
THE NEW CONFLICTS LAW

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ABSTRACT

*The deterrent and remedial power of civil litigation in U.S. courts is justifiably famous. But as *Kiobel* and other cases underscore, such litigation is only one of many possible ways to regulate harms that affect multiple sovereigns. Globalization, increased cross-border activity, and the lightweight limits on extraterritorial jurisdiction imposed by international law combine to create an environment in which it is common for multiple legal systems to regulate a single course of conduct. When sovereigns disagree over how to regulate harm, the ensuing conflicts expose U.S. legal systems to a new and unfamiliar form of political backlash.*

This Article identifies, explains, and critically analyzes a new body of law that responds to these conflicts in a novel and problematic way. Beginning in the 1980s and accelerating in recent terms, the Supreme Court has interpreted indeterminate legal materials that are not obviously about regulatory conflict to create a set of clear, ex ante rules restricting private regulatory enforcement in U.S. courts. This set of rules—"the new conflicts law"—prevents conflicts between domestic litigation and other nations' approaches to regulating harm and transfers authority for regulatory conflict from frontline decisionmakers to the U.S. Supreme Court. But in seeking to limit interference with foreign regulation, the new law undermines U.S. regulatory systems with no clear welfare payoff. And it often precludes democratically accountable policymakers from revisiting the Supreme Court's conclusions about the appropriate relationship between U.S. litigation and foreign regulation.

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To address these concerns, the Article proposes incremental changes to four doctrines within the new conflicts law. The more basic and urgent task, however, is to recognize the new conflicts law for the significant development it is. With little fanfare, the Supreme Court has dramatically changed the way in which the U.S. legal system manages regulatory conflict.

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INTRODUCTION

In areas as diverse as securities fraud,¹ personal jurisdiction,² and human rights,³ the Supreme Court has restricted private regulatory enforcement in U.S. courts to prevent interference with foreign nations' efforts to regulate harm. The authorities underpinning the Court's intervention—framework jurisdictional statutes,⁴ the Due Process Clause,⁵ and unwritten canons of statutory interpretation,⁶ among others—are not self-evidently about conflicts between different regulatory systems. But the Court has interpreted them to create a set of clear, *ex ante* rules that cede power to coordinate legal systems and privilege the regulatory preferences of actors doing business across territorial borders. These rules—"the new conflicts law"—fundamentally transform the United States' relationship with foreign legal systems.

Traditionally, U.S. law took a conciliatory approach to regulatory conflict. Focused on conflicts among the fifty states, legal doctrine sought to manage regulatory conflict through flexible standards that permitted case-specific judgments about which government's regulatory system should take priority in an individual case.⁷ For example, the Restatement (Second) of Conflicts of Law instructs courts to determine the rights and liabilities of the parties to a tort action by considering such factors as "the relevant policies of the forum," "the relevant policies of other interested states and the relative interests of those

1. *See Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2886 (2010) (repudiating decades old understanding of the territorial reach of § 10(b) of the Securities Exchange Act, and holding that § 10(b) applies only to frauds that culminate in a transaction in the United States).

2. *See J. McIntyre Mach. Co. v. Nicastro*, 131 S. Ct. 2780, 2794 (2011) (Breyer, J., concurring) (rejecting state court's assertion of personal jurisdiction over foreign manufacturer on the ground that "[i]t may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States").

3. *See Kiobel v. Royal Dutch Petroleum Co.* 133 S. Ct. 1659, 1669 (2013) (holding that the Alien Tort Statute does not apply extraterritorially).

4. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (elaborating enforceability of forum selection clause pursuant to 28 U.S.C. § 1333's grant of maritime jurisdiction).

5. *See Nicastro*, 131 S. Ct. at 2791 (articulating due process limits on personal jurisdiction).

6. *See Morrison*, 130 S. Ct. at 2877-87 (expounding presumption against extraterritoriality).

7. For a classic statement of this approach, see Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 177 (1963). For a survey of later forms of "interest analysis," see LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 43-69 (1991).

states,” and “the basic policies underlying the particular field of law.”⁸

Beginning in the mid-1980s and accelerating in recent terms, the law has taken a markedly different approach. Focused on conflicts between U.S. litigation and foreign regulation, a collection of reconceived doctrines denies a U.S. forum to entire categories of disputes via clear, ex ante rules,⁹ and thereby heads off conflicts between litigation in U.S. courts and methods of regulating harm favored by foreign governments and multinational businesses. The result is nothing less than a new conflicts law. Rather than attempting to give effect to the policies of all sovereigns with an interest in a dispute, U.S. regulatory systems are disabled in favor of regulation by other legal systems. Instead of managing conflict through flexible standards, the new law works through determinate rules.

This Article identifies, explains, and assesses this new body of law.¹⁰ Part I

8. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(a)-(c) (1971).

9. In standard usage, “[a] legal direction is ‘rule’-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts.” Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992). By contrast, “[a] legal directive is ‘standard’-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.” *Id.*

10. Though its identification of the new conflicts law is novel, the Article is informed by an important body of scholarship exploring the place of private, civil litigation in U.S. courts in the larger project of “global governance.” See, e.g., ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001) (describing and explaining the United States’ distinctive reliance on private litigation as a mechanism of regulation); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1164 (2007) (developing eponymous theory for how “mechanisms, institutions, and practices can help mediate conflicts by recognizing that multiple communities may legitimately wish to assert their norms over a given act or actor, by seeking ways of reconciling competing norms, and by deferring to alternative approaches if possible”); Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT’L L. 251 (2006) (proposing typology for cases in which litigants ask domestic courts to regulate global economic misconduct); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-84 (1996) (offering theory for how actors “interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law”); Richard Marcus, *Bomb-Throwing, Democratic Theory, and Basic Values – A New Path to Procedural Harmonization*, 107 NW. U. L. REV. 475 (2013) (offering political theory explanations for the enduring distinctiveness of American civil procedure); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081 (2010) (considering political economy of closing U.S. fora to foreign litigants); Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violation*, 27 YALE J. INT’L L. 1 (2002) (advancing theory for why the United States has become the forum of choice for enforcement of human rights norms); Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67 (2009) (proposing a typology for the transnational regulatory functions performed by U.S. courts and arguing that many court-access doctrines are best understood from a governance perspective); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2010) (testing hypothesis that U.S. courts provide the forum of choice for self-

sets the stage by reviewing the social, economic, and legal factors that generate interjurisdictional regulatory conflict. Globalization, increasing cross-border activity, and the lightweight limits on extraterritorial jurisdiction imposed by international law have combined to create an environment in which it is common for more than one government to assert authority over a single course of conduct. But governments proscribe different conduct norms and follow different strategies for enforcing the norms they promulgate. When multiple governments regulate the same conduct, these differences in norms and regulatory strategy generate interjurisdictional regulatory conflict.¹¹ Paradigmatically, private civil litigation in U.S. courts undermines a foreign government's approach to regulating harm, leading to protests of impermissible "extraterritorial" regulation by the United States.

