnational bankruptcies.

## II. DEFINITION OF TERMS: TERRITORIALISM AND UNIVERSALISM

In order to understand the context out of which Chapter 15 arose, and the potential consequences of Chapter 15, it is necessary to understand the two competing and opposite models of international bankruptcy jurisdiction that define the debate: territorialism and universalism.<sup>1</sup> Although the

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<sup>1</sup> Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2220 (2000) [hereinafter LoPucki, *Cooperative Territoriality*]; see generally Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2282–302 (2000) [hereinafter Westbrook, *Multinational Default*]; John A. E. Pottow,

debate encapsulates modern tensions relating to globalization, the issue appears to have been first raised in the 1880s with an article in the *Harvard Law Review*.<sup>2</sup> However, the debate gained increasing momentum during the 1990s as international economic activity gained pace.

Territorialism is simply the traditional practice of nations exercising exclusive jurisdiction over assets and parties within their borders.<sup>3</sup> It is the default rule in every substantive area of law, including bankruptcy.<sup>4</sup> It rests upon traditional notions of national sovereignty, which means that the law of the sovereign is imposed on all people and property within its territorial reach.<sup>5</sup> In a multinational bankruptcy conducted under the principles of territorialism, each country decides under its own laws how the debtor's assets within its territory will be treated in the face of creditor claims, without deferring to any foreign proceeding involving the same debtor.<sup>6</sup>

The following is a simple example of territorialism. Suppose a business has assets in both the Country A and Country B, and files a bankruptcy petition in Country A. The laws of Country A will govern the disposition of assets within its territory, but the assets in Country B are not affected by the filing. The creditors in Country B may move to seize the assets in Country B notwithstanding the bankruptcy filing. In order to protect its assets in Country B, the business will need to commence a separate bankruptcy proceeding in that country which would proceed under the laws of Country B. Thus, there would be two separate and independent proceedings, each applying its own law.

Universalism, on the other hand, is based on the concept of "one law,

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*Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT'L L. 935, 944-52 (2005); *In re Treco*, 240 F.3d 148, 153 (2d Cir. 2001). As for the terms "bankruptcy" and "insolvency," they will be used interchangeably for purposes of this article (although bankruptcy lawyers and scholars will recognize that these terms in their purest forms are not identical).

<sup>2</sup> John Lowell, *Conflict of Laws as Applied to Assignments for Creditors*, 1 HARV. L. REV. 259, 259-64 (1888).

<sup>3</sup> LoPucki, *Cooperative Territoriality*, *supra* note 1, at 2218; Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT'L L. REV. 555, 561 (2001) [hereinafter Tung, *Fear of Commitment*].

<sup>4</sup> LoPucki, *Cooperative Territoriality*, *supra* note 1, at 2218.

<sup>5</sup> Jay L. Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 5 (2002) [hereinafter Westbrook, *Multinational Enterprises*]. To its detractors, territorialism is referred to pejoratively as the "grab rule" because each nation's court grabs the assets within its jurisdiction for distribution under its own laws. Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2179 (2000); *see also* Pottow, *supra* note 1, at 944-45.

<sup>6</sup> LoPucki, *Cooperative Territoriality*, *supra* note 1, at 2218; *see also* Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31, 42-43 (2001) [hereinafter Tung, *Possible?*].

one court.”<sup>7</sup> It envisions a single bankruptcy proceeding in the debtor’s “home country” where a single court applies the bankruptcy law of its country and makes a unified worldwide distribution to creditors through liquidation or reorganization.<sup>8</sup> That court would have global jurisdiction over all of the debtor’s assets and creditors, wherever located, and displace all the courts and bankruptcy laws of other countries.<sup>9</sup> Universalism requires a country to defer to a foreign legal proceeding, even with respect to property within its own territory and legal relationships formed and wholly conducted within its own borders.<sup>10</sup>

By administering the case in one jurisdiction, universalism avoids duplicative proceedings (and therefore duplicative administrative costs). Its underlying theory posits that the overall value of the bankrupt estate will be maximized because one forum will be able to realize the sum of the parts or the going concern value, as opposed to a piecemeal liquidation or treatment.<sup>11</sup> Additionally, lenders’ costs will theoretically be reduced

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<sup>7</sup> Tung, *Possible?*, *supra* note 6, at 40.

In its purest conceptual form, universalism aspires to the harmonization of one worldwide, substantive law of bankruptcy. The most common model of universalism, however, follows a pluralist route. Sidestepping the issue of which substantive provisions the ideal bankruptcy law would possess, it simply selects from one of the pre-existing bankruptcy regimes *ex post*. To the extent that other courts are needed (to give legal force to the orders of the courts of the governing jurisdiction), such courts could convene ancillary proceedings designed to effectuate the controlling court’s orders. The current universalist paradigm thus concedes the divergence of present domestic bankruptcy laws and advocates only a pluralist system of choice-of-law; its theory does not envision (or rely upon) substantive harmonization of those bankruptcy laws.

Pottow, *supra* note 1, at 948 (citation omitted).

<sup>8</sup> Guzman, *supra* note 5, at 2179; *see also* Jay L. Westbrook, *Universalism and Choice of Law*, 23 PENN. ST. INT’L L. REV. 625, 625–26 (2005) [hereinafter Westbrook, *Universalism*]. Professor Westbrook, a leading bankruptcy scholar, is widely acknowledged as the “most eloquent and effective proponent of universalism.” Guzman, *supra* note 5, at 2179–80.

<sup>9</sup> Tung, *Fear of Commitment*, *supra* note 3, at 569.

<sup>10</sup> *Id.* At its most extreme, universalists subscribe to a vision of one-world government and promote a supposedly forward-looking, forward-thinking global perspective. *Id.* at 558.

<sup>11</sup> Westbrook, *Multinational Default*, *supra* note 1, at 2285. For example, suppose a bankrupt company owns an American factory that produces widgets with unique specifications for sale in the United States. It also owns a facility in Mexico that makes slight modifications to the American widgets to comply with Mexican requirements. Suppose further that the Mexican facility can only modify widgets with the particular specifications of its sister American company. The universalists would correctly point out that the two facilities should be sold or reorganized together because the Mexican facility’s value lies in its ability to modify the American widgets. If sold separately, its value might be limited to the value of its real estate and scrap value (with no value assigned to its modification process). Under universalism, the two facilities would be administered

because lenders will know in advance which law will govern repayment and apply to their collateral.<sup>12</sup> Thus, they are relieved of the burden of risk assessment in the face of conflicting legal systems. Universalism's claimed benefits can be summed up to include: (1) a more efficient allocation of capital, (2) a reduction in confusion over competing domestic priority rules, (3) a reduction in the lender's cost of monitoring foreign assets, (4) reduced administrative costs due to a reduction in the number of proceedings, (5) avoidance of forum shopping and the race to file, (6) facilitated reorganizations, (7) increased reorganization or liquidation value, and (8) the provision of overall clarity and certainty to all parties.<sup>13</sup> The theory concludes that such reductions in costs, and increases in efficiency, will lead to a reduction in the cost of lending and a corresponding reduction in the cost of capital for borrowers.<sup>14</sup> The ultimate benefit is therefore presented as enhanced global efficiencies and economic activity.

Universalism is also allegedly supported by the need for "market symmetry," which is "the requirement that some systems in a legal regime must be symmetrical with the market, covering all or nearly all transactions and stakeholders in that market with respect to the legal rights and duties embraced by those systems."<sup>15</sup> In order for bankruptcy law to be effective, it must cover the entire market, and within the United States, this need for market coverage explains why bankruptcy law is federal (in other words, each state does not have its own bankruptcy law) and specifically provided for in the Constitution.<sup>16</sup> The universalists extrapolate from this national example to conclude that in a globalized marketplace, bankruptcy law needs to be global.<sup>17</sup>

According to one of universalism's supporters, "the majority view, at least among academic circles, is that universalism is normatively superior as an efficient and fair model to resolve cross-border defaults, notwithstanding the ongoing preference for territorialism among many

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together by a single court. Under a strict territorial approach, the two might be administered completely separately by the two different courts. The territorialists will point out, however, that territorialism allows for cooperation between the courts to realize the highest value for the assets.

<sup>12</sup> Jay L. Westbrook, *The Lessons of Maxwell Communication*, 64 FORDHAM L. REV. 2531, 2541 (1996) [hereinafter Westbrook, *Maxwell Communication*].

<sup>13</sup> Guzman, *supra* note 5, at 2179; Pottow, *supra* note 1, at 947.

<sup>14</sup> Guzman, *supra* note 5, at 2181.

<sup>15</sup> Westbrook, *Multinational Default*, *supra* note 1, at 2283; Westbrook, *Multinational Enterprises*, *supra* note 5, at 6; *see also* Pottow, *supra* note 1, at 940.

<sup>16</sup> Westbrook, *Multinational Default*, *supra* note 1, at 2283–84.

<sup>17</sup> The argument based on "market symmetry" begs the question whether bankruptcy law "should" be globalized beyond borders. Just because national bankruptcy laws apply throughout national territories does not mean that a bankruptcy law "should" have global reach in derogation of national sovereignty. *See infra* Part VI.A.2.



country's policymakers."<sup>18</sup> However, "[d]espite the near-unanimous support of the academic community, policymakers have chosen not to adopt universalism. Although a number of other arguments have been advanced for territorialism, its support leans heavily on a sense among judges, legislators, and some academics that territorialism can help small, local creditors."<sup>19</sup>

Territorialism and universalism are at opposite ends of the spectrum.<sup>20</sup> In the course of debate, the pure ideals of the two competing models have been softened at the edges to widen their appeal and acknowledge actual practice (to some degree). The modified versions are known as cooperative territorialism and modified universalism, and are closer together on the continuum.<sup>21</sup> Cooperative territorialism permits a departure from strict territorial sovereignty by encouraging cooperation on an as needed basis, and contemplates the use of international conventions to govern such matters as the return of improperly removed assets on the eve of bankruptcy.<sup>22</sup> The typical scenario would involve parallel bankruptcy proceedings in each country with debtor assets, and cooperation would occur through the interaction of agents appointed by each state to represent the bankruptcy estate located there.<sup>23</sup> Modified universalism departs from the pure universalist ideal by accepting the right of a country to refuse (under certain circumstances) to defer to another country's court.<sup>24</sup>

### III. A BRIEF SUMMARY OF CHAPTER 15<sup>25</sup>

Chapter 15 is entitled "Ancillary and Other Cross-Border Cases."<sup>26</sup>

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<sup>18</sup> Pottow, *supra* note 1, at 951.

<sup>19</sup> Guzman, *supra* note 5, at 2184.

<sup>20</sup> There is also another model known as contractualism. It contemplates that a debtor would contractually choose which country's law to apply with each creditor. Evelyn H. Biery et al., *A Look at Transnational Insolvencies and Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 47 B.C. L. REV. 23, 30-31 (2005).

<sup>21</sup> Jay L. Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 716 (2005) [hereinafter Westbrook, *Chapter 15*]; Pottow, *supra* note 1, at 952-55. According to Professor Pottow, the universalists had to modify their position due to the "quixotism" of their quest while territorialism had to be modified because of its "grotteness." *Id.* at 952.

<sup>22</sup> Pottow, *supra* note 1, at 954-55.

<sup>23</sup> Tung, *Fear of Commitment*, *supra* note 3, at 562.

<sup>24</sup> Pottow, *supra* note 1, at 952. "Taken to its extreme, then, the discretionary safety valve of modified universalism has the potential simply to 'modify' universalism back into territorialism, because a state may refuse to defer to the controlling state when its laws are different, i.e., when there is a true conflict of laws." *Id.* at 954.

<sup>25</sup> This is not intended to serve as a comprehensive overview or discussion of Chapter 15. This section merely identifies a few of the main features of the new law, especially the features that are necessary to understand in relation to the discussion of sovereignty issues.

<sup>26</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-

Section 1501(a) enumerates five objectives: (1) cooperation between U.S. courts and foreign courts, (2) “greater legal certainty for trade and investment,” (3) “fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor,” (4) “protection and maximization of the value of the debtor’s assets,” and (5) “facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.”<sup>27</sup> Chapter 15 applies to bankruptcies of American multinational corporations and foreign corporations with assets or operations in the United States.<sup>28</sup> It requires American courts to “cooperate to the maximum extent possible with a foreign court or a foreign representative.”<sup>29</sup>

A case under Chapter 15 is commenced by an application to the court by a foreign representative for “recognition” of a foreign proceeding.<sup>30</sup> Chapter 15 focuses on what is referred to as a “foreign main proceeding.”<sup>31</sup> A “foreign main proceeding” is “a foreign proceeding pending in the country where the debtor has the center of its main interests.”<sup>32</sup> An order granting recognition of a foreign main proceeding

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8, § 801, 119 Stat. 23 (2005) (to be codified at 11 U.S.C. §§ 1501–32). The term “ancillary” generally refers to a limited proceeding which is designed to assist a foreign proceeding. Biery, *supra* note 20, at 31. “Once an ancillary proceeding is invoked, the domestic court’s primary responsibility is to aid the foreign court in administering the debtor’s assets.” *Id.* at 31–32. In contrast to ancillary proceedings, parallel proceedings are full proceedings in each country where the debtor has assets. *Id.* at 32; *see also* Westbrook, *Multinational Enterprises*, *supra* note 5, at 10–12. The use of the word “ancillary” in the title of Chapter 15 indicates that purpose of the legislation is to promote “a general rule that countries other than the home country of the debtor, where a main proceeding would be brought, should usually act through ancillary proceedings in aid of the main proceedings, in preference to a system of full bankruptcies . . . in each state where assets are found.” H.R. REP. NO. 109–31, at 108 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 171; *see also* Westbrook, *Multinational Enterprises*, *supra* note 5, at 10.

<sup>27</sup> Bankruptcy Abuse Prevention and Consumer Protection Act § 801.

<sup>28</sup> Westbrook, *Chapter 15*, *supra* note 21, at 715.