The traditional approach, Part II explains, provided an unsatisfying response to the problem. Due to its reliance on flexible standards, the approach allocated authority for managing regulatory conflict to frontline decisionmakers and failed to specify which legal system controlled in recurring conflict situations. The approach, moreover, was internally inconsistent. While the approach generally sought to accommodate the policies of all sovereigns with an interest in a dispute, it contained a number of arbitrary exclusions that reflected historical happenstance rather than a reasoned response to regulatory conflict. In political terms, the traditional approach thereby failed to settle problems of regulatory conflict and prevented appropriate governmental actors from doing so.

The new conflicts law, which Part III introduces, addresses these shortcomings via restrictions on U.S. regulatory power. Interpreting indeterminate legal materials that are not obviously about regulatory conflict, the Supreme Court has created a set of clear, *ex ante* rules restricting private regulatory enforcement in U.S. courts in areas that are also regulated by a coordinate regulatory system. The rules are difficult to justify using conventional interpretative techniques, yet they have a powerful mediating effect on regulatory conflict. By restricting U.S. court access, the rules limit the circumstances in which domestic litigation interferes with other legal systems' efforts to regulate harm. Because the rules hinge on objective and easily ascertainable facts, trial courts are no longer entrusted to make judgments about the interaction of different regulatory regimes.

Without doubt, the rules that make up the new conflicts law are informed by the Rehnquist and Roberts Courts' skepticism about the general project of

interested multinational litigants).

11. *See infra* notes 31-76 and accompanying text.

private regulatory enforcement.¹² But insofar as they specifically respond to the political and foreign-relations problems created by overlapping assertions of regulatory authority, it is appropriate to view them as distinct phenomena. Doing so not only produces a better model of the factors driving doctrinal change, but has payoffs for advocacy directed at modifying the new conflicts law. While the practical consequences of identifying a pro-defendant bias in the Court's decisions are modest, recognizing the role of interjurisdictional regulatory conflict permits advocates to make arguments with deep foundations in the Court's thinking.

That recognition is critical, Part IV contends, because the new conflicts law makes questionable design choices and could be greatly improved with relatively modest doctrinal corrections. From a welfare perspective, the most significant feature of the new law is that it permits regulated actors to determine whether and in what circumstances they will be subject to regulation in the United States. Law-and-economics scholars have defended laws that share this feature on the theory that those laws enable a beneficial form of competition among legal systems.¹³ But various conditions must be present for regulatory competition to succeed, and the new conflicts law is, as a rule, insensitive to them. The Article therefore proposes that doctrines that permit private parties to select the governing legal regime include a check to ensure that choice is likely to actually improve welfare. In practical terms, private regulatory choice should be respected only if the parties know the regime they are agreeing to and a transaction's stakes are high enough so that the parties can reasonably be expected to protect their own interests.

12. See generally Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 343 (observing that in the subconstitutional domain, "the Court has sought, across a broad range of subject matters, to reduce the role of judicial lawmaking and to refuse to take responsibility for shaping a workable legal system in the everyday disputes that come before the judiciary"); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1108 (2006) (positing that "hostility to litigation" explains the most significant developments in the Rehnquist Court's jurisprudence).

13. See, e.g., ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 26-33 (2009) [hereinafter O'HARA & RIBSTEIN, *LAW MARKET*]; ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 4-5 (1993); Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 906-08 (1998); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 913-14 (2002); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000) [hereinafter O'Hara & Ribstein, *Politics to Efficiency*]; Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 264-73 (1977). See also William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201 (2007) (describing conditions for successful regulatory competition).

Aside from welfare effects, the new conflicts law has implications for enforcement of U.S. regulatory policy. The denial of a forum permanently disables some U.S. regulatory systems and prevents others from reaching transnational conduct that affects the U.S. market. Moreover, the new law has a worrying tendency to allocate decisions about regulatory conflict to the Supreme Court to the exclusion of policymakers in the political branches. While these concerns do not justify abandoning the new conflicts law, they do suggest that it should operate through default rules rather than permanent restrictions on U.S. regulation. To facilitate congressional involvement in the design of conflict-mediating doctrines, the Article proposes that doctrines governing forum selection agreements and arbitration be particularized so that the enforceability of an agreement specifying the forum for regulatory enforcement depends on the substantive right at stake. In a field now dominated by personal jurisdiction doctrine, the Article proposes a new federal choice of law rule.

In the scholarly literature, conflicts of law frequently is described as a “dismal swamp.”¹⁴ According to the standard account, the field is an ossified body of doctrine that fails to supply coherent answers to problems of regulatory conflict. But as the Article demonstrates, this understanding is somewhat myopic. Choice-of-law doctrine has stagnated in the decades since the American Law Institute promulgated the Restatement (Second) of Conflicts of Laws, but the social and economic forces that necessitate a body of conflicts law have only become more powerful. In the absence of coherent choice-of-law tools, those forces exert a kind of hydraulic pressure on other areas of the law to manage regulatory conflict. The new conflicts law is the most recent

14. See, e.g., Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 1037 (2011) (arguing modern choice of law doctrine is an “inherently indeterminate and manipulable doctrine” (quoting *Campbell v. Apfel*, 177 F.3d 890, 893 n.3 (9th Cir. 1999))); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 8 (1991) (positing that under modern choice of law rules, “no one c[an] predict in advance what state’s law govern[s] their actions.”); Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1407 (1996) (“[C]onflicts of law is dead – killed by a realism intended to save it.”); Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA And Shady Grove*, 106 NW. U. L. REV. 1, 10 (2012) (“[T]he field is widely regarded as a conceptual disaster.”). The term “dismal swamp” derives from William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953), which argued “the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.” But see Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719 (2009) (questioning claim that choice of law is unpredictable in view of statistical evidence that objective factors correctly predict many choice of law rulings).

product of that process.