<sup>29</sup> Bankruptcy Abuse Prevention and Consumer Protection Act § 801. “Perhaps the most innovative provision in the chapter is the authorization for the courts, as well as a trustee or DIP [(debtor in possession)], to communicate directly with the foreign court and trustee [pursuant to sections 1525 and 1526].” Westbrook, *Chapter 15*, *supra* note 21, at 723.

<sup>30</sup> Bankruptcy Abuse Prevention and Consumer Protection Act § 801. “Foreign proceeding” and “foreign representative” are defined in § 802(b). *Id.* § 802(b).

<sup>31</sup> Westbrook, *Chapter 15*, *supra* note 21, at 717. Chapter 15 also governs a “foreign nonmain proceeding,” which is defined as “a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.” Bankruptcy Abuse Prevention and Consumer Protection Act § 801. As one would expect, the recognition of a foreign main proceeding triggers more provisions than a foreign nonmain proceeding. *Id.* § 801.

<sup>32</sup> Bankruptcy Abuse Prevention and Consumer Protection Act § 801. As discussed later in this section, the phrase “center of its main interests” is an example of the almost verbatim

triggers a wide range of powerful provisions of the Bankruptcy Code,<sup>33</sup> including the automatic stay<sup>34</sup> and the foreign representative's right to operate the American portion of the business.<sup>35</sup> A court may dismiss or suspend a domestic bankruptcy case if a foreign proceeding has been granted recognition under Chapter 15 or the purposes of Chapter 15 "would be best served by such dismissal or suspension."<sup>36</sup> Chapter 15 applies unless its application would violate public policy.<sup>37</sup> A foreign representative applying for recognition is not required to make a showing that public policy will not be violated.<sup>38</sup> It is up to an interested party or the court to raise the issue.

A fairly typical case under Chapter 15 may look something like this: a Canadian company with its headquarters in Toronto commences bankruptcy proceedings in Canada. It has one widget-making factory in Canada and one in the United States. Each of the factories has unpaid employees and suppliers. The American factory secures a bank loan from an American lender, and the Canadian factory secures a loan from a Canadian bank. The Canadian representative applies for recognition of a foreign main proceeding under Chapter 15. The American court grants the application. All proceedings and creditor actions in the United States are stayed, and the Canadian representative takes control of all U.S. assets and operates the American factory. The American creditors then pursue their claims in the Canadian proceeding. The Canadian judge has jurisdiction over all the assets and creditors and resolves all claims together.

The old Bankruptcy Code's nod to international issues was contained in a single section repealed and replaced by Chapter 15. Section 304<sup>39</sup> permitted the filing of ancillary cases in U.S. bankruptcy courts by foreign representatives "to protect the dignity of concurrently existing foreign proceedings."<sup>40</sup> The purpose of the section was to prevent the piecemeal

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adoption of the language of the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law, because it is a phrase that is unfamiliar to American jurisprudence.

<sup>33</sup> *Id.*

<sup>34</sup> 11 U.S.C.S. § 362 (2000) (LexisNexis 2006).

<sup>35</sup> *Id.* § 363.

<sup>36</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 802(d)(6), 119 Stat. 23, 145 (2005) (to be codified at 11 U.S.C. § 305(a)).

<sup>37</sup> *Id.* § 801. This section provides in its entirety: "Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> 11 U.S.C. § 304 (2000), *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act § 802(d)(3); Westbrook, *Chapter 15*, *supra* note 21, at 714. In contrast to that single section, Chapter 15 contains five subchapters and 32 sections.

<sup>40</sup> Biery, *supra* note 20, at 33.

distribution of assets in the United States by local creditors.<sup>41</sup> While Section 304 and Chapter 15 may have similar goals, a major difference between the two is that the language of Section 304 was primarily discretionary (as opposed to the mandatory language of many of the provisions of Chapter 15). Section 304 did not require the courts to grant any particular relief; it merely stated the court “may” grant the relief enumerated in the section.<sup>42</sup> This discretionary language resulted in a wide variety of decisions under the old law, some maintaining territoriality, and others embracing universalism.<sup>43</sup> According to Professor Westbrook, Section 304’s language and prior case law apply only where they enable the court to go beyond Chapter 15 in cooperating with the foreign court, but do not apply where they limit relief under Chapter 15.<sup>44</sup>

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<sup>41</sup> *Id.*; *In re Treco*, 240 F.3d at 154.

<sup>42</sup> 11 U.S.C. § 304(b) (2000), *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, § 802(d)(3), 119 Stat. 23, 146 (2005). This is in contrast to the language of Chapter 15 which states that “an order recognizing a foreign proceeding shall be entered” and a “foreign proceeding shall be recognized” if certain conditions are met. Bankruptcy Abuse Prevention and Consumer Protection Act § 801.

<sup>43</sup> *See generally* Biery, *supra* note 20, at 41–48 (and cases discussed therein). There is some debate as to whether Section 304 embodied universalism.

Unable to win adoption of a universalist law or convention, the universalists asserted that [section] 304 of the U.S. Bankruptcy Code, which had been adopted in 1978, was such a law. Section 304 authorized the bankruptcy courts of the United States to turn over control of U.S. assets to foreign bankruptcy courts. But the statute added: “(C) In determining whether to grant [such] relief . . . the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by [U.S. bankruptcy law].” Read literally, [section] 304 clearly limits authority to surrender U.S. assets to situations in which the foreign court will distribute them in substantially the same way a U.S. court would. But the universalists, many of whom were themselves bankruptcy judges, chose not to read [section] 304 as written. Instead, they claimed that [section] 304 authorized turnover of assets to foreign courts that would distribute the assets substantially differently, as long as the foreign country had a bankruptcy law “of the same sort generally as [the United States].” Universalist judges, including Judge Burton R. Lifland, began surrendering U.S. assets for distribution by foreign bankruptcy courts, and universalist commentators, including Professor Jay L. Westbrook, cheered them on. The effect was to sporadically implement universalism in the United States, at the expense of the particular U.S. creditors whose assets were surrendered.

Lynn M. Lopucki, *Global and Out of Control*, 79 AM. BANKR. L.J. 79, 84–85 (2005) (citation omitted) [hereinafter Lopucki, *Out of Control*]. Professor Westbrook has characterized Section 304 as “modified universalism.” Westbrook, *Maxwell Communication*, *supra* note 12, at 2533.

<sup>44</sup> Westbrook, *Chapter 15*, *supra* note 21, at 720.

#### A. The Genesis of Chapter 15

Chapter 15 explicitly incorporates the Model Law on Cross-Border Insolvency (the "Model Law") promulgated by the United Nations Commission on International Trade Law ("UNCITRAL"), based in Vienna.<sup>45</sup> In the 1990s, the issue of cooperation in international bankruptcies became the subject of a "working group" formed by UNCITRAL.<sup>46</sup> The working group met twice a year, once in New York and once in Vienna, and was comprised of delegates from the approximately 30 countries in the rotating membership of UNCITRAL, as well as observers from any interested U.N. member state and interested international organizations.<sup>47</sup> The efforts of this group led to the promulgation of the Model Law at UNCITRAL's Thirtieth Session on May 12–30, 1997.<sup>48</sup> The Model Law was approved by resolution of the United Nations General Assembly later that year in December.<sup>49</sup>

"The Model Law makes universalism the foundation of the United States' international bankruptcy policy."<sup>50</sup> "The number one reason for adopting it was to demonstrate the United States' commitment to the Model Law and to cooperation and universalism generally, in the hope that [the United States'] example would encourage other countries to follow."<sup>51</sup> The drafters of Chapter 15 tried to avoid changing the language of the Model Law, even where alternative language would have been consistent with American statutory style and practice.<sup>52</sup> Any departures from the text of the Model Law were as narrow and limited as possible.<sup>53</sup>

#### IV. THE PURPOSE OF CHAPTER 15—A STRATEGICALLY INCREMENTAL MOVE TOWARD UNIVERSALISM

Chapter 15 does not impose a pure universalist framework. It does not commit the United States to a global, substantive bankruptcy law. There

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<sup>45</sup> Bankruptcy Abuse Prevention and Consumer Protection Act § 801; Westbrook, *Chapter 15*, *supra* note 21, at 719; Westbrook, *Multinational Enterprises*, *supra* note 5, at 18–19.

<sup>46</sup> Westbrook, *Chapter 15*, *supra* note 21, at 719.

<sup>47</sup> Jay L. Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 570 (1996) [hereinafter Westbrook, *Insolvency Law*]. The United States delegation was co-  
led by Professor Westbrook. *Id.* at 563.

<sup>48</sup> Biery, *supra* note 20, at 49; Westbrook, *Chapter 15*, *supra* note 21, at 2 n.3.

<sup>49</sup> Biery, *supra* note 20 at 49.

<sup>50</sup> Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 143 (2005).  
[hereinafter LoPucki, *Universalism Unravels*].

<sup>51</sup> Westbrook, *Chapter 15*, *supra* note 21, at 726.

<sup>52</sup> *Id.* at 19.

<sup>53</sup> *Id.* at 720.

appear to be sufficient safety valves to protect American interests.<sup>54</sup> In some ways, it looks rather benign with its emphasis on cooperation and communication.<sup>55</sup> If that is the case, however, why are its backers so happy with the law?<sup>56</sup>

Unable to obtain the whole loaf of universalism, perhaps they are happy with the half loaf of Chapter 15, knowing that it represents a significant step toward the ultimate goal of universalism. This interpretation finds support in the expert and matter-of-fact scholarship of universalism's proponents. The proponents openly acknowledge that it was too much of a challenge to move the United States and other nations to full universalism. The delegates who agreed upon the Model Law knew they had to operate within practical constraints. For example, the reason why a model law was generated (rather than a treaty, for example) was because it would have been too difficult to achieve consensus over anything more substantial than a model law.<sup>57</sup> This also explains why the Model Law does not attempt to substantively unify the different bankruptcy laws around the world; there never would have been agreement.<sup>58</sup>

Appreciating the historic resistance to universalism, its proponents set more modest goals for the Model Law. Thus, the purpose of the Model Law is to advance universalism incrementally,<sup>59</sup> by gradually introducing the acceptance of outcome differences in transnational insolvencies. The gradual process permits "acclimation" to universalism.<sup>60</sup> "In summary,

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<sup>54</sup> See, e.g., Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 801, 119 Stat. 23, 134 (2005) (to be codified at 11 U.S.C. §§ 1506, 1521(b), 1522(a)) (requiring the courts to satisfy themselves that interests of creditors are protected before certain actions are taken).

<sup>55</sup> See, e.g., *id.* § 801. To the extent that Chapter 15 concerns itself with cooperation and communication, there is little reason to object to it. There is agreement that cooperation is desirable. See generally Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999) [hereinafter LoPucki, *International Bankruptcy*]. With respect to Chapter 15 in particular, there is merit to formalizing the ability of courts to communicate with each other across borders, and to conferring official recognition on the person who has authority over an insolvent estate. By having a formal structure in place, courts are assured that they are acting within their authority by communicating with a foreign court and that they are dealing with authorized representatives. Plus, an established statutory framework relieves the courts of the need to re-invent the wheel for each new case.

<sup>56</sup> Westbrook, *Chapter 15*, *supra* note 21, at 713. "After years of receiving plaintive emails from foreign bankruptcy lawyers, judges and academics asking when Chapter 15 would become part of United States law, we can at last celebrate its arrival." *Id.*

<sup>57</sup> Westbrook, *Insolvency Law*, *supra* note 47, at 570; Pottow, *supra* note 1, at 958-59, 985.

<sup>58</sup> Biery, *supra* note 20, at 50.

<sup>59</sup> Pottow, *supra* note 1, at 970; Westbrook, *Insolvency Law*, *supra* note 47, at 571.

<sup>60</sup> Pottow, *supra* note 1, at 988-90. Outcome difference simply means the fact that a local creditor may end up far worse off under the application of a foreign bankruptcy law

while not overtly trumpeting its universalist proclivities—and wisely so, given the historically consensus-dooming touchiness of the ongoing debate—the Model Law actually contains several provisions, albeit at the margin, which begin to ‘nudge’ states along the way to ceding some sovereignty.”<sup>61</sup>

Thus, states come to accept some erosion of regulatory sovereignty.<sup>62</sup> Universalism remains, however, the “ultimate ideal.”<sup>63</sup> “[T]here may be some states that let their guards down because of the non-threatening nature of the universalist provisions in the [Model] Law—states that may well be surprised to find themselves moved slightly more along the universalist continuum and, upon realizing where they are, unlikely to move back.”<sup>64</sup>

Any question as to whether adoption of the Model Law was designed to commit the United States to a universalist position was clarified by the promulgation of the Principles of Cooperation in Transnational Insolvency Cases among the Members of the North American Free Trade Association, adopted by the American Law Institute in 2002 (the “ALI Principles”).<sup>65</sup> Professor Westbrook, a principal drafter of the ALI Principles, described General Principle V as urging “the courts of the NAFTA [North American Free Trade Agreement] countries [to] determine distributions from a universalist perspective to the maximum extent permitted by their respective laws.”<sup>66</sup> Thus, even if U.S. creditors were to succeed in initiating an involuntary parallel proceeding, the ALI Principles direct the court to dismiss it.<sup>67</sup> Although the ALI Principles were developed in the context of NAFTA, ALI recommends their application “to cooperate with proceedings in non-NAFTA jurisdictions.”<sup>68</sup>

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than under his own country’s law. John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to “Local Interests,”* 104 MICH. L. REV. 1899, 1906 (2006) [hereinafter Pottow, *Greed and Pride*].

<sup>61</sup> Pottow, *supra* note 1, at 983.

<sup>62</sup> *Id.* at 976–77. It is interesting to note that universalism’s proponents have felt the need to deny that the universalist aims of the Model Law were slipped past the Congress in disguise (denying the contention that territorialist states were “hoodwinked” into adopting the Model Law). *Id.* at 991.