I. THE PROBLEM OF INTERJURISDICTIONAL REGULATORY CONFLICT

A fundamental objective of all legal systems is to regulate harm.¹⁵ But in a world of many governments, overlapping assertions of regulatory power can lead to intergovernmental conflicts. This Part summarizes the social, economic, and legal forces that generate this kind of interjurisdictional regulatory conflict and provides a taxonomy of the forms such conflict takes. The primary contribution is to demonstrate that differences in *strategies* for regulating harm have as much capacity to generate conflict as differences in substantive legal norms.

A. *The Demise of the Territorial Model*

Prior to the twentieth century, interjurisdictional regulatory conflict was not an urgent problem. Nearly all legal actors believed that a government's power to regulate was governed by public international law, which followed a territorial model for allocating jurisdiction that went a long way toward preventing conflicting assertions of regulatory power.¹⁶ As articulated in the leading nineteenth century decision, *Pennoyer v. Neff*, it was "well-established principle[]" that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."¹⁷ From this principle, two "elementary" corollaries followed: first, that "the laws of one State have no operation outside of its territory, except so far as is allowed by comity," and second, that "no tribunal established by [a State] can extend its process beyond that territory so as to subject either persons or property to its decisions."¹⁸ A domestic court that disregarded these principles violated due process, because it failed to respect the "rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."¹⁹

The rise of interstate and international commerce in the early decades of the twentieth century precipitated a rapid breakdown in the territorial model.²⁰

15. For foundational statements in the western liberal tradition, see, for example, JOHN STUART MILL, *ON LIBERTY* 134 (1859); THOMAS HOBBS, *LEVIATHAN* 115 (Cambridge 1904) (1651).

16. See Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 234-35 (2010).

17. 95 U.S. 714, 722 (1878). Here, the Court was using "State" in the international law sense, to refer to states of the union as well as nations.

18. *Id.*

19. *Id.* at 733.

20. For the general history of the breakdown of the territorial model, see 4 CHARLES

The basic problem was that an actor who caused harm within a jurisdiction was not guaranteed to be there at the moment the law was enforced. Activity from outside a jurisdiction might cause harm within it, as with a gunman who shoots his victim across state lines.²¹ Or, as occurred in *Pennoyer*, an actor might enter a jurisdiction, cause harm, and depart before being brought to account.²²

The turning point in international law was the Permanent Court of International Justice's 1927 decision in the *S.S. Lotus*.²³ Upholding Turkey's authority to prosecute a French steamship captain involved in a collision on the high seas, the court wrote that international law did not "lay[] down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory."²⁴ Eighteen years later, *International Shoe Co. v. Washington* worked a similar transformation in U.S. constitutional law. A state, the Supreme Court held, may exercise regulatory authority over a non-resident defendant that has "certain minimum contacts with it, such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"²⁵ Though the exact meaning of *International Shoe* is still being worked out six decades later,²⁶ the case brought an unmistakable end to the dominance of the territorial model in domestic law.²⁷

ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1065 (3d ed. 2011). For a contemporary perspective, see John Ely Briggs, *State Rights*, 10 IOWA L. BULL. 297, 308 (1925) ("The crux of the situation is that socially and economically the states are antiquated political areas—they are no longer social and economic units. . . . An Iowa farmer does business with the Federal Farm Loan Bank in Omaha, not in Des Moines, and the Illinois farmer must go to St. Louis instead of Chicago.").

21. See *Simpson v. Georgia*, 17 S.E. 984, 985-86 (Ga. 1893) (holding that Georgia may exercise jurisdiction over a defendant who shot a firearm into the state from South Carolina).

22. The respondent in *Pennoyer*, Marcus Neff, hired Oregon attorney John H. Mitchell and left the state of Oregon without paying the bill for Mitchell's services. The question presented was whether an Oregon court could adjudicate Neff's liabilities and order the sale of his property to satisfy those liabilities without obtaining personal jurisdiction by in-state service of process. See 95 U.S. at 719-20.

23. S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

24. *Id.* at ¶ 46.

25. *Int'l Shoe Co. v. Wash. Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Though *International Shoe* is better known for its discussion of the constitutional limits on a state court's exercise of personal jurisdiction, the decision also upheld Washington's application of its unemployment insurance scheme to out-of-state companies that did business within the state. According to the Court, "[t]he activities which establish [a corporation's] 'presence' [for personal jurisdiction purposes] subject it alike to taxation by the state and to suit to recover the tax." *Id.* at 321.

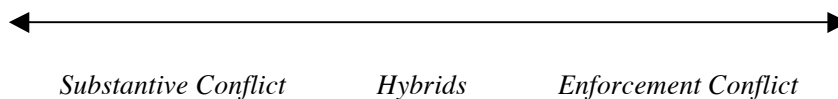
26. See *infra* notes 192-197 and accompanying text.

27. See *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) ("[Following *Shoe*,] the

B. A Spectrum of Conflicts

The breakdown of the territorial model gave rise to a new shared regulatory space, in which more than one legal system could exercise regulatory authority over a single transaction or course of conduct.²⁸ When governments differ over how to regulate harm, overlapping assertions of regulatory power within this space generate regulatory conflicts.

Regulatory conflicts come in many forms and can be mapped onto a spectrum that recalls the familiar distinction between substance and procedure in *Erie*²⁹ and the Rules Enabling Act.³⁰ Figure 1 below depicts that spectrum:



1. Substantive Conflicts

Toward the leftmost side of the spectrum are pure conflicts of substantive law: Sovereign *A* establishes substantive norms that conflict with those established by Sovereign *B*. A current example is provided by the spectacular litigation between Chevron Corp. and residents of the Ecuadorian Amazon over Chevron's responsibility for environmental damage caused by its subsidiary Texaco.

The history of that litigation has quickly become the stuff of legend.³¹ In

relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.”).

28. The concept of shared regulatory space is familiar from administrative law, where scholars have considered how agencies with overlapping jurisdiction should coordinate their activities. *E.g.*, Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1078-80 (2013); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, passim (2012). In the present context, the concept refers to the space created by different *sovereigns'* overlapping jurisdiction.

29. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that federal courts exercising diversity jurisdiction must apply state substantive law, regardless of its legislative or judicial origin, and federal procedural law). For the classic articulation of the difference between substantive and procedural law, see *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring) (“[T]he proper line of approach in determining whether to apply a state or a federal rule, whether ‘substantive’ or ‘procedural,’ is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.”).

30. 28 U.S.C. § 2072.

31. The summary here follows *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir.

1993, a class of Ecuadorian plaintiffs brought suit against Texaco in the U.S. District Court for the Southern District of New York, seeking compensation for environmental damage and personal injury caused by Texaco's operations in Ecuador.³² After years of litigation, the New York court dismissed the action for *forum non conveniens*, reasoning that the case should be heard in Ecuador.³³ The court there held a lengthy trial and eventually entered an \$18 billion judgment pursuant to a newly enacted law that provided a private tort remedy to communities injured by environmental contamination.³⁴ Having assumed Texaco's liabilities with its 2001 purchase of the company, Chevron launched collateral attacks on the judgment in various judicial and arbitral fora.³⁵ In short, Chevron argued that it should not be bound by a judgment from the forum it previously contended was the superior forum for the litigation. It argued that the judgment was unenforceable because the Ecuadorian proceedings were unfair (a "fraud," in Chevron's telling) and because a 1995 settlement agreement released Texaco from any liability in exchange for its commitment to clean up forty oil-production sites.³⁶

As this Article went to press, a New York district court was preparing to try a claim Chevron brought against the plaintiffs and their lawyers under the Racketeer Influenced and Corrupt Organizations Act,³⁷ and an arbitral tribunal in the Hague convened under the U.S.-Ecuador Bilateral Investment Treaty was investigating whether the entry of the Ecuadorian judgment violated international law.³⁸ Regardless of the outcome of those proceedings, litigation over the judgment will continue for decades as plaintiffs seek to enforce it in fora where Chevron holds assets.³⁹

2012), and Sarah Joseph, *Protracted Lawfare: The Tale of Chevron Texaco in the Amazon*, 3 J. HUM. RTS. & ENVMT 70 (2012). For additional background, see Roger Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 VA. J. INT'L L. 127, 142-45 (2013), and Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, *passim* (2011).

32. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001), *aff'd* 303 F.3d 470 (2d Cir. 2002).

33. *See Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476 (2d Cir. 2002) (quoting the district court's observation that "[t]hese cases have everything to do with Ecuador and nothing to do with the United States").

34. *Naranjo*, 667 F.3d at 235.

35. *See id.* at 235-36.

36. *Id.* at 235.

37. *See Chevron Corp. v. Donziger*, No. 11 Civ. 0691(LAK), 2013 WL 1896932, at *1 (S.D.N.Y. May 7, 2013).

38. *See Fourth Interim Order, Chevron Corp. v. Republic of Ecuador*, PCA Case No. 2009-23 (Feb. 7, 2013).

39. *See, e.g., Yaiguaje v. Chevron Corp.*, 2013 ONSC 2527 (refusing to recognize judgment in Canada on technical grounds).

These proceedings create an intractable coordination problem, as different legal systems are called upon to adjudicate one another's response to a common harm. And due to differences in legal systems' substantive laws, the problem is pregnant with interjurisdictional conflict. The Ecuadorian court applied domestic law to determine Chevron's liabilities and the settlement agreement's effect on private plaintiffs' claims. The Hague tribunal, convened under the 1993 U.S.-Ecuador Bilateral Investment Treaty,⁴⁰ will apply international law to analyze the fairness of the proceedings in Ecuador and the effect of the settlement. And Chevron, through proceedings it has initiated in U.S. court, seeks to re-litigate as a matter of U.S. law issues already decided by its prior forum of choice, Ecuador. There is no guarantee that these various laws will be uniform. Indeed, the parties' recourse to forum after forum reflects their expectation that there is strategic advantage to be gained from the application of different substantive norms.

From a political standpoint, what is problematic about the proceedings is that different legal systems are sitting in judgment of one another, applying legal standards that are necessarily divergent. Such judgments may be unavoidable when rights acquired in one system are enforced in another. But they are nonetheless in tension with the basic principle of sovereign equality upon which international law and politics are founded.⁴¹

2. Enforcement Conflicts

At the rightmost side of the spectrum are conflicts that result purely from differences in sovereigns' strategies for enforcing the law. Scholars of regulation have long recognized that in deciding how to regulate harm governments choose from a menu of options. Among other things, a government must decide the actor to whom enforcement authority is allocated (criminal prosecutors, administrative agencies, private individuals, etc.);⁴² the tools available for investigating wrongdoing (criminal subpoenas, civil discovery, etc.);⁴³ the timeframe for regulation (ex ante versus ex post);⁴⁴ and

40. S. TREATY DOC. NO. 103-15, 1993 WL 796850.

41. See U.N. Charter art. 2.

42. See, e.g., David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. (forthcoming 2013); Susan Rose-Ackerman, *Regulation and the Law of Torts*, 81 AM. ECON. REV. 54 (1991); A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of the Law* (Nat'l Bureau of Econ. Research, Working Paper No. 6993, 1999); William M. Landes & Richard A. Posner, *The Private Enforcement of Law* (Nat'l Bureau of Econ. Research, Working Paper No. 62, 1974).

43. See, e.g., Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1675-82 (1998); Stephen Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002).

the penalties to impose when a violation of the law is established (imprisonment, injunctions, damages, etc.).⁴⁵ Even when governments agree on substantive norms, they can disagree over how to enforce those norms, and the resulting inter-governmental conflicts can be just as significant as substantive conflicts of law.

Perhaps the most salient contemporary example of the phenomenon is provided by litigation under the Alien Tort Statute (ATS).⁴⁶ Enacted as part of the First Judiciary Act, the ATS permits federal courts to recognize a private cause of action for a “limited category” of international law violations recognized as such by “civilized nations.”⁴⁷ In 2004, the Supreme Court ruled in *Sosa v. Alvarez-Machain* that to be enforceable under the ATS, an international law norm must be “accepted by the civilized world” and “defined with a specificity” comparable to three eighteenth-century norms catalogued in Blackstone’s *Commentaries*.⁴⁸ At least in theory, the restriction of ATS litigation to causes of action based on specific, universally recognized norms precludes such litigation from generating the kind of conflict typified by the Chevron/Ecuador litigation; the substantive law applied in actions under the ATS is the same worldwide.⁴⁹

As Professor Beth Stephens describes, however, the tools available for enforcing international law vary widely among nations.⁵⁰ In the United States, the combination of the ATS, liberal procedural rules, and broader “attitudes

44. See, e.g., Charles D. Kolstad et al., *Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?*, 80 AM. ECON. REV. 888 (1990); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984).

45. See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998).

46. 28 U.S.C. § 1350 (2006). The statute provides in its entirety: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

47. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

48. *Id.* at 725. The Blackstone norms are (1) the protection of “safe conducts,” (2) the prohibition of assaults on ambassadors, and (3) the prohibition of piracy. *Id.* at 715. At the time of the ATS’s enactment, a “safe conduct” was an express or implied guarantee of safe passage extended by a government to an alien. See Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 836-37 (2006).

49. But see Curtis A. Bradley, *State Action and Corporate Human Rights Liability*, 85 NOTRE DAME L. REV. 1823, 1828 (2010) (complaining that U.S. courts have applied international law incompetently and thereby distorted its meaning); Kevin Jon Heller, *The Fourth Circuit Joins the International Law Improv*, OPINIO JURIS (Sept. 21, 2011), <http://opiniojuris.org/2011/09/21/the-fourth-circuit-joins-the-international-law-improv> (same).

50. Stephens, *supra* note 10.

toward civil lawsuits as a tool for law reform” create an environment uniquely welcoming for private enforcers.⁵¹ For example, where the English rule of attorney’s fees forces “the average plaintiff in a human rights suit [to risk incurring] hundreds of thousands of Pounds in legal bills,” the American rule permits parties to bring suit without the risk that they will incur liability for the other side’s fees and costs.⁵²

Due to these procedural differences, the United States was until recently the forum of choice for private litigants seeking to enforce international human rights law.⁵³ That, in turn, led foreign governments to protest ATS litigation directed at activities they wished to regulate.⁵⁴ The Governments of the Netherlands and the United Kingdom complained, for example, that ATS litigation allows “U.S. litigators and judges to bypass the legal systems of other sovereigns by deciding civil cases involving foreign parties where there is no significant nexus to the U.S.”⁵⁵ South Africa, Sweden, Germany, Indonesia, and innumerable industry groups have voiced similar complaints.⁵⁶

As discussed below, this political backlash led the Supreme Court in *Kiobel v. Royal Dutch Petroleum* to impose a territorial restriction on the scope of the ATS that makes little sense in light of the statute’s text, history, and purposes. For now, however, the key point is that the nominally procedural character of differences in how governments regulate is no obstacle to those differences causing intense inter-governmental conflicts.

3. Hybrids

Toward the center of the spectrum are conflicts that implicate substance and enforcement strategy in equal measure. Illustrative are the wave of “f-

51. *Id.* at 10.

52. *Id.* at 29 (quoting Michael Byers, *English Courts and Serious Human Rights Violations Abroad: A Preliminary Assessment*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 241, 244 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000)).

53. Stephens, *supra* note 10, at 16.

54. *See, e.g.*, Brief of the United States at apps. A-E, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (reprinting correspondence from the Governments of South Africa, Switzerland, Germany objecting to ATS litigation against corporations alleged to have aided and abetted apartheid in South Africa); Diplomatic Note No. 145/VI/05/05/DN from the Embassy of the Republic of Indonesia to the U.S. Department of State, June 15, 2005, *Doe VIII v. Exxon Mobil Corp.*, No. 01 Civ. 1357 (D.D.C. July 18, 2005) (objecting to “extra territorial jurisdiction of a United States Court over an allegation against an Indonesian government institution . . . for operations taking place in Indonesia”).

55. Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland at 24, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (S.D.N.Y. filed June 13, 2012).

56. *See supra* note 54.

cubed” securities fraud cases that preceded the Supreme Court’s 2010 decision in *Morrison v. National Australia Bank*.⁵⁷

Consider *In re Vivendi*.⁵⁸ In many ways, *Vivendi* was a run-of-the-mill securities fraud case. Confronted with a liquidity shortfall in the midst of an acquisition spree, executives of the French media conglomerate misrepresented the company’s financial condition, leading to an increase in its stock price that allowed it to make additional acquisitions.⁵⁹ When Vivendi’s true financial condition became public, its stock price plummeted.⁶⁰ Investors who purchased shares in reliance on the executives’ statements or the integrity of the trading price suffered losses.⁶¹

The twist, from a regulatory perspective, was that the relevant conduct spread across two continents. Many of the misleading statements were made in New York, where Vivendi executives relocated to gain access to the capital markets.⁶² But approximately three-quarters of the company’s investors were located in Europe and acquired Vivendi stock on a foreign exchange.⁶³

In France, the public prosecution service (*le parquet de Paris*) initiated a criminal investigation and filed charges against two of Vivendi’s top executives, Jean Marie Messier and Edgar Bronfman Jr.⁶⁴ Messier and Bronfman were found guilty of various offenses and given suspended sentences. However, Vivendi was never required to compensate investors who suffered losses as a result of its misstatements.⁶⁵

The U.S. response, in contrast, was dominated by private lawsuits seeking compensation for investors. The Securities and Exchange Commission opened

57. 130 S. Ct. 2869 (2010).

58. Major reported decisions include *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512 (S.D.N.Y. 2011); *In re Vivendi Universal, S.A. Sec. Litig.*, 634 F. Supp. 2d 352 (S.D.N.Y. 2009); *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571(RJH)(HBP), 2009 WL 855799 (S.D.N.Y. Mar. 31, 2009); *In re Vivendi Universal, S.A.*, 242 F.R.D. 76 (S.D.N.Y. 2007); and *In re Vivendi Universal, S.A.*, 381 F. Supp. 2d 158 (S.D.N.Y. 2003). The term “f-cubed” refers to the situation in which “foreign plaintiffs sue foreign defendants for misconduct in connection with securities traded on foreign exchanges.” *In re BP P.L.C. Sec. Litig.*, 843 F. Supp. 2d 712, 793-94 (S.D. Tex. 2012) (emphasis added).

59. *See Vivendi*, 765 F. Supp. 2d at 536.

60. *See id.*

61. *See id.*

62. *See Vivendi*, 381 F. Supp. 2d at 169-70.