<sup>63</sup> Jay L. Westbrook, *Fearful Future Far Off*, 33 BANKR. CT. DEC. No. 25, A5 (1999) [hereinafter Westbrook, *Fearful Future*] (“The Model Law does not make the terrible changes that [LoPucki] suggests. He would be closer to right if the Model Law really did embody ‘universalism,’ which I regard as our ultimate ideal.”).

<sup>64</sup> Pottow, *supra* note 1, at 991.

<sup>65</sup> LoPucki, *Out of Control*, *supra* note 43, at 87. The ALI Principles were developed specifically for use among the NAFTA countries. Westbrook, *Chapter 15*, *supra* note 21, at 714. However, they were also drafted with Chapter 15 in mind, and the ALI concluded that they should be applied generally to multinational bankruptcy cases in American courts. *Id.*

<sup>66</sup> Westbrook, *Multinational Enterprises*, *supra* note 5, at 35.

<sup>67</sup> LoPucki, *Out of Control*, *supra* note 43, at 88.

<sup>68</sup> *Id.* at 88; see also Westbrook, *Multinational Enterprises*, *supra* note 5, at 39.

Despite the clear aim of the Model Law, it apparently was presented to Congress as a benign model of cooperation that was not universalistic.<sup>69</sup> Only its supporters were permitted to testify before Congress.<sup>70</sup> The entire process was an exercise in universalism “through the back door.”<sup>71</sup> Thus, there are two messages concerning Chapter 15, and the content of the message depends on the audience. For Congress, the message was: Chapter 15 is about cooperation; there is no universalism in the legislation. When the audience is comprised of internationalists, the message is: Chapter 15 is a significant step toward eventual and inevitable universalism.<sup>72</sup>

## V. CHAPTER 15 AND THE EROSION OF NATIONAL SOVEREIGNTY

So what is wrong with universalism? Why did it need to be deemphasized before Congress? The answer to both questions is simple. Universalism necessarily requires countries to cede national sovereignty. Strong national sovereignty and universalism are inherently incompatible. Anyone who favors strong sovereignty views universalism as an unacceptable outcome.

Although its proponents downplay the sovereignty issues, the first indication that the issue is ever-present is found in the language of Chapter 15 itself. Section 1508 explicitly commands American courts to maintain, as much as possible, uniformity of interpretation with other countries of the Model Law, and the statute directs the courts to look to the decisions of other countries that have adopted it.<sup>73</sup> The legislative history of Section 1508 adds that the American courts should refer to the UNCITRAL Case Law on Uniform Texts, which contains reports from national reporters all over the world concerning court decisions interpreting treaties, model laws,

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<sup>69</sup> LoPucki, *Universalism Unravels*, *supra* note 50, at 166 n.102 (citing Westbrook, *Fearful Future*, *supra* note 63, at 5).

<sup>70</sup> *Id.* at 166.

<sup>71</sup> *Id.*

<sup>72</sup> It is also possible that universalism’s supporters will argue that Chapter 15 achieves the goal of “one court, one law.” Now that Chapter 15 is law, they may argue that it fully embodies universalism and will likely urge the courts to apply Chapter 15 as broadly as possible (to the point, for example, where the public policy exception is rarely applied). This scenario would be like a repeat of the universalists’ arguments after the enactment of Section 304. See LoPucki, *Out of Control*, *supra* note 43 (describing the arguments to have Section 304 interpreted as universalism). This likely development underscores the point that the enactment of Chapter 15 does not end the debate, but rather gives it more urgency because substantive outcomes will depend on how much of the universalist ideal will be read into it.

<sup>73</sup> Westbrook, *Chapter 15*, *supra* note 21, at 720. Section 1508 provides: “In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”



and other text promulgated by UNCITRAL.<sup>74</sup> “Not only are these sources persuasive, but they advance the crucial goal of uniformity of interpretation.”<sup>75</sup> The Model Law has been adopted in Eritrea, Japan, Mexico, Poland, Romania, and South Africa, and those countries are to serve as models for American jurisprudence.<sup>76</sup> Section 1508 opens the door wide for the introduction of foreign law, and moves the courts away from the primacy of American law.

It could be argued that this reads too much into Section 1508. However, the universalists’ own interpretation of Chapter 15 raises serious concerns about the status of national sovereignty. According to its proponents, Chapter 15 does not adopt substantive rules of bankruptcy law or change domestic law, “*except as necessary to permit results that are fair and sensible from a worldwide perspective.*”<sup>77</sup> That exception is breathtaking. It expressly subordinates domestic law to some global standard, and domestic concerns must give way whenever the worldwide perspective produces a more fair and sensible result. Moreover, some universalists contend that the pursuit of nationalist, territorialist policies always produces a suboptimal result compared to a situation where countries embrace universalism.<sup>78</sup> Therefore, in their view, domestic law must always be changed or subordinated.

Some universalists are quite open about the fact that national sovereignty must be sacrificed. In arguing the superiority of universalism over territorialism, Professor Guzman acknowledged that a local court’s deference to another country’s court concerning the disposition of local assets “represents the loss of sovereignty of one country in favor of that of another.”<sup>79</sup> He further remarked: “Put simply, international business activity requires the compromise of certain notions of national sovereignty because many countries may have an interest in the fate of debtors and their creditors.”<sup>80</sup> Indeed, the universalists frame the problem in this manner:

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<sup>74</sup> H.R. Rep. 109–31(I), at 109–10 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 109–10.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* The first country to adopt the Model Law was Eritrea. Westbrook, *Multinational Enterprises*, *supra* note 5, at 74 n.81.

<sup>77</sup> Westbrook, *Chapter 15*, *supra* note 21, at 721 (emphasis added). Professor Westbrook’s views carry special weight and merit particular attention because of his involvement in the development of the Model Law and his central role in the drafting of Chapter 15. *Id.* at n.41.

<sup>78</sup> See, e.g., Lucian Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775, 781 (1999); see discussion *infra* Part V.A.1.

<sup>79</sup> Guzman, *supra* note 5, at 2206.

<sup>80</sup> *Id.* This casual indifference concerning the primacy of foreign law seems to be a necessary trait for some of universalism’s supporters. Fortunately, the Founding Fathers did not have such a cavalier attitude on this issue. “[King George III] has combined with others

"At the heart of the difference between domestic and transnational bankruptcies is the fact that national governments take into account the interests of and legislate only with respect to those parties within the country."<sup>81</sup> They further complain that "[r]ules designed to protect the interests of local creditors in the adjudication of bankruptcies may have harmful results on the allocation of capital across countries by causing suboptimal investment by multinational firms."<sup>82</sup>

In the universalist's world view, an American citizen should give up the protection of U.S. law and become subject to the exclusive jurisdiction of foreign law in the event of bankruptcy if she: (i) sold goods or services on credit to a foreign corporation, (ii) was an employee of a foreign company, or (iii) was injured by a foreign corporation.<sup>83</sup> In effect, a foreign corporation brings to the United States all of its domestic bankruptcy law

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to subject us to a Jurisdiction foreign to our Constitution." THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

<sup>81</sup> Bebhuk & Guzman, *supra* note 78, at 781. At the risk of being flippant, one might ask, "And the problem is . . .?"

<sup>82</sup> *Id.* at 779. This statement, by itself, fully reflects the values of the universalists. From an American perspective, the interests of American citizens are subordinated to the interests of multinational companies (foreign and domestic). Benefits redounding to Americans must be forfeited in favor of global benefits. Harms to personal interests are disregarded in order to promote global economic efficiencies.

<sup>83</sup> The harmful effects of universalism on unsecured creditors, unpaid employees, and tort victims are discussed in more detail in Part VI.B, *supra*.

With the exception of (iii), universalism's supporters might argue that these outcomes are acceptable because the U.S. citizen voluntarily enters into the relationship with the foreign company. This, of course, presumes that loss of sovereignty is permissible when it is based on voluntary transactions. Those on the political right should have significant objections to this disregard of the traditional right of nations to exercise exclusive jurisdiction within their borders. Those on the political left might question whether the transactions are truly "voluntary." Given generally difficult economic circumstances, one might question whether a trade creditor or worker has a "choice" when dealing with a foreign company. For example, the American car industry is in the midst of a significant shedding of jobs. Does an unemployed, middle-aged auto worker have a "choice" if the only other available job is with a foreign manufacturer?

Even if one accepts that the transactions are genuinely voluntary, the universalists still have no answer to the problems described by Professor LoPucki regarding the uncertainty in determining a company's "home country," which is discussed in further detail in Part VI.C., *infra*. To illustrate, suppose a trade creditor extends credit to a U.S. corporation that is wholly-owned by a foreign company. The creditor knows the parent company is foreign, but also knows that her customer is incorporated in her state. With the knowledge that she is entering into a transaction with a corporation from her state, she expects that American law will apply in the event of bankruptcy. However, this expectation can be easily frustrated. The U.S. subsidiary could subsequently change its place of incorporation to a foreign jurisdiction, or the foreign parent could commence a bankruptcy case in its home country and include its subsidiary. In either case, the American creditor who enters into the transaction with full knowledge and with expectation of the application of American law could still find herself forced to pursue her claim in a foreign court under foreign law.

and supplants American law in its entirety. The bankruptcy of a major multinational company would thus result in thousands of employees and creditors, and thousands of transactions losing the protection of American laws. An entire social and commercial stratum would be carved out of the country's sovereignty and subjected to foreign law.<sup>84</sup>

Universalism welcomes this state of the world because it rejects the notion that persons who deal with multinational companies have "vested rights" in the application of their own local law.<sup>85</sup> Instead, the universalist argues that protection of local creditors should be based on "the common policies found in most [foreign] jurisdictions."<sup>86</sup> As a result, "[p]olitical judgments about local asset disposition and allocation of local losses from the foreign firm's demise are left in the hands of a foreign court. Universalism effectively requires a state's precommitment to wholesale deferral to other states' various prescriptions for financial distress."<sup>87</sup>

According to its supporters, universalism promotes certainty by making one law paramount. It seems more plausible, however, that the universalist vision of the world creates more legal uncertainty. Under territorialism and traditional notions of sovereignty, a citizen or resident of a country can rely on the fact that the laws of that country will be applied. As a general rule, people do not live their daily lives wondering if they are or will be subject to the laws of another country. Universalism, on the other hand, necessarily creates more uncertainty. When considering job offers, a person may need to consider the home country of the employer to determine possible effects on wages and pensions in the event of bankruptcy. A business owner may find herself having to consider the repayment priorities of a different country when deciding to do business with a foreign-based company.<sup>88</sup> Instead of being able to rely on the

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<sup>84</sup> Professor Tung has described the flip-side of this scenario. See Tung, *Fear of Commitment*, *supra* note 3, at 576. Because so many of the world's large multinationals are U.S. companies, the chances are greater that a large multinational bankruptcy will involve an American company and result in the application of American law to transactions in other countries. To some, this might represent further encroachment of America's influence.

This leads to amusing speculation that universalists in the United States are actually working to expand America's economic and legal influence at the expense of other countries. Perhaps Chapter 15 is actually the legislative equivalent of Commodore Perry's black ships in Tokyo Bay. One wonders how the non-American members of the UNCITRAL working group would view this interpretation.

<sup>85</sup> Westbrook, *Multinational Enterprises*, *supra* note 5, at 9.

<sup>86</sup> *Id.*

<sup>87</sup> Tung, *Fear of Commitment*, *supra* note 3, at 576.

<sup>88</sup> Universalists would likely argue that such a need for the awareness of foreign laws is a necessary price of increased international business opportunities and that it should be welcomed because it is the result of a growing global economy. Suppose, however, that an American business owner wants no part of the burden of monitoring international legal consequences. The universalists might then assert that she can opt out of the possible

application of national law, employees, business owners, and consumers will be vulnerable to the possibility that they may become subject to a foreign nation's law, without ever leaving home. Universalism disregards and casts aside the normal expectations and social bargains that are implicit in national citizenship or residency. It is difficult to understand how this promotes certainty.

#### A. Why Should One Care about Bankruptcy Law?

At this point, a reader might question why a diminution of national sovereignty in this context should arouse any concern. After all, this issue is confined to bankruptcy law—an arcane corner of the law that most laymen and even lawyers manage to avoid. One might think that as long as the issue is only about bankruptcy and only debated among bankruptcy scholars, there is no real problem. That line of thinking, however, underestimates the nature and scope of the subject.

Unlike other areas of law, bankruptcy law is wholesale. It is law in bulk. And it is drastic. Most types of legal proceedings decide a particular issue or transaction. By contrast, bankruptcy affects not merely one or a few distinct transactions but every legal relationship involving the debtor firm. Ideally, bankruptcy produces a comprehensive restructuring of the debtor's legal arrangements with creditors and equity holders, marshaling all the debtor's assets while also holding out the possibility of saving the going concern. The collective proceeding produces a complete reshuffling of rights among a debtor and its various classes of claimants, overriding legal rights that exist outside of formal insolvency proceedings.<sup>89</sup>

Because of its comprehensive reach, each nation's bankruptcy laws embody and reflect that particular nation's social and political choices.<sup>90</sup> It is not just a simple matter of deciding who gets repaid. Bankruptcy laws "profoundly reflect the legal, historical, political, and cultural context of the countries that have developed them."<sup>91</sup> "Given the vast cultural differences

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application of foreign law by deliberately limiting her transactions to American companies. Even if she chose this route, nothing prevents her American counter-party from being purchased by a foreign company after she has entered into her transaction. Thus, the business owner cannot opt out.

<sup>89</sup> Tung, *Fear of Commitment*, *supra* note 3, at 566 (describing bankruptcy law as "meta-law"); *see also* Tung, *Possible?*, *supra* note 6, at 47 (bankruptcy law "provides for the comprehensive restructuring of a firm and every legal relationship between a business and its creditors and other interested parties" and overrides contract, property and other rights that exist outside of bankruptcy).