63. For the relative frequency of trading on U.S. and foreign exchanges, see *Vivendi*, 765 F. Supp. 2d at 519.

64. *See* Matthew Saltmarsh & Eric Pfanner, *French Court Convicts Executives in Vivendi*, N.Y. TIMES, Jan. 22, 2011, at B2. Interestingly, the prosecution of Messier and Bronfman was ordered by the trial court and proceeded over the objection of the public prosecutor. *See id.*

65. *Id.*

an investigation that resulted in a \$50 million settlement.⁶⁶ Far more significant, however, was a class action filed by private attorneys seeking damages under Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder.⁶⁷ The trial court initially included foreign investors from France, England, and the Netherlands in the plaintiff class,⁶⁸ and at trial, the jury returned a \$5 billion estimated verdict.⁶⁹ In a post-verdict ruling, the district court held that *Morrison* required the exclusion of foreign investors from the plaintiff class.⁷⁰ Even then, liability from the class action surpassed \$500 million.⁷¹

Due to the differences in U.S. and French securities regulation, the litigation in New York was an affront to French sensibilities.⁷² In a brief to the U.S. Supreme Court, France complained that the type of litigation typified by *Vivendi* disrupted its “carefully thought out balancing of plaintiffs’ and defendants’ interests.”⁷³ Foreign nations, the Republic explained, “have different schemes of disclosure, different pleading and substantive standards for scienter, different standards of reliance, materiality and causation, different rules governing contribution and indemnity, and different limitations periods.”⁷⁴ Moreover, while conflicts-of-law doctrine classified “attorney’s fees, contingency fees, jury trials, and pre-trial discovery” as matters of procedure (which are controlled by the law of the forum), they had a “substantial practical effect” on the Republic’s efforts to regulate securities issuers.⁷⁵ “Extraterritorial application of U.S. securities fraud law,” the

66. See Distribution Plan Notice, SEC v. Vivendi Universal, S.A., No. 03-CV-10195-PKC (S.D.N.Y.), available at <http://www.vivendisecsettlement.com/us/notice.pdf>.

67. See *Vivendi*, 381 F. Supp. 2d at 166.

68. *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 109 (S.D.N.Y. 2007).

69. *Court Finds Vivendi Liable For Misleading Investors*, N.Y. TIMES, Jan. 30, 2010, at B0.

70. *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 534 (S.D.N.Y. 2011).

71. VIVENDI S.A., FINANCIAL REPORT AND AUDITED CONSOLIDATED FINANCIAL STATEMENTS FOR THE YEAR ENDED DECEMBER 31, 2011, at 14-15, available at http://www.vivendi.com/_files_/IMG/pdf/20120302_03_02_2012_Chapter_4_of_2011_Annual_Report.pdf.

72. See, e.g., *Le Procès Vivendi Relance le Débat sur les “Class Actions,”* LE MONDE, Feb. 4, 2010, at 15 (describing debate over treatment of class actions prompted by *Vivendi*); *Le Site Classaction.fr Est Condamné pour “Démarchage Juridique Illicite,”* LE MONDE, Dec. 8, 2005, at 15 (describing fine levied against French website that solicited plaintiffs for participation in *Vivendi*).

73. Brief for the Republic of France at 24, *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (No. 08-1191), 2010 WL 723010.

74. *Id.* at 23.

75. *Id.* at 24.

Republic averred, “interferes with the ability of foreign nations to regulate their own financial markets and craft remedies that they deem appropriate and consistent with their own legal traditions and policy judgments.”⁷⁶

C. The Importance of Private Enforcement

“Probably to a unique degree, American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies.”⁷⁷ As Robert Kagan observes, reliance on private enforcers permits the United States to capture the benefits of “an activist, regulatory welfare state” within a “decentralized, nonhierarchical governmental system.”⁷⁸ At the same time, private enforcement generates patterns of law enforcement that, to many foreign governments and multinational businesses, appear strange and unjustified.⁷⁹ Lacking an actor who can exercise prosecutorial discretion, enforcement in the United States is uniquely driven by the financial payoff from private litigation.⁸⁰ And because enforcement authority is delegated to many actors, it is difficult to coordinate

76. *Id.* at 2-3.

77. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669 (1986). See generally David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence From Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1253-62 (2012); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1145-46 (2011). The choice to make use of private enforcers is reflected in many features of American law: comparatively liberal pleading standards, see David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 123-30 (2010); contingent-fee litigation financing, see Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 90-91 (2010); procedural devices that facilitate aggregate litigation, e.g., 28 U.S.C. § 1407 (2006); FED. R. CIV. P. 23; private rights of action against government officers for wrongdoing, see David L. Noll, Note, *Qualified Immunity in Limbo: Rights, Procedure, and the Social Costs of Damages Litigation Against Public Officials*, 87 N.Y.U. L. REV. 911, 915-16 (2008); and statutes that award attorneys' fees and costs to successful litigants, e.g., 42 U.S.C. § 1988 (2006), among others.

78. KAGAN, *supra* note 10, at 16.

79. See, e.g., Francesca Bignami, *Cooperative Legalism and the Non-Americanization of European Regulatory Styles: The Case of Data Privacy*, 59 AM. J. COMP. L. 411, 457-58 (2011); Deborah R. Hensler, *Goldilocks and the Class Action*, 126 HARV. L. REV. n.56 (2012) (noting that in Europe, “advocates for private enforcement of antitrust and consumer protection law have struggled against those who champion traditional European reliance on public enforcement and deride proposals for ‘American-style class actions’”).

80. See, e.g., Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 114 (2005); Coffee, *supra* note 77, at 679. For analysis of whether and in what circumstances gatekeeping by public agencies can rationalize private enforcement, see Freeman Engstrom, *supra* note 42.

their activities.⁸¹

Reliance on private enforcement therefore exacerbates problems of regulatory conflict that originate in the breakdown of the territorial model. The potential for regulatory conflict exists whenever legal systems exercise overlapping jurisdiction. But where authority to enforce the law is centralized in politically accountable actors, informal coordination is possible despite the existence of formally overlapping jurisdiction.⁸² When enforcement is directed by private, profit-motivated actors, such informal coordination is less likely, if not impossible.

* * *

Ultimately, the operation of U.S. litigation and other regulatory systems in shared regulatory space has implications for a particular aspect of sovereignty—the ability to regulate harm authoritatively. As the Supreme Court has recognized, private civil litigation in U.S. courts “can interfere with a foreign nation’s ability independently to regulate its own commercial affairs.”⁸³ In the following Parts, the Article describes the sea change in how the U.S. legal system manages that problem.

II. THE TRADITIONAL APPROACH

Although interjurisdictional regulatory conflict has existed for generations, the way the law manages it has changed over time. In the latter half of the twentieth century, the dominant approach in the doctrine and scholarship managed regulatory conflict through flexible standards that permitted case-specific judgments about which sovereign’s regulatory system would govern a given transaction or occurrence. Through such judgments, the approach sought to give the greatest possible effect to sovereigns’ varying regulatory policies and, where the policies conflicted, avoid precedents giving priority to any legal system.

In practice, the traditional approach suffered from a number of shortcomings. Due to its reliance on indeterminate standards, the approach entrusted frontline officials with important questions of regulatory policy and failed to generate answers to recurring conflict problems. In addition, the approach contained a number of arbitrary exclusions that reflected historical happenstance rather than a reasoned response to regulatory conflict. This Part describes these shortcomings in two of the traditional approach’s paradigm

81. See Stephenson, *supra* note 80, at 118.

82. See William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L. L.J. 101, 165-66 (1998) (discussing international antitrust cooperation agreements).

83. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004).

doctrines: choice of law and *forum non conveniens*.

A. Choice of Law

Choice of law doctrine determines the law applicable in a private, civil lawsuit that conceivably could be governed by more than one sovereign's substantive law.⁸⁴ For example, if both the driver and passenger of an automobile are residents of New York and the automobile is involved in an accident in Canada, choice of law principles determine whether New York or Canadian law governs the driver's responsibilities to the passenger.⁸⁵

Until the 1950s, almost all states followed the territorial, rules-based model of choice of law elaborated by Professor Joseph Beale in the Restatement (First) of Conflict of Laws.⁸⁶ Beale's model assumed human activities fell into a fixed number of legal categories such contract or tort, and based choice of law on the place where the last element needed to create an entitlement or cause of action occurred.⁸⁷ Thus for torts, the place of the injury generally determined the governing law;⁸⁸ in contracts, the validity and legal effect of an agreement were determined by where the contract was formed.⁸⁹ While simple to administer, Beale's model rested on questionable philosophical foundations⁹⁰ and produced strange results when the place where an entitlement vested did not correspond with intuitive views of which sovereign should exercise regulatory authority. For example, it might seem odd that Arizona rather than California law should determine whether a driver's estate can be sued if two California residents are killed in a collision on an Arizona highway.⁹¹

84. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. a (1971). *But see* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 280 (1990) (positing that "a choice of law problem exists when more than one law appears to govern the disposition of a case," regardless of the laws' origins).

85. *See* Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963).

86. The history of U.S. choice of law doctrine in the twentieth century is set out in a number of excellent studies. The brief summary here follows Brilmayer, *supra* note 7, Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987), and Gottesman, *supra* note 14, at 3.

87. Gottesman, *supra* note 14, at 4.

88. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934).

89. *Id.* §§ 332, 346.

90. In the 1930s, legal realists argued that "Beale's choices rested on formalistic a priori assumptions that were not the 'givens' Beale assumed them to be." Gottesman, *supra* note 14, at 4 n.15 (citations omitted). Although "Beale assumed that a right or cause of action 'vested' when a particular set of events had occurred," it is impossible to know that a right has vested without *first* determining which state's law applies and considering whether the set of actions create a liability under that law. *Id.*

91. *Cf.* Grant v. McAuliffe, 264 P.2d 944, 949 (Cal. 1953) (concluding that the survival of a cause of action is procedural matter governed by the law of the forum to avoid

In the 1950s, a group of scholars led by Professor Brainerd Currie began to argue that choice of law doctrine should be guided by the regulatory policies of states with an interest in a dispute rather than the metaphysics of where a right vested.⁹² “The new approach—interest analysis—posited that the key to determining [the governing law] was to identify which states had an interest in applying their laws to a given dispute.”⁹³ Where only one state had a genuine interest in applying its law, that state’s law controlled.⁹⁴ But where more than one state had an interest in the transaction, the state with the greater interest in the transaction took priority. To ascertain which state that was, scholars proposed a variety of tests that gave priority to (among other things) the forum’s regulatory policies,⁹⁵ the law of the state whose regulatory objectives would be most impaired if its law was not applied,⁹⁶ and the court’s idea of which state had the “better law.”⁹⁷ Though the merits of these tests were the subject of extensive debate, they proceeded from the same premise—that in many cases, analysis of conflicting laws’ underlying objectives would show that one state had a stronger interest in having its law applied.

Interest analysis proved hugely influential,⁹⁸ and in 1971, the American Law Institute adopted a form of it in the *Restatement (Second) of Conflicts of Law*.⁹⁹ Reflecting “a hodgepodge” of interest analysts’ theories, the second Restatement favored “presumptive [choice of law] rules that could be overcome by a combination of factors that included not only territorial contacts in other states but also the interests of other states in having their laws applied.”¹⁰⁰ The Restatement instructed that to determine the rights and liabilities of the parties to a lawsuit, the court should identify the state with “the most significant relationship to the transaction and the parties.”¹⁰¹ In tort actions, that

this result).