<sup>90</sup> Tung, *Possible?*, *supra* note 6, at 48. Bankruptcy laws reflect a nation's substantive policy decision and are distributive, "deciding which creditors warrant special treatment in distribution" and which transfers of assets to specific creditors should be set aside to further the greater good of all creditors. Pottow, *supra* note 1, at 942.

<sup>91</sup> Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and*

around the world, and the history of each country's economy and attitudes about money and debt, there is no one-kind-fits-all bankruptcy system for either enterprises or individuals."<sup>92</sup>

These fundamental and wide-ranging policy choices are reflected in the bankruptcy laws of various countries. For example, under the French code, the court appoints an administrator to take control of the distressed business. "The objectives of the administrator, as specified by statute, are to maintain the firm as a going concern, preserve employment, and satisfy creditors' claims, in that order."<sup>93</sup> In the United Kingdom, by comparison, control of a business in an insolvency proceeding passes to the creditors. In the typical situation, a secured creditor appoints an administrative receiver to "assume all the powers of the company's board of directors, with the sole purpose of realizing sufficient funds to repay the debts owing to the secured creditor."<sup>94</sup> The receiver has no duty to consider the interests of unsecured creditors, and "has full discretion over whether to sell the firm as a going concern, or close it and liquidate its assets piecemeal."<sup>95</sup>

This simple comparison of neighboring and historically intertwined

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*Insolvency Systems: The Perils of Legal Transplantation*, 28 B.C. INT'L & COMP. L. REV. 1, 4 (2005) (presenting a wide-ranging survey and discussion of historical and cultural influences in the development of bankruptcy laws in the United States and various countries in Europe and Asia).

As an example of the different policies reflected by a particular country's bankruptcy law, Professor Tung makes an interesting and intuitively appealing observation about different tort and unemployment coverage systems.

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

Tung, *Fear of Commitment*, note 3, at n.79.

<sup>92</sup> Martin, *supra* note 91, at 5. On the subject of debt forgiveness, for example, which reflects fundamental views of commercial and social obligations, "people are less forgiving about debt forgiveness than they are in the United States. In some parts of the world, not paying debts is the ultimate disgrace. In other parts of the world, there simply is no personal bankruptcy system, and little in the way of business reorganization either." *Id.* at 35.

<sup>93</sup> Sergei A. Davydenko et al., *Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany and the UK* (Eur. Corporate Governance Inst., Finance Working Paper No. 89-2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=647861](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=647861).

<sup>94</sup> *Id.* at 4.

<sup>95</sup> *Id.* at 4-5.

Western European countries reveals widely diverging social choices. Not surprisingly, France puts a premium on workers' rights. The United Kingdom, on the other hand, with its adherence to a more laissez-faire style of capitalism, puts the emphasis on repayment of lenders, with little, if any, consideration given to employment concerns. Their bankruptcy laws reflect fundamentally different views about the social contract among the citizens and with the government, and the relationship between capital and labor.<sup>96</sup> This comparison shows that bankruptcy law is not limited to technical questions of priority among creditors, and amply demonstrates the validity of Professor Tung's observation: "Bankruptcy law's wholesale purview means that recognition of a foreign proceeding effects the wholesale import of another state's regime for deciding sensitive policy issues. Political judgments about local asset disposition and allocation of local losses from the foreign firm's demise are left in the hands of a foreign court."<sup>97</sup>

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<sup>96</sup> This article focuses on the erosion of sovereignty from an American perspective. An internationalist might view this focus as typical American defensiveness or wariness regarding foreign matters. The popular view among internationalists, even (or perhaps especially) American ones, seems to be that the rest of the world is engaged in a headlong embrace of globalism while America stays on the sidelines. Such a view, however, misapprehends the interests of other countries. The evidence is weak (or at most inconclusive) whether other countries are in a rush to trade national sovereignty for the perceived benefits of internationalization. There is no question that the French government would have serious objections to an American company in France using American bankruptcy law to restructure or downsize its French work force. To assume that only American sensibilities might be offended by universalism's goals would be incorrect.

Along these lines, it is a bit curious that America is one of the early adopters of the Model Law, and one of the few major industrialized to have done so. Perhaps this is a reflection of the enthusiasm of American and America-based globalists. However, they may be behind the curve on the globalization issue. The rest of the world may have already reached the point where serious doubts about further global integration are dominating the agenda. Few would doubt that political and economic integration in Europe has brought innumerable benefits to its citizens. The benefits to commerce and harmonization are readily apparent when crossing the Rhine from France into Germany is as easy as crossing the Mississippi from Illinois into Missouri. However, recent events show there is a limit to which ordinary people can be pushed toward further integration when given a choice, as starkly demonstrated by the resounding rejections of the E.U. Constitution by the voters in France and the Netherlands in 2005. Furthermore, serious fault lines in the European Union are being exposed by the possibility of Turkey's admission. These types of events should give pause to universalism's supporters as to the feasibility and desirability of their goals.

<sup>97</sup> Tung, *Possible?*, *supra* note 6, at 22. Along similar lines, Professor LoPucki poses the following questions:

Under universalism, the court of the home country would have jurisdiction over the bankruptcy case. But what would be included in that jurisdiction? Could the court void an otherwise valid collective bargaining agreement? Relieve the debtor of the burdensome effects of environmental laws? Suspend the payment of pensions to retired workers? Risk the pension fund in a reorganization attempt?

Professor Pottow's observation is equally valid: "When one state cedes jurisdiction to another state to facilitate a market-wide resolution of the default, it must fully subjugate its broad-reaching, deep-cutting, and policy-rich bankruptcy laws to those of the controlling state."<sup>98</sup> Given the nature of bankruptcy law, any erosion of national sovereignty through a universalist approach encroaches upon and interferes with the basic framework of a country's social and legal values. Thus, the concerns are not "just" about bankruptcy law; the concerns are about a country's entire social and legal fabric.

## VI. THE PROBLEMS WITH UNIVERSALISM

So what is the problem with universalism? It apparently has widespread support among academics and international bankruptcy lawyers. Its supporters claim that it is synonymous with global growth and economic efficiency. From afar, it presents an appealing vision. But closer inspection reveals numerous flaws—flaws that cannot be explained away by its supporters. This section summarizes several of the arguments against universalism. This summary is not intended to be a comprehensive survey or in-depth presentation of the arguments. It simply touches upon the issues that have been raised and examined by others. Its purpose is to highlight the fact that universalism's claimed virtues are not unchallenged and that universalism has certain disadvantages. This discussion is necessary because the universalists would argue that to the extent there is an erosion of sovereignty, it is outweighed by the demonstrable benefits of universalism and Chapter 15's move in that direction. This section argues, however, that any benefits are imaginary, while the harms are certain.

### A. The Unproven and Hypothetical Benefits of Universalism

#### *1. The Lack of Proof of Economic Benefit*

Much of the universalists' argument rests on notions of economic gain and efficiency. A leading paper on the subject criticizes territorialism on the basis that it distorts foreign investment and leads to an inefficient allocation of capital.<sup>99</sup> The theory is based on the proposition that the interest rates demanded by creditors will vary with and depend upon the anticipated return in bankruptcy, which in turn will vary with each

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LoPucki, *Cooperative Territoriality*, *supra* note 1, at 2237.

<sup>98</sup> Pottow, *supra* note 1, at 951.

<sup>99</sup> Bebchuk & Guzman, *supra* note 78, at 778.

country's application of its own territorialist laws.<sup>100</sup> To illustrate, suppose Country T's lenders are protected by a strict territorialist system that guarantees them 100% repayment before any foreign lenders are paid, while Country U's lenders are subject to a universalist regime that does not prefer local lenders over foreign lenders. Because Country T's lenders have greater assurance of repayment, they will be able to offer their loans at a lower interest rate than Country U's lenders. Further suppose that the anticipated rate of return on investment (apart from interest rate considerations) in Country U is higher than the similar anticipated rate of return in Country T. Despite the fact that Country U offers a higher rate of return (before factoring in interest rate differentials), a multinational firm may still choose to invest in Country T if the rate of return is higher after factoring in the lower interest rate.<sup>101</sup>

The universalists thus conclude that the multinational firm's investment decision has been distorted as a result of territorialism. In this illustration, the multinational investor has chosen "not to invest in the country offering the greatest return on investment, accepting instead a lower return in exchange for a lower interest on loans."<sup>102</sup> This distorted investment decision is characterized as "a deadweight loss for society."<sup>103</sup>

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<sup>100</sup> *Id.* at 779.

<sup>101</sup> *Id.* at 789. Students of game theory will spot the Prisoner's Dilemma in this situation. According to the universalists, the optimal result is the adoption of universalism by both countries. However, one country can gain an advantage over the other by retaining a territorialist system while the other moves to universalism. The worst result for a country is to adopt universalism only to discover that the other country has remained territorialist. Thus, there is a strong disincentive to adopt universalism.

Professor Tung has discussed the Prisoner's Dilemma in great depth in his article, *Is International Bankruptcy Possible?*, *supra* note 6, at 22–39. In introducing his game theory analysis, Professor Tung warned of the inherent lack of reality in treating countries as efficiency-seeking black boxes in economic models and ignoring the dynamics of domestic political influences:

In general, a state's preference for its own bankruptcy law and reluctance to recognize foreign bankruptcy proceedings may arise from the desire of domestic political actors to defend the policies implicit in their domestic laws. This may include the preservation of any perquisites that redound to a particular group under those laws. The complexities of a state's bankruptcy regime reflect myriad policy decisions and political trade offs. These trade-offs might enhance the public interest or merely the interests of the victors in domestic rent seeking contests. Regardless of which, political actors will wish to preserve the balance struck in their domestic bankruptcy rules. They will generally resist recognition of foreign bankruptcy proceedings that would upset this careful balance.

*Id.* at 55.

<sup>102</sup> Bebchuk & Guzman, *supra* note 78, at 779.

<sup>103</sup> *Id.* The work of Professors Bebchuk and Guzman is impressive for its quantitative



The costs of distorted investment decisions are borne by the shareholders of the multinational investors.<sup>104</sup>

The problem, however, with these arguments is that there is no empirical support for them. It is untested theory, and it is untested because the actual state of the world is so far removed from the foundational suppositions and assumptions of the theory. Even leading proponents of universalism have expressed doubts as to whether any actual economic efficiency gains will result and concede that the benefits are, at best, abstract.<sup>105</sup> Indeed, universalism's proponents concede that a territorialist country can benefit economically by acting to protect its national constituents.<sup>106</sup> Given the absence of demonstrable benefit, one wonders why any country would choose to abandon the historic stability of territorialism in favor of a radical overhaul to universalism.<sup>107</sup>

## 2. The Problem with Market Symmetry

Universalism's supporters assert that a global economy needs a bankruptcy regime to be co-extensive with the market. To support this

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rigor. However, there is an underlying wishful element to it that raises questions about its relevance. In essence, they argue that if nations abandoned territorialism—the longstanding norm and condition of international relations—we would all benefit. But it is also true that if all borrowers agreed to refrain from fraud and pay back their loans, then the cost of capital would be reduced and we would all benefit. Just as it is in the nature of borrowers to occasionally not repay their loans, it is in the nature of nations to assert their territoriality and sovereignty. Thus, what is the point of wishing otherwise?

One more hypothetical takes this question a step further by looking at the behavior of nations. The universalists could also argue that if only the United States would share its classified technology with China, then it could outsource the manufacturing of its military aircraft and naval vessels to Chinese companies which could produce them at much lower cost due to cheaper labor. The resulting savings would benefit all of us. Thankfully, this will never happen for obvious reasons, and there is no point lamenting any claimed deadweight loss to society.

This last point highlights another fundamental problem with the quantitative model presented by Professors Bebchuk and Guzman. The purpose of their model is to persuade policymakers that territorialism ought to be abandoned in favor of universalism. This would require, of course, a significant overhaul of national laws and abandonment of traditional notions of national sovereignty. They urge this result on the basis of a model that incorporates only a few variables. However, any move away from territoriality necessarily raises issues of national security, the relationship of capital and labor, debtors and creditors, etc. The complexity of any decision regarding such issues is probably beyond the scope of any reliable quantitative model.

<sup>104</sup> *Id.* at 800.

<sup>105</sup> See, e.g., Westbrook, *Multinational Default*, *supra* note 1, at 2326.

<sup>106</sup> See, e.g., Bebchuk & Guzman, *supra* note 78, at 780.

<sup>107</sup> The political realities also suggest that a national legislature would have little incentive to adopt universalism. "The losers of territorialism—the ones who pay for the benefits gained by the territorialist and the deadweight loss that is generated—are foreign firms." *Id.* Foreign firms do not vote, and thus have no constituency power.

point, an analogy is drawn to the laws governing intellectual property.<sup>108</sup> However, a closer analysis of the intellectual property analogy arguably leads to the opposite conclusion—namely, that bankruptcy law cannot be global.

The need for a co-extensive legal regime governing intellectual property rights is explained as follows:

Without intellectual property rights created by law, the information (e.g. the invention or composition) would be a pure public good. In a world without intellectual property, for example, the first copy of a new book could be copied by the first purchasers. This copy could then be copied by others. Eventually, the “free” copies would dominate the market. And this would destroy the incentives of authors to write! . . . Intellectual property law comes to the rescue. By enforcing patents and copyrights through legal sanctions, *intellectual property law transforms information from a public good to a toll good.*<sup>109</sup>

Intellectual property law is about protecting the private property rights of the creator. The law needs to restrict access and copying in order to prevent the intellectual property from becoming a public good, and it is the legal regime that assures the value of the property.

However, as discussed in Section V.A, *supra*, bankruptcy law is concerned with more than just private property rights. Bankruptcy law is also concerned with the ordering of public goods. The level of employment

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<sup>108</sup> See Westbrook, *Multinational Enterprises*, *supra* note 5, at 6–7; see also Westbrook, *Multinational Default*, *supra* note 1, at 2283 (“[T]here are legal systems that cannot function effectively unless their scope is symmetrical with the market. That is, they must govern the interests of all parties throughout the market whose interests may be implicated. A common example of such a system is the law of intellectual property, which in virtually all jurisdictions is co-extensive with a national market and which imposes rules that govern the rights of all potential stakeholders, whether or not they have contractual relationships inter se.”).

<sup>109</sup> Lawrence B. Solum, Legal Theory Lexicon 029: Public and Private Goods, [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/03/legal\\_theory\\_le.html](http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le.html) (last visited Mar. 28, 2004) (emphasis added) (“A toll good is characterized by nonrivalrous consumption but excludability.”). Rivalrous consumption means that consumption of a good prevents someone else from consuming it. Consumption of an apple is rivalrous because if someone eats it, someone else cannot. An idea is nonrivalrous because it can be “consumed” or enjoyed by an indefinite number. Excludability means someone can be prevented from consuming or enjoying a good.

A public good is both nonrivalrous and nonexcludable. As an example, a country’s national defense is a public good. *Id.* It is nonrivalrous because protection of one citizen does not diminish protection of another. It is nonexcludable because when a country defends a particular territory, it cannot exempt some of the citizens in that area from protection. For example, the military could not decide to defend an apartment building but leave the residents of the third floor exposed to the opposing forces.

in France is a public good that is protected by its bankruptcy laws. The social contract with labor is a public good that is enforced by Mexico's priorities in bankruptcy. These public goods can only be protected so long as a nation guards its sovereign interests. This necessarily implies that bankruptcy laws can only extend as far as a nation's borders.

The distinction between private property and public good is significant. The value of intellectual property depends upon and increases with the expanding (geographic) reach of intellectual property law. Thus, there is a strong incentive for those who value intellectual property to expand its legal protection as wide as possible. The only parties who are negatively affected by such an expansion are those who wish to use the property without compensation, i.e. those with a weak or illegitimate claim to the property. With a public good, on the other hand, there is no such universal incentive to expand the reach of the law. The definition of a public good varies with each country, and the expansion of law to promote one country's public good encroaches on another country's policy. As in the example of France and the United Kingdom, in Section V.A, *supra*, the expansion of the United Kingdom's support for the right of lenders would impair France's protection of its workforce. Given these unavoidable conflicts, there is no universal incentive to expand the reach of the law.

#### B. The Harm to Unsecured Creditors

In contrast to the hypothetical benefits, even its supporters concede that universalism harms unsecured creditors in many instances. By way of a simplified illustration, suppose a company based in Country X has \$100,000 of assets in the United States that are available to unsecured creditors and \$100,000 of such assets in Country X. It owes \$100,000 to unsecured claimants in America who (under the facts of this hypothetical) enjoy a statutory priority over other general, unsecured creditors pursuant to the U.S. Bankruptcy Code, and \$900,000 to other unsecured claimants outside of the United States who do not enjoy any priority status. Under a territorialist system, bankruptcy proceedings could be commenced and proceed separately in the United States and Country X. The American unsecured claimants (who enjoy priority) would seek recovery out of the \$100,000 of assets located in the United States, and would recover 100 cents on the dollar. In a universalist regime, however, the company would file one case in Country X, which would have jurisdiction over all the assets and creditors. Suppose Country X did not recognize the priority enjoyed by the American creditors under U.S. law.<sup>110</sup> There would be a total of

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<sup>110</sup> The foreign court would subject American creditors to its own laws regarding priority of payment. See Tung, *Fear of Commitment*, *supra* note 3, at 572. "There are substantial

\$200,000 in assets to satisfy \$1,000,000 in claims, and each unsecured claimant would recover 20 cents on the dollar—a significant reduction for the Americans.

The universalists defend the harm to the American creditors in this example by invoking the principle of the “Rough Wash.”<sup>111</sup> The theory is that a universalist rule will roughly even out benefits and losses for local creditors over time and as numerous cases are decided under universalism, because they will collectively gain enough from foreign deference to the local forum in one case to balance any loss from local deference to a foreign forum in another.<sup>112</sup>

There is an obvious problem with the “Rough Wash” justification. The local creditor who is harmed by the application of universalism in one case will not be the same local creditor who benefits from universalism in the next case.<sup>113</sup> In effect, the universalists urge unsecured creditor A to accept his financial loss in this case so that a stranger, unsecured creditor B, may gain in the next. One wonders if the universalists have ever asked a real life unsecured creditor A for his response to this proposal. Moreover, the benefits of the “Rough Wash” theory “are difficult or impossible to measure empirically.”<sup>114</sup>

### *1. The Harm to Tort Creditors*

Many large bankruptcies have been filed in the United States due to a debtor’s exposure to mass tort claims. Some of these cases have involved thousands of tort claimants, and the courts have been called upon to address

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differences in priority rules around the world despite a pattern of preference for certain creditors, like secured parties, employees, and tax authorities.” Westbrook, *Universalism*, *supra* note 8, at 635 n.41. For example, the United States gives special priority status to grain producers and fishermen. 11 U.S.C. § 507(a) (2000). These creditors would lose their priority status in another jurisdiction with a different set of priorities:

In effect, local claimants’ rights, which would ordinarily include collection rights against the debtor’s local assets, adjudicated by local courts under local law, would instead under universalism be disaggregated from those local assets and subjected to foreign rules applied by a foreign court in light of foreign claims.

Tung, *Fear of Commitment*, *supra* note 3, at 572.

<sup>111</sup> See, e.g., Pottow, *Greed and Pride*, *supra* note 60; Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 464 (1991) [hereinafter Westbrook, *Theory and Pragmatism*].

<sup>112</sup> See, e.g., Guzman, *supra* note 5, at 2185; Pottow, *Greed and Pride*, *supra* note 60, at 1909; Westbrook, *Theory and Pragmatism*, *supra* note 111, at 465.

<sup>113</sup> See LoPucki, *Cooperative Territoriality*, *supra* note 1, at 2218.

<sup>114</sup> Westbrook, *Theory and Pragmatism*, *supra* note 111, at 468.

the harms and resolve the claims.<sup>115</sup> American bankruptcy courts have developed an expertise in adjudicating mass tort claims, and the American bar is well-equipped to represent such claims.<sup>116</sup> However, the universalist ideal would deprive American claimants of their day in their court.

The harm to tort creditors is demonstrated by the following hypothetical. Suppose a Chinese company owns a refinery and several producing oil wells in the United States.<sup>117</sup> Due to an incident at the refinery, thousands of residents in the surrounding area are seriously injured. Their claims threaten to overwhelm the company, and the company's lenders and suppliers become nervous about doing business with it. However, the producing oil wells generate sufficient revenue to cover most of the claims. Under the historical, territorialist system, the company would commence a bankruptcy action in the United States, and a resolution would likely be reached where the claims would be satisfied out of the present and future revenues of the producing wells.<sup>118</sup>

Under universalism and Chapter 15, on the other hand, the company could file bankruptcy in China (which would be the main foreign proceeding). An order granting recognition in the United States would automatically stay the victims' claims in the United States. Furthermore, the tort victims would not be eligible to file an involuntary petition in the United States to force the Chinese company into bankruptcy proceedings.<sup>119</sup> In the pure application of universalism, the tort victims would have to go to China and seek justice in a Chinese court applying Chinese law.

The universalists might argue that this scenario would never happen in real life because no American judge would allow that result and would certainly invoke Section 1506, the public policy exception.<sup>120</sup> One would

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<sup>115</sup> See generally Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1367 n.17 (2005).

<sup>116</sup> The bankruptcy courts have developed the expertise to resolve mass tort claims due in large part to the many cases involving liability for asbestos claims. *Id.* at 1367, n.17.

<sup>117</sup> This hypothetical was drawn from the recent, failed attempt of a Chinese oil company to buy Unocal, an American oil company. CNNMoney.com, *Unocal's Talk with Chinese Bidder soon*, [http://money.cnn.com/2005/06/24/news/international/unocal\\_waiver/](http://money.cnn.com/2005/06/24/news/international/unocal_waiver/) (last visited June 24, 2005).

<sup>118</sup> McGovern, *supra* note 115, at 1367 n.17.

<sup>119</sup> See 11 U.S.C. § 303(b). Under this statute, an involuntary case may only be filed by a holder of a claim "that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount." This language excludes the tort claimants in the hypothetical.

<sup>120</sup> It is fair to conclude that this hypothetical involving a Chinese company is exactly the type of situation for which Section 1506 was designed. China's ability to handle reasonably complex cases is suspect due to its weak courts and poorly qualified judges. Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOBAL STUD. L. REV. 97, 108 (2003). As of 1995, only five percent of China's judges had a four-year college degree in any subject. *Id.* Moreover, "China's courts are at present not fully reliable as enforcers of statutorily guaranteed rights." *Id.* at 109. There is also the well-

certainly hope that would be the case. However, what if the oil company were based in France, Italy or Spain? Many would agree that presents a closer call, and universalists might urge the American court to force the tort victims to press their claims in liberal and democratic Western Europe.

Such variations in these factual scenarios test the contours of the public policy exception. The universalists argue that being forced into a distant forum is not, by itself, reason to reject universalism or the application of Chapter 15, because this already occurs in the United States, for example, when California claimants are forced into a Delaware bankruptcy court. The existing case law supports the view that expenses due to travel and the hiring of far away counsel do not constitute undue prejudice.<sup>121</sup> Thus, the burden is no more onerous for foreign jurisdictions; after all, Houston is closer to Mexico City than New York City. This argument overlooks, of course, the fact that a California claimant in Delaware can rely on the fact that English is the language of the court, and that the proceedings will be governed by the Bankruptcy Code, the Bankruptcy Rules, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the U.S. Constitution.<sup>122</sup> No such assurances exist in Paris, Rome, or Madrid.

But if the burden of litigating in a distant forum does not trouble the universalist, what about the fact that American tort claimants will not have the benefit of American-style representation, procedures, or remedies? For example, most of the world's advanced legal systems (including Western European ones) reject class action-style litigation.<sup>123</sup> As a result, claimants in the foreign jurisdiction would also be deprived of well-financed and

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known problem of corruption in the judiciary. *Id.* Indeed, on Transparency International's Corruption Perception Index 2005, China scores a dismal 3.2 out of 10. Transparency International, [http://www.transparency.org/policy\\_and\\_research/surveys\\_indices/cpi/2005](http://www.transparency.org/policy_and_research/surveys_indices/cpi/2005) (last visited Oct. 1, 2006). According to its website, Transparency International is the "leading international non-governmental organization devoted to combating corruption." Transparency International, [http://www.transparency.org/about\\_us](http://www.transparency.org/about_us) (last visited Oct. 1, 2006). On its Corruption Perception Index, a score below 5 indicates serious levels of corruption. Transparency International, [http://www.transparency.org/policy\\_and\\_research/surveys\\_indices/cpi/2005/media\\_pack](http://www.transparency.org/policy_and_research/surveys_indices/cpi/2005/media_pack) (last visited Oct. 1, 2006).

<sup>121</sup> See Biery, *supra* note 20, at 39.

<sup>122</sup> Thus, at a minimum, consistency of substantive law is an obvious given, unlike the situation when national borders are crossed. "In some countries tort creditors share pro rata with commercial creditors; in other countries, tort creditors are subordinated to commercial creditors; and in yet others, tort creditors who have not yet reduced their claims to judgments before bankruptcy do not share at all." LoPucki, *Cooperative Territoriality*, *supra* note 1, at 2224 (highlighting laws of Mexico, Spain and the United States, as they were at the time of publication). Moreover, the need to translate documents would impose a burdensome and perhaps prohibitive cost.

<sup>123</sup> See generally Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405, 413 (2001).

aggressive plaintiffs' counsel. Again, it is unclear whether the universalists would concede that the public policy exception should be triggered under these circumstances.<sup>124</sup> Even Professor Westbrook has acknowledged the significant harm posed to tort creditors, wondering whether tort victims should be exempted from a universalist regime.<sup>125</sup> The problem, of course, is that Chapter 15 does not carve out an exemption for tort victims, and they are left to take their chances before a judge who may or may not worship at the altar of internationalism.

Fortunately for tort victims, there may be constitutional protections that will trump any universalist attempt to force them into a foreign court. For example, the First Amendment to the U.S. Constitution guarantees the right to petition; this right includes the right of access to the courts.<sup>126</sup> If Chapter 15 were to force tort victims out of the American courts, would that violate their First Amendment rights? The Fifth Amendment prohibits the

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<sup>124</sup> Professor LoPucki has pointed out the dramatic differences in the value of claims in the U.S. tort system versus their value in foreign systems:

What was thought to be \$3 billion in claims against Union Carbide for the deaths of 4,000 people in Bhopal, India was settled for \$470 million when it became apparent the cases would be tried in India rather than in the United States. The recent settlement of breast implant claims in the Dow Corning bankruptcy expressly gave foreign women lower payments than U.S. women for the same injuries, on the theory that those injuries were worth less under foreign procedures.

LoPucki, *Cooperative Territoriality*, *supra* note 1, at 2225–26.

<sup>125</sup> Westbrook, *Theory and Pragmatism*, *supra* 112, at 489.

<sup>126</sup> *Cal. Trans. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972); *see also* *Tenn. v. Lane*, 541 U.S. 509 (2004) (ruling on “fundamental right of access to the courts”). The fundamental importance of access to the courts is also enshrined in, among other places, the Civil Rights Act of 1866:

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right in every state and territory in the United States, to make and enforce contracts, *to sue, be parties, and give evidence*, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

14 Stat. 27 (1866) (emphasis added). Of course, most members of the UNCITRAL working group were probably unfamiliar with this Act, and the heavy price America paid to reach that point in its history. But such are the kinds of rights that the sophisticated elite so easily disregard in the pursuit of their goals of global harmony and economic efficiencies.

taking of private property for public use without just compensation. Would there be a taking if the tort victims were forced into a foreign court?<sup>127</sup>

A thorough analysis of the constitutional issues is beyond the scope of this article, and this brief discussion is merely an exercise in issue spotting.<sup>128</sup> Nonetheless, if the universalists are to prevail in their attempts, they will need to address these issues fully.<sup>129</sup> It is understandable that most of the delegates to the UNCITRAL working group on the Model Law probably did not realize that the U.S. Constitution might have some bearing on their efforts. But this demonstrates an important point—those in favor of an internationalist solution to all of the world's ills need to bear in mind that what they propose often runs counter to deep issues of fundamental rights embraced by sovereign nations, and that nations and their citizens will not simply forfeit these rights on the urging of a self-selected elite.

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<sup>127</sup> See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981), which suggests the possibility of a constitutional problem based on the Fifth Amendment. That case arose out of the seizure of the U.S. embassy in Tehran in November, 1979 and the taking of American hostages. In response to this crisis, the President froze Iranian assets in the United States, and also placed certain restrictions on judicial proceedings against Iran. In December 1979, Dames & Moore commenced a lawsuit in a U.S. District Court against the government of Iran seeking damages for breach of contract. In January 1989, the American hostages were released pursuant to an agreement between the United States and Iran. This agreement required (among other things) the United States to terminate all pending legal proceedings in its courts brought by its nationals against Iran and to refer all such matters to binding arbitration before the Iran-United States Claims Tribunal. In the meantime, the U.S. District Court entered summary judgment in favor of Dames & Moore for the amount of its claim. Dames & Moore then filed an action against the United States to prevent enforcement of the agreement with Iran.

The relevant part about this case with respect to Chapter 15 is that the petitioner argued before the Supreme Court that the government's actions constituted a Fifth Amendment taking concerning its claim against Iran. The Court acknowledged the validity of the issue, but did not rule on it because it was not ripe for review.

To the extent that *Dames & Moore* can be viewed broadly as a case where an American claimant was deprived of its rights to have its claim resolved in an American court and was instead forced to pursue its claim in a foreign tribunal, a claimant in bankruptcy could arguably raise a similar Fifth Amendment challenge to the application of Chapter 15. It must be conceded that this analysis is cursory and untested.

<sup>128</sup> Another possible issue is raised by a recent article about the constitutional problems created by the Supreme Court's reliance on foreign authorities. See Robert J. Delahunty and John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291, 292 (2005). Professors Delahunty and Yoo make the interesting argument that such use may violate the Appointments Clause. Deference to foreign decisions "would subject American citizens to the judgments of foreign and international courts, and the Constitution makes no provision for the transfer of federal power to entities outside of our system of government. To the contrary, the Appointments Clause directly limits the transfer of federal power." *Id.* at 299. Query whether this analysis is applicable to Chapter 15 as well.

<sup>129</sup> If these constitutional problems are embedded in Chapter 15, then that would put to rest any justification based on the "Rough Wash" principle.



## 2. *The Harm to Employees*

The claims of unpaid employees in bankruptcy raise another thorny problem for universalism.<sup>130</sup> The problem arises because such claims are treated in materially different ways across borders. In some countries, unpaid employees may have priority over other unsecured creditors and even most secured creditors.<sup>131</sup> In contrast, unpaid employees in the United States enjoy no such priority over secured creditors.<sup>132</sup> The following scenario illustrates the potential harm. Suppose workers in Country B enjoy special priority for recovery of unpaid wages. Suppose further that such workers are employees of a U.S. company that commences a bankruptcy case. Under a universalist system, the Country B workers will find themselves seeking payment of unpaid wages in an American court applying American law, which does not recognize the special priority. The prejudice would be magnified if the American business has had a long-standing presence in Country B, with relationships developed over years or perhaps decades. This passage of time would only serve to deepen expectations that the law of Country B would apply. Another form of prejudice would result if the employer were a corporation formed under the laws of Country B but wholly-owned by an American parent. The Country B subsidiary could find itself being administered in the United States if the subsidiary were brought into the parent's bankruptcy. In such an event, the workers (whose rights were formed under the laws of Country B) would still find themselves in an American court under American law.

It is very difficult for a court in Country B to tell a group of Country B employees who have worked in a branch office in Country B for years that they will not enjoy the special priority distribution rule accorded to workers under Country B's bankruptcy laws, even though there are plentiful assets in Country B to cover such a payout, because their employer's bankruptcy will be governed under the laws of Country A, which grants no such priority.<sup>133</sup>

Universalism acknowledges this problem and the potential prejudice to employees, but it is unable to provide an answer to solve the problem.

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<sup>130</sup> Guzman, *supra* note 5, at 2196 (“[t]reatment of employees presents a more complex problem.”).

<sup>131</sup> LoPucki, *International Bankruptcy*, *supra* note 55, at 710 (discussing law of Mexico, as of time of publication).

<sup>132</sup> American employees are, however, entitled to a certain level of priority among unsecured claims for unpaid wages “but only to the extent of \$10,000 for each individual . . . earned within 180 days” before the filing of the bankruptcy petition or the cessation of the business. 11 U.S.C.S. § 507(a)(4) (LexisNexis 2006).

<sup>133</sup> Pottow, *supra* note 1, at 951.

### 3. The Universalists' Response Regarding the Harm to Unsecured Creditors

Universalists are fully aware of the problems raised by the treatment of unsecured creditors, but they offer no solutions. Instead, they respond to the problem by asserting that the concerns of unsecured creditors are too small to merit a solution, and that global economic gains should not be sacrificed just to placate nationalistic concerns for small, local creditors. One leading universalist has dismissed the concern for unsecured creditors by observing: "Rather than consider the impact of territorialism on all creditors, however, attention is often drawn to a small number of creditors that seem to elicit sympathy from commentators."<sup>134</sup> The argument continues that such small creditors should not sway the debate because the dollar amounts of their claims are too small, especially when compared to the other claimants in a large bankruptcy such as million or billion dollar international lenders.<sup>135</sup> "It is important to keep in mind, however, that they represent only a small fraction of the total value at stake in a bankruptcy, and that adopting territorialism to assist these creditors will impose a cost on the entire system—ultimately leading to a higher cost of lending."<sup>136</sup> The question is then posed: "Should the efficiency of the bankruptcy process be compromised for the majority of creditors in order to assist this minority?"<sup>137</sup> The universalists' position confirms Professor LoPucki's observation that universalism will harm the smallest or least sophisticated participants in a bankruptcy.<sup>138</sup>

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<sup>134</sup> Guzman, *supra* note 5, at 2195.

<sup>135</sup> See *id.* at 2194.

<sup>136</sup> *Id.* at 2195.

<sup>137</sup> *Id.* Professor Westbrook suggests that these problems can be avoided by applying universalism only to "large" multinationals. Westbrook, *Universalism*, *supra* note 8, at 2298–99. However, Professor Tung points out that large cases will probably generate more issues involving local creditors and interests:

If the size of the firm bears any relation to the level of its local activity, however, it would seem that a "large" firm would be at least as likely to engage in significant numbers of local transactions—employment and supply contracts, for example—as a smaller multinational firm. Moreover, the failure of the large multinational may have significantly greater local effects than failure of a small one.

Tung, *Fear of Commitment*, *supra* note 3, at 576 n.82.

<sup>138</sup> LoPucki, *Out of Control*, *supra* note 43, at 102–03 ("The losers will be the corporate outsiders who have no means of controlling their debtor's choice of courts: tort victims, employees, suppliers, customers, other stakeholders with small interests, and—as with every strategy game—the less sophisticated players."). The monetary value of these small interests may be dwarfed by the claims of multinational banks. On the other hand, a large bankruptcy can involve thousands of small claimants, while the number of large lenders will be considerably less.

### C. The Incentives for Forum Shopping and Manipulation of Venue

A fundamental premise of the universalist approach is that a debtor corporation has a home country, or a “center of its main interests” (to use the language of the Model Law and Chapter 15). This premise is necessary. Otherwise, a debtor doing business in a multitude of countries could simply choose whatever forum offered the most benefit to it in a bankruptcy, regardless of the strength of its ties to that forum.<sup>139</sup> The home country requirement is designed to provide assurance that there will be a sufficient nexus between the debtor and the forum and to enable potential creditors to determine in advance the law that will be applied. Professor LoPucki has forcefully presented, however, the problem with the home country standard.

The home country standard has four fatal flaws that in combination will permit almost unbridled forum shopping and encourage court competition. First, many of the largest multinational companies do not have home countries in any meaningful sense. When they file for bankruptcy, these companies each will be able to choose among the courts of two or more countries. Second, even multinational companies that do have clear, unmistakable home countries can, and already do, change them. Third, as the U.S. experience has shown, with billions of dollars of business at stake for bankruptcy professionals, competing courts cannot be counted on to determine fairly and in good faith whether they are the home court of multinationals that choose to file with them. Each will be biased in favor of its own jurisdiction. Finally, if international forum shopping and competition do—as I expect they will—run out of control, mechanisms for fixing the problem do not exist. International institutions are not strong enough to impose a solution.<sup>140</sup>

In his comprehensive series of articles, Professor LoPucki has described the incentives for forum shopping and venue manipulation under a universalist regime.<sup>141</sup> In summary, Professor LoPucki points out that universalism is an all or nothing system where one court runs the entire worldwide proceeding, and someone must be the first to decide which court will run it.<sup>142</sup> That someone will be the court in which a case is first filed.<sup>143</sup> “That means the case placers—the debtor, its attorneys, and their

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<sup>139</sup> See *id.* at 80.

<sup>140</sup> *Id.* at 81.

<sup>141</sup> See LoPucki, *International Bankruptcy*, *supra* note 55; see LoPucki, *Cooperative Territoriality*, *supra* note 1; see LoPucki, *Out of Control*, *supra* note 43; see LoPucki, *Universalism Unravels*, *supra* note 50.

<sup>142</sup> LoPucki, *Universalism Unravels*, *supra* note 50, at 148.

<sup>143</sup> See *id.*

contractual allies—will choose the court that makes the venue decision.”<sup>144</sup> This will lead to a competition for cases because the country that gets the case will get the business for its own professionals and prefer its own creditors.<sup>145</sup> Moreover, the potential for harm resulting from international forum shopping is much greater than any harm resulting from forum shopping in a domestic context. Forum shopping for a different bankruptcy court within the United States only results in a (possibly) different interpretation or application of the Bankruptcy Code.<sup>146</sup> Foreign shopping among countries results in an entirely different set of remedies, a change in the priorities among creditors, a change in avoiding powers, and an invalidating of security interests.<sup>147</sup>

Professor LoPucki has also described the strategic behavior of multinational companies in changing venue by changing their home country.<sup>148</sup> The following example involving Singer, N.V. (whose origins are traced to Singer, the old sewing machine manufacturer) was set forth in *Global and Out of Control?*<sup>149</sup> A Hong Kong company bought Singer in 1989, and changed Singer’s place of incorporation to the Netherlands Antilles and its headquarters to Hong Kong. When Singer filed for

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<sup>144</sup> *Id.*

<sup>145</sup> *See id.*

<sup>146</sup> *See* LoPucki, *Out of Control*, *supra* note 43, at 79.

<sup>147</sup> LoPucki, *International Bankruptcy*, *supra* note 55, at 721.

<sup>148</sup> *See id.* at 722; LoPucki, *Out of Control*, *supra* note 43, at 97.

In *A Global Solution to Multinational Default*, Professor Westbrook makes a reference to sham incorporations under “a flag of convenience” in his response to Professor LoPucki’s concerns over forum shopping. Westbrook, *Multinational Default*, *supra* note 1, at 2316. The use of the phrase is interesting because the actual practice in admiralty law bolsters Professor LoPucki’s argument that the incentives to forum shop undermine universalism.

Strangely enough, admiralty law does provide a useful (if unconventional) analogy to universalism. Under universalism, each corporation, in effect, carries the flag of its home country wherever it does business in the world, and all who do business with it become subject to the laws of its home country in the event of bankruptcy. Under admiralty law, a ship on the high seas is (in a sense) a part of the territory of the country whose flag it flies. *Scharrenberg v. Dollar S.S.Co.*, 245 U.S. 122, 127 (1917); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1923). As a result of this legal principle, ship owners choose to register their vessels in countries with favorable or lax regulations under so-called flags of convenience, and escape the burdens of their home countries—forum shopping, in other words. *See generally* Tony Alderton & Nik Winchester, *Regulation, Representation and the Flag Market*, J. MAR. RES. (Sept. 2002), available at <http://www.jmr.nmm.ac.uk/server/show/conJmrArticle.53/viewPage/1>. So, what has been the result of the incentives for forum shopping? “Despite the fact that the concept of a genuine link has been enshrined in international law, the last fifty years or so has seen the evolution of the FOC [Flag of Convenience] system to the extent that, by 1998, 51.3% of the world’s total gross tonnage . . . was registered to FOC fleets.” *Id.* (emphasis added). This is compelling evidence from real world practice to show what happens when incentives and opportunities to forum shop present themselves.

<sup>149</sup> LoPucki, *Out of Control*, *supra* note 43, at 98–99.

bankruptcy in 1999, it was no longer an American company.

Singer wanted, however, to reorganize in the United States. Shortly before filing in the New York bankruptcy court, Singer hired a CEO in New York and declared New York its headquarters. But even after the New York court assumed jurisdiction over Singer's worldwide operations, Singer remained concerned whether the courts of other nations would recognize the U.S. proceeding and enforce the plan against "numerous international creditors who might assert that they were not subject to U.S. jurisdiction." The problem was that Singer's parent company, Singer, N.V., was still a Netherlands Antilles company. To solve the problem . . . Singer filed a motion seeking authority to create a new wholly-owned U.S. subsidiary of Singer N.V., Singer U.S.A. L.L.C. ("Singer USA"). After Singer USA was formed, the proposal was to transfer all of Singer N.V.'s assets (Singer N.V.'s equity interests in its subsidiaries) to Singer USA and to cause Singer USA to guarantee all of Singer N.V.'s liabilities. Thereafter, Singer N.V.'s sole asset would consist of its equity interest in Singer USA . . . The next step would be for Singer USA to file its own Chapter 11 petition, thus bringing Singer USA within the protection of the U.S. bankruptcy court. The final step was to propose a Chapter 11 plan of reorganization for Singer USA that eliminated Singer N.V.'s equity interest and issued 100 % of the new equity in Singer USA to Singer USA's creditors, i.e., the holders of the obligations of Singer N.V. that Singer USA had guaranteed.<sup>150</sup>

In sum, Singer replaced the Netherlands Antilles corporation with a new American one, placed the new corporation into bankruptcy in New York, and obtained plan confirmation.<sup>151</sup> This example demonstrates the creativity of counsel, and there is little that universalism can do to stem lawyers' ingenuity.

More recent actual events have further confirmed Professor LoPucki's predictions. The European Union adopted a universalist bankruptcy

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<sup>150</sup> *Id.* (quoting Evan D. Flaschen & Leo Plank, *The Foreign Representative: A New Approach to Coordinating the Bankruptcy of a Multinational Enterprise*, 10 AM. BANKR. INST. L. REV. 111, 123 (2002)).

<sup>151</sup> Professor LoPucki has also cited other examples of corporations changing their structure in anticipation of bankruptcy. They include (i) "Dreco Energy, which moved both its headquarters and center of operations from Canada to the United States in contemplation of bankruptcy"; (ii) "Commodore, which moved its headquarters and place of incorporation from the United States to the Bahamas for tax reasons before filing bankruptcy there"; and (iii) Bank of Commerce and Credit International (more commonly known as BCCI), "which moved its headquarters from London to Abu Dhabi before filing bankruptcy at its place of incorporation in Luxembourg." LoPucki, *Universalism Unravels*, *supra* note 50, at 155.

scheme for its members, which became effective in 2002.<sup>152</sup> As soon as the universalist system became law, venue disputes among E.U. countries erupted.<sup>153</sup> As an example, a dispute surfaced between Italy and Ireland concerning jurisdiction over the bankruptcy of Eurofoods, a subsidiary of Parmalat.<sup>154</sup> Furthermore, Professor LoPucki's concerns regarding the home country standard have been confirmed by the European Commission in its official statements.<sup>155</sup> Thus, any doubts about the forces involved are quickly dispelled by looking at actual cases.

Universalism's supporters also tend to ignore the significant financial incentives for strategic case placement, and the motivations driving law firms to place the case in their local court. The high financial stakes and rewards involved in a large bankruptcy case are seen in the bankruptcy of United Airlines, where the debtor's law firm, by itself, billed approximately \$93 million in fees for its work on the case.<sup>156</sup> With such staggering amounts up for grabs, the incentives for strategic positioning and forum shopping are obvious. If a law firm and others affected by case placement face the prospect of losing out on tens of millions of dollars in fees and costs, it can be reasonably assumed that much effort will be devoted to devising a strategy for case placement. The lawyers will not sit on the sidelines waiting for hypothetical global efficiencies to determine who will win the fees.

#### D. The Likelihood of Bizarre Results

According to its supporters, universalism leads to greater predictability for debtors and creditors because each party knows in advance the law that will govern a possible bankruptcy. If an American bank lends to a French company with assets in the United States, France, Germany and Italy, the bank can rely on the fact that French law will govern the borrower's

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<sup>152</sup> Commission Regulation 1346/2000, On Insolvency Proceedings, 2000 O.J. (L 160) (EC).

<sup>153</sup> LoPucki, *Universalism Unravels*, *supra* note 50, at 144.

<sup>154</sup> LoPucki, *Out of Control*, *supra* note 43, at 95 (citing other examples, as well).

<sup>155</sup> See U.N. Comm'n Int'l Trade (UNCITRAL), *Draft UNCITRAL Legislative Guide on Insolvency Law, Compilation of Comments by International Organizations*, U.N. Doc. A/CN.9/558 (June 14–25, 2004), available at [http://www.uncitral.org/uncitral/en/commis-sion/working\\_groups/5Insolvency.html](http://www.uncitral.org/uncitral/en/commis-sion/working_groups/5Insolvency.html). In that document, the European Commission addressed the issue of an insolvency filing by a group of companies, and noted that there had historically been two approaches within the European Union—"the 'companies group' approach (based on economic criteria)" and "the 'incorporation' approach (based on the head office jurisdiction)." *Id.* at 3. It then pointed out that "there are some contradictory cases by national courts that show the difficulty of applying common criteria in practice." *Id.*

<sup>156</sup> *United's Bankruptcy Tab: \$335 Million-plus in Fees*, USA TODAY, Mar. 10, 2006, available at [http://www.usatoday.com/travel/news/2006-03-10-ual-bankruptcy-fees\\_x.htm](http://www.usatoday.com/travel/news/2006-03-10-ual-bankruptcy-fees_x.htm).

bankruptcy and that it need not weigh its legal risks under four different sets of bankruptcy laws.

Professor LoPucki, however, has demonstrated that the real world is not quite so simple in a hypothetical involving Daimler-Chrysler.<sup>157</sup> At the top of this corporate group of automobile manufacturers is a company called Daimler-Benz, the German parent corporation. Daimler-Benz owns several subsidiaries operating in dozens of countries, one of which is the American corporation called Daimler-Chrysler Corporation. Daimler-Chrysler, in turn, has its own subsidiaries which manufacture automobiles in about a dozen other countries. One of Daimler-Chrysler's subsidiaries is Chrysler de Mexico, S.A., which manufactures automobiles only in Mexico.

In the event of a bankruptcy filing by the corporate group, a universalist would require administration of the case in Germany, the home of the parent corporation. The result would be the administration of the affairs of Chrysler de Mexico, S.A. in Germany, with the court applying German remedies and priorities to transactions principally and, often times, exclusively among Mexicans.<sup>158</sup> This result would no doubt fulfill the dream of the internationalist. However, it would be a result in complete disregard of the expectations and practices of the Mexican parties. Moreover, it is difficult to detect where the claimed economic and jurisprudential efficiencies would arise. The parties would find themselves in a distant court, represented by distant counsel and operating in a foreign language.

#### E. The Questionable Assumption of Convergence of Laws

One of the universalists' goals is to drive nations toward a convergence of their laws.<sup>159</sup> Convergence is, in fact, a necessary feature of universalism because there must be a general similarity of laws in order for it to be workable.<sup>160</sup> Otherwise, attempts at a universalist treatment of bankruptcies would always be frustrated by courts exercising the public policy exception to prevent local claimants from being subjected to laws

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<sup>157</sup> LoPucki, *Out of Control*, *supra* note 43, at 93. This hypothetical is based on Daimler-Chrysler's corporate structure as it was in 1997. *Id.* at 93 n.46.

<sup>158</sup> This result is consistent with the ALI Principles. See Westbrook, *Multinational Enterprises*, *supra* note 5, at 38 (subsidiaries should be allowed to file for insolvency in the home country of the parent, and corporate groups should be reorganized from a worldwide perspective like a single company).

<sup>159</sup> See Westbrook, *Multinational Default*, *supra* note 1, at 2288.

<sup>160</sup> See *id.* at 2291; Westbrook, *Theory and Pragmatism*, *supra* note 112, at 468 (a "prerequisite to obtaining the benefits of universalism is general similarity of laws"); Biery, Boland & Cornwell, *supra* note 20, at 29.

fundamentally inconsistent with their own. Because of the general convergence of laws among developed nations, the universalists would argue that an American court should have no hesitation in deferring to the jurisdiction of court in the European Union, for example. The reluctant judge should be reassured by the fact that the liberal democracies of Western Europe will provide a fair and predictable forum for foreigners because the laws and proceedings are transparent. The statutes and procedures are open and readily ascertainable by any informed reader.

This argument, however, rests on a large and faulty assumption. It assumes that the law as it exists in text is actually applied. The fallacy of this assumption was exposed in a recent paper discussing the Parmalat bankruptcy.<sup>161</sup> A common view of the Parmalat scandal is that the company's downfall was caused by lax Italian rules governing financial reporting.<sup>162</sup> Professors Guido Ferrarini and Paolo Guidici refute that view, however, and point out that the actual cause of the problem was the fact that the laws on the books were not enforced.<sup>163</sup> Indeed, they further pointed out that Italian laws were actually quite severe—more severe than American laws in some instances; they just were ignored by the governing authorities.<sup>164</sup>

The lesson from this example is clear. Universalists try to address concerns by pointing to the law on the books of other developed countries and giving assurances that the laws have sufficient similarity to ensure fair treatment of claims. What they cannot provide, however, is assurance or proof that the laws on the books are actually enforced. Mere text by itself provides nothing without enforcement. Universalists need to address this issue before offering up universalism as the ideal.<sup>165</sup>

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<sup>161</sup> Guido Ferrarini and Paolo Guidici, *Financial Scandals and the Role of Private Enforcement: The Parmalat Case* (European Corporate Governance Inst., Working Paper No. 40/2005), available at <http://ssrn.com/abstract=730403>. Parmalat was a large Italian producer of dairy products, which became the subject of insolvency proceedings due to financial fraud. It was one of the largest bankruptcies in Europe and has been described as Europe's Enron.

<sup>162</sup> *Id.* at 26–31.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* A similar situation regarding lack of enforcement also exists in China. See Clarke, *supra* note 120, at 109 (discussing “the tendency of Chinese courts not to aggressively seek jurisdiction over cases, but on the contrary to fear it and often to go to great lengths to avoid taking difficult or sensitive cases”).

<sup>165</sup> There is also the somewhat related issue of corruption, which obviously affects whether a country's laws are enforced. According to Transparency International's Corruption Perception Index 2005, only 42 out of 159 surveyed countries score 5.0 or higher, which means 117 countries have a score indicating serious corruption. Transparency International, *Corruption Perceptions Index 2005* (2005), available at [http://www.transparency.org/policy\\_and\\_research/surveys\\_indices/cpi/2005](http://www.transparency.org/policy_and_research/surveys_indices/cpi/2005). Italy and South Korea, two developed international trade powerhouses, score a borderline 5.0. *Id.*



## F. Summary

If universalism's benefits exist at all, they are hypothetical. Its harms, on the other hand, are concrete, and the parties who pay the price are easily identifiable. The universalists' response is that the harms are small in quantity and those who suffer the harms are not important enough to stand in the way of global gains. Even if one accepts the values underlying this calculus, universalists are hard pressed to demonstrate tangible gains. Perhaps universalism can be best described as an idealized vision of global harmony, full of benefits for multinational enterprises, without the annoying distractions of political reality or the whining of wage-earners or small business owners.

## VII. CHAPTER 15 IN THE LARGER CONTEXT OF THE INTERNATIONALIZATION OF AMERICAN LAW

Although universalism has widespread support among academics, even its supporters must acknowledge or have acknowledged that its claimed benefits are abstract and hypothetical. A belief in its benefits requires a leap of faith, and many have already jumped. Given the uncertainty of its advantages, one wonders why there is so much momentum behind it. The reason appears to be that there are many who simply believe that anything "international" is automatically better than anything local. In that regard, it is more than coincidental that Chapter 15 became law at the same time as debate grew over the Supreme Court's increasing and controversial reliance on foreign authorities, as exemplified by cases such as *Lawrence v. Texas*,<sup>166</sup> *Roper v. Simmons*,<sup>167</sup> and *Atkins v. Virginia*.<sup>168</sup> Indeed, this article contends that the debate in bankruptcy

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Greece, a member of the European Union scores 4.3. *Id.* Of the countries that have enacted the Model Law, Eritrea scores a 2.6, Mexico (America's NAFTA partner) a 3.5, Poland a 3.4, Romania a 3.0, and South Africa a 4.5. *Id.* In other words, these countries have scores indicating a serious level of corruption. The legislative history of Chapter 15 directs American courts to look to these countries for guidance because they are "persuasive" and "advance the crucial goal of uniformity of interpretation." *Supra* Part V (quoting H.R. REP. NO. 109-31, at 110 (2005)).

<sup>166</sup> 539 U.S. 558 (2003) (striking down state law criminalizing homosexual conduct).

<sup>167</sup> 543 U.S. 551 (2005) (barring application of death penalty to juvenile offenders).

<sup>168</sup> 536 U.S. 304 (2002) (barring execution of mentally retarded capital defendants). Dean Harold Koh has characterized the ideological divide as follows (from his own internationalist perspective):

More fundamentally, the last Supreme Court Term confirms that two distinct approaches now uncomfortably coexist within our own Supreme Court's global jurisprudence. The first is a "nationalist jurisprudence," exemplified by the opinions of Justices Scalia and Clarence Thomas. That jurisprudence is characterized by commitments to territoriality, extreme deference to national

circles about Chapter 15 and universalism is actually part of the larger and ongoing debate over the Supreme Court's reliance on foreign authority to interpret the Constitution. These debates center around the extent to which the United States (or any country for that matter) should yield its sovereignty in deference to a foreign authority. The embrace of all things international on the part of some is a sign of the times, and deserves closer scrutiny.<sup>169</sup>

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executive power and political institutions, and resistance to comity or international law as meaningful constraints on national prerogatives. This line of cases largely refuses to look beyond U.S. national interests when assessing the legality of extraterritorial action. Moreover, these decisions have largely rejected international comity as a reason unilaterally to restrain the scope of U.S. regulation, and dismiss treaty or customary international law rules as meaningful restraints upon U.S. action. To deal with perceived exigencies, these rulings have broadly deferred to federal executive power, largely unchecked by judicial oversight, "clear statement" principles, or claims of individual rights. When advised of foreign legal precedents, these decisions have treated them as irrelevant, or worse yet, an impermissible imposition on the exercise of American sovereignty.

A second, more venerable strand of "transnationalist jurisprudence," now being carried forward by Justices Breyer and Ginsburg, began with Chief Justice (and former congressional secretary for foreign affairs) John Jay and Chief Justice (and former secretary of state) Marshall, "who were familiar with the law of nations and comfortable navigating by it." In later years, this school was carried forward by Justice Gray in *Hilton v. Guyot* and *The Paquete Habana*, and by three members of the Supreme Court—Chief Justice Melville Fuller and Justices David Brewer and William Day—who helped found the American Society of International Law, along with William Howard Taft, who later became president, then chief justice, of the United States. During the tenure of Chief Justices Earl Warren and Burger, the transnationalist position was championed by Justices William J. Brennan, William O. Douglas, and—particularly his famous Sabbatino dissent—Justice Byron White. And in the Burger and early Rehnquist Courts, the leading transnationalist role was played by Justice Harry Blackmun.

Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 52–53 (2004) (footnotes omitted).

<sup>169</sup> The controversy has reached the point where several members of the House of Representatives submitted a resolution to express their disapproval of this practice. See H. R. 97, 109th Cong. (Feb. 15, 2005). The resolution contains some interesting language that is relevant to this discussion of Chapter 15. Among other things, it states:

Whereas Americans should not have to look for guidance on how to live their lives from the often contradictory decisions of any of hundreds of other foreign organizations; and

Whereas inappropriate judicial reliance on foreign judgments, laws, or pronouncements threatens the sovereignty of the United States, the separation of powers and the President's and the Senate's treaty-making authority . . .

The irony of the highly visible debate over the Supreme Court's practice is that the effects of citing foreign authority are mild compared to the requirements of Chapter 15. The Supreme Court did not state that it was bound by foreign law in *Lawrence*, *Roper* or *Atkins*; it looked to foreign law as a form of guidance.<sup>170</sup> The foreign authorities were merely decorative justifications for the decisions.<sup>171</sup> As such, "the practice of citing to international law may contribute little of analytical value and have no real effect on the actual course of judicial decisionmaking."<sup>172</sup> Chapter 15, in contrast, is more than decoration and dictates substantive outcomes. The debate involving the Supreme Court is, in large part, about symbolism (although symbolism regarding the Constitution certainly requires attention). Chapter 15, on the other hand, directly affects basic property rights (and also implicates constitutional concerns), yet its passage has largely escaped notice. The parallels between the two debates, however, show that they are actually part of the same debate, and the scholarship regarding the Supreme Court provides beneficial guidance to the debate over Chapter 15.<sup>173</sup>

In connection with the Supreme Court debate, one scholar has written that the introduction and use of foreign authority "invites the deployment of a sweeping body of legal materials from outside U.S. domestic law" and "invites [foreign authorities] into American society's most difficult and contentious 'values' questions."<sup>174</sup> This statement applies equally to the

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*Id.*

<sup>170</sup> "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Roper*, 543 U.S. at 578.

<sup>171</sup> See John O. McGinnis, *Foreign to our Constitution*, 100 Nw. U. L. Rev. 303, 310 (2006).

<sup>172</sup> Delahunty & Yoo, *supra* note 128, at 292. At the same time, Delahunty and Yoo also caution that reliance on foreign authorities may be more than "mere ornamentation" and warn against such reliance. *Id.*

<sup>173</sup> A critic of this article might interject that the debates are not similar for one significant reason. Congress has expressly stated that foreign authority is relevant in the interpretation and application of Chapter 15, and that the courts should be guided by other countries that have adopted the Model Law. Thus, the use of foreign authority for Chapter 15 is more akin to reliance on foreign authority to interpret a treaty in that foreign law is inherently and inextricably part of the law. In that regard, a bankruptcy judge does not "choose" to look to foreign law; the statute requires it.

This argument only goes so far, however. The main battle over Chapter 15 will be about the expansiveness or narrowness of its application (as determined by the public policy exception, for example), and whether it really is just thinly-disguised universalism. This article contends that the significant and larger issue is whether domestic, national interests should defer or be subordinated to foreign law, and that this larger issue is what the Supreme Court debate is about.

<sup>174</sup> Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV., June & July 2005, at 33-34.

bankruptcy context due to the values-laden nature of bankruptcy law.

The debate concerning the Supreme Court also provides lessons regarding the universalists' implicit agnosticism regarding different national laws. Universalists generally refrain from making value judgments about various legal systems. They are less concerned about which country's law applies; the main concern is that one law apply.<sup>175</sup> The Supreme Court debate, however, has generated perceptive analyses regarding national laws, which argue that the individuality and distinctiveness of national laws do matter. Professor John McGinnis' observations along these lines are especially compelling.

A foreign law, including a foreign court decision, is simply not framed with reference to being applied anywhere but to its own nation. Even if its decision is the product of a democratic consensus or some other process that creates good norms for the foreign nation, the content of that consensus is that the norm should be applied in its own nation. . . . A related difficulty with the use of foreign law is that any such law is part of a complex system of related norms and foreign structures in that nation<sup>176</sup>

Professors McGinnis and Lund also note:

Any judicial opinion from another culture is the culmination of a complex institutional structure for producing norms. The low cost of accessing the mere words of a foreign judicial opinion can blind us to the fact that we are only seeing the surface of a far deeper social structure that is in tension with American institutions.<sup>177</sup>

Such observations seem particularly applicable to bankruptcy law due to its comprehensive reach and embodiment of innumerable, fundamental values.

The debate has also generated some interesting observations regarding the social dynamics of internationalism. It seems that much of the impetus toward global harmonization is an outgrowth of conferences in exotic locales attended by law professors and judges who bask in a shared cosmopolitanism. This socialization process may explain the fascination with internationalization. In discussing the motivations of Supreme Court Justices to cite foreign laws, Professor McGinnis wrote:

At a more sociological level, the citation of foreign sources of law reflects the globalization of the judiciary. Supreme Court judges

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<sup>175</sup> Tung, *Possible?*, *supra* note 6, at 4.

<sup>176</sup> McGinnis, *supra* note 172, at 311.

<sup>177</sup> Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1605 (2004).

interact with their peers in other nations on a more regular basis. Their long summer recess is a perfect time to make the acquaintance of justices in their favorite nations. Lake Como or the south of France provides a good atmosphere for bonding. All of us seek approval from our peers and the Justices would naturally regard foreign justices as their equals. These peers would appreciate the citing of their handiwork.<sup>178</sup>

If one were to substitute “judges” and “justices” with “law professors,” this quote might describe the manner in which the UNCITRAL working group arrived at the Model Law.<sup>179</sup> There is a big difference, however. A Justice’s concession to vanity or appeal for acceptance does not subject an American to foreign jurisdiction. No one has been deprived of property because the Supreme Court decorated its opinions with European embellishments.

Professors Robert Delahunty and John Yoo have provided further thoughts on this theme:

Globalization has abetted the emergence of a variety of ‘global networks,’ including networks of governmental power-holders who, over time, may form a common outlook based on personal ties, shared experiences, and the like. Such global networks seem to be resulting in the creation of a transnational class of judicial and regulatory elites who are increasingly freed from the constraints of territoriality, national sovereignty, and domestic political constituencies, and whose judicial and administrative decisions reflect an increasingly harmonized outlook. As Professor Jonathan Macey has observed, “[m]any people, particularly those active in the foreign policy community, view regulatory cooperation as an end in itself. Cooperation in the international sphere is a form of global

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<sup>178</sup> McGinnis, *supra* note 172, at 326–27.

<sup>179</sup> There is also the question of which interests are represented at such conferences:

[Law professors] are not required to be representative of the views of their nation’s citizens nor are they likely to be so. We have evidence, for instance, that elite international law professors in the United States are very unrepresentative of popular opinion . . . International law judges are no more likely to be representative. Some are appointed by nations whose leaders are not elected. *Moreover, they are biased toward discovering consensus among states even when it does not exist to create more international law and thus more power for themselves.*

*Id.* at 314 (emphasis added). In a similar vein, Professor LoPucki has observed that “[m]ost of these professionals are well-meaning, good-hearted idealists, working for what they see as an improvement in the system. A few are schemers, seeking to advance themselves or their local bankruptcy courts.” LoPucki, *Out of Control*, *supra* note 43, at 79.

social norm.” The phenomenon has deeper and broader implications than the mere engineering of channels for institutional cooperation across national boundaries. The phenomenon appears to be linked to the emergence of what can be called a deterritorialized, “cosmopolitan” moral sensibility, generally shared by governing elites of the advanced nations.<sup>180</sup>

Although written in the context of the Supreme Court debate, these observations apply directly and equally to the Chapter 15 debate, and demonstrate that both are part of the larger controversy about sovereignty issues. If nothing else, Chapter 15 and universalism seek freedom from the constraints of territoriality, national sovereignty, and domestic political constituencies.

The heady mix of historic settings, inspiring architecture, five-star comfort and social acceptance by foreign elites as one of their own provides a potent and intoxicating mélange for those who travel the international legal circuit. Their thoughts inevitably turn to a starry-eyed vision of a globalized world guided by their cosmopolitan sophistication. The world, however, is populated by people who labor and start their own businesses for uncertain rewards, and they expect their governments (at least in democracies) to enforce their social choices. Their concerns seem to be invisible at the international conferences, but they are the ones who inevitably pay for the theories of the transnational elite who look only to each other for validation.

Typically, the work product of the transnational elite rarely sees the light of day outside of the conference rooms of luxury hotels, but Chapter 15’s supporters have been particularly successful and effective in converting their visions into reality. Regardless of whether one agrees or disagrees with their views, they certainly cannot be criticized for lack of talent or success. The question now is whether Chapter 15 will develop into a more complete universalist system. Perhaps most people have no trouble with these implications, and if that is the case, then those views will prevail. If, on the other hand, most people have serious concerns with or objections to the consequences of Chapter 15 and universalism, attention needs to turn to the available mechanisms to limit the effects.

#### VIII. THE NEED FOR BROAD APPLICATION OF THE PUBLIC POLICY EXCEPTION

Now that Chapter 15 is law, is it too late to stop the erosion of sovereignty (assuming one accepts that as a desirable goal)? Fortunately, Chapter 15 contains built-in safety valves, and it may be the case that

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<sup>180</sup> Delahunty & Yoo, *supra* note 128, at 329 (citations omitted).

Congress has placed the responsibility of protecting U.S. interests on the courts. The main safety valve is Section 1506, the public policy exception. Additional safety valves are built into Sections 1521(b) and 1522(a), which require the courts to ensure that the interests of creditors and other interested entities are "sufficiently protected."<sup>181</sup>

These provisions should enable the courts to stem the potentially prejudicial consequences of Chapter 15. The problem, however, is that many judges will likely be introduced to Chapter 15 at conferences where the only voices on the subject will be those of universalists. They will be reminded of the legislative history of Section 1506, which states that the public policy exception has been narrowly interpreted on a consistent basis in courts around the world, and that the word "manifestly" in international usage restricts the exception to the most fundamental policies of the United States.<sup>182</sup> They will be further reminded that the lofty goals of global growth and harmonization will be frustrated if the public policy exception is liberally applied.

It is the hope of this article that a more balanced view will be considered, so that the courts will understand that it is their responsibility to closely examine the effects of recognition, and to act forcefully to protect American creditors. This means broad and generous application of the public policy exception to the point where, if necessary, it becomes the exception that swallows the rule. Perhaps the judiciary will draw inspiration from the judge who stated "this Court does not intend to stand idly by while United States citizens and creditors are harmed."<sup>183</sup> Of course, such courage in the face of internationalist criticism will come at a heavy price. That judge will probably not be invited to speak at conferences of assembled elites at five star hotels in Salzburg, Barcelona, and Milan.

## IX. CONCLUSION

The debate over territorialism and universalism has been active and sustained for over a decade now, and the universalists are prevailing. Their success is evidenced by the fact that Chapter 15 is the law of the land. However, several questions remain. What does Chapter 15 do? What purpose does it serve? Whose interests are served? This article does not dispute the benefits of international cooperation among courts in the appropriate circumstances. There are also compelling reasons for lawyers and judges to widen their perspectives to take into account events and practices in other places. To the extent that Chapter 15 acts in furtherance

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<sup>181</sup> 11 U.S.C.S. §§ 1521(b), 1522(a) (LexisNexis 2006).

<sup>182</sup> H.R. REP. NO. 109-31, at 109 (2005).

<sup>183</sup> *Interpool Ltd v. Certain Freights of M/V Venture Star*, 102 B.R. 373 (D.N.J. 1988).

of these goals, there is little basis for criticism. However, its proponents have a much grander vision in mind, and it comes at the expense of national sovereignty and imposes a high cost on small, and not so small, creditors.

The beneficiaries do not include employees, business owners who supply multinational companies, or tort victims. There is no reliable evidence that even big, global lenders will benefit. Thus, the universalists have difficulty in identifying an actual creditor that will realize a demonstrable benefit. On the other hand, there is little difficulty in identifying actual creditors will certainly be harmed.

So, exactly who wants universalism? The answer appears to be a select group of professors, judges, and lawyers, who are regulars on the international circuit. What binds them is a commitment to an internationalized ideal, a shared vision of a cosmopolitan elite—an ideal and vision that seems to have little concern for people who labor or grow businesses. This is a club of worldly sophisticates, who disdain territorialism and its perceived backwardness. Universalism is a badge of cosmopolitan sophistication.<sup>184</sup> Framed this way, who can resist the siren call to be part of the sophisticated, smart set? This may be the real, and perhaps only, reason for universalism's success to date. However, is it too much to ask that there be more to Chapter 15 than internationalism for its own sake? "Flaunting a cosmopolitan sensibility may be quite chic, but this high style comes with a price."<sup>185</sup> And this cost is placed squarely on the backs of the small participants who move their respective economies forward.

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<sup>184</sup> Tung, *Fear of Commitment*, *supra* note 3, at 558.

<sup>185</sup> Lund & McGinnis, *supra* note 177, at 1607.