92. Brilmayer, *supra* note 7, at 41-62; Gottesman, *supra* note 14, at 5.

93. Gottesman, *supra* note 14, at 5.

94. Currie, *supra* note 7, at 183-84.

95. *Id.*

96. William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 33 (1963).

97. Robert Leflar, *Conflicts Law: More Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588 (1966).

98. According Professor Symeon Symeonides’ current survey, some form of interest analysis or the second Restatement has been adopted in thirty-six states. Symeon C. Symeonides, *Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey*, 60 AM. J. COMP. L. 291, 308 tbl.1 (2012). Adopters include the most economically significant jurisdictions in the United States, such as California, Texas, New York, Florida (as to torts only), and Illinois. *Id.*

99. RESTATEMENT (SECOND) OF CONFLICTS OF LAW (1971).

100. Gottesman, *supra* note 14, at 7-8.

101. RESTATEMENT (SECOND) OF CONFLICTS OF LAW §§ 145, 188.

relationship was determined by seven nonexclusive factors.¹⁰² In contract cases, courts were to examine five more factors unless the contract included a choice-of-law clause.¹⁰³

Ironically, one consequence of the Second Restatement's approach to choice of law decisions was to *avoid* judgments about which legal system's policies took priority in recurring conflicts situations. The command to determine the applicable law by looking to the place of the most significant relationship "provided courts [flexibility] to weigh all conceivably relevant factors and then tailor the choice of law to the circumstances of the case."¹⁰⁴ "[C]ourts could arrive at any outcome applying its factors, and no one could predict in advance what state's law governed their actions."¹⁰⁵

The Restatement's use of standards rather than rules also allocated authority for managing regulatory conflict to front-line decisionmakers. As Part 0 describes, regulatory conflict places a fundamentally political form of pressure on U.S. legal systems: foreign governments object to U.S. litigation because it undermines the effectiveness or finality of alternate forms of regulation.¹⁰⁶ Given the political dimension of international regulatory conflict, one might expect the political branches or at least the Supreme Court to determine how the nation responds.¹⁰⁷ Yet the Restatement, because of its reliance on indeterminate standards, "effectively gives trial courts discretion to

102. The factors are: "the needs of the interstate and international systems"; "the relevant policies of the forum"; "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue"; "the protection of justified expectations"; "the basic policies underlying the particular field of law"; and "certainty, predictability and uniformity of result in the determination and application of the law to be applied." *Id.* § 6(2).

103. The factors are: "the place of contracting"; "the place of negotiation of the contract"; "the place of performance"; "the location of the subject matter of the contract"; and "the domicile, residence, nationality, place of incorporation and place of business of the parties." *Id.* § 188(2).

104. Gottesman, *supra* note 14, at 8.

105. *Id.* In a recent study, Professor Whytock concludes that "international choice-of-law decisionmaking may be more predictable than conventional wisdom suggests." Whytock, *supra* note 14, at 776. Based on statistical analysis of approximately 200 published district court decisions, he finds that an eight-variable model correctly predicts 78.8% of international choice-of-law decisions. *Id.* Accepting Whytock's conclusion that commentators' claims about the indeterminacy of contemporary choice-of-law doctrine are perhaps overstated, it would seem that the doctrine still fails to generate answers to which regulatory system takes priority in recurring conflict situations. In Whytock's analysis, 21.2% of choice-of-law decisions were *not* accurately predicted by the eight-variable model.

106. *See supra* notes 73-75, 54-55.

107. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964), *superseded by statute* 22 U.S.C. § 2370(e)(2) (2012).

determine which substantive law to apply.”¹⁰⁸

Curiously, the Second Restatement also failed to address the full spectrum of regulatory conflicts, particularly enforcement conflicts. As Part I describes, differences in enforcement strategy can generate political backlash against civil litigation in U.S. courts. Yet the Restatement preserved the historical rule that matters of “procedure” are presumptively governed by forum law.¹⁰⁹ On critical matters such as pleading,¹¹⁰ limitations periods,¹¹¹ and the availability of aggregate proceedings,¹¹² courts following the Restatement do not undertake choice-of-law analysis at all and instead apply the law of the forum. The only justification the Restatement offers is that “in matters of judicial administration, it would often be disruptive or difficult for the forum to apply the local law rules of another state. The difficulties involved in doing so would not be repaid by a furtherance of the values that the application of another state’s local law is designed to promote.”¹¹³

B. *Forum Non Conveniens*

These same shortcomings—reliance on frontline decisionmakers, failure to resolve recurring conflict problems, and incomplete responses to regulatory conflict—appear in the doctrine of *forum non conveniens*. That doctrine seeks to determine the appropriate forum for litigation of a case that can be heard in multiple legal systems.¹¹⁴ In federal law, three leading decisions—*Gulf Oil*

108. Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 821 n.69 (2002). Accord Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1137 (2007); Genevieve G. York-Erwin, Note, *The Choice-Of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1798 (2009).

109. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 122 (1971). See generally Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1266-70 (1999); Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 YALE L.J. 333 (1933).

110. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 127.

111. *Id.* § 142; but see *id.* § 143 (providing that a foreign statute of limitations will be enforced if it bars the right and not merely the remedy).

112. *Id.* § 125.

113. *Id.* § 122 cmt. a. Another area in which the incompleteness of the Restatement’s response to regulatory conflict is manifest is the so-called “penal law exception.” *Id.* § 89. Under that exception, courts will not enforce a foreign law that has the purpose of “punishing the defendant for a wrong done by him.” *Id.* § 89 cmt. a. A large body of law—including all criminal law, certain rights of action created by securities and antitrust statutes, and certain statutes authorizing punitive damages—is thereby excluded from choice-of-law analysis.

114. Since the enactment of the modern venue statute, 28 U.S.C. § 1404, federal courts only apply *forum non conveniens* when a litigant asks that a case be dismissed in favor of litigation in a foreign forum. WRIGHT, *supra* note 20, § 3828. Even so, most states follow

Corp. v. Gilbert,¹¹⁵ *Koster v. Lumbermens Mutual Casualty Co.*,¹¹⁶ and *Piper Aircraft Co. v. Reyno*¹¹⁷—define the doctrine’s key features.

Gulf Oil directs a court presented with a *forum non conveniens* motion to base the decision to dismiss or retain jurisdiction on two sets of indeterminate “public” and “private” interest factors. Public interest factors include the “[a]dministrative difficulties . . . when litigation is piled up in congested centers instead of being handled at its origin,” the burden of jury duty for “a community which has no relation to the litigation,” the accessibility of the litigation to persons it affects, the “local interest in having localized controversies decided at home,” and the interest “in having the trial of a diversity case in a forum that is at home with the state law that must govern the case.”¹¹⁸ Private factors include “the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.”¹¹⁹

Koster holds that a plaintiff’s choice of forum ordinarily is entitled to substantial deference, though the presumption is weaker in actions brought on behalf of a class.¹²⁰ Finally in *Piper*, the Court ruled that the fact that an alternative forum provides less attractive substantive law is generally irrelevant to *forum non conveniens* analysis.¹²¹ *Piper* further instructs, however, that an action may not be dismissed “if the *remedy* offered by the other forum is clearly unsatisfactory.”¹²²

Like choice of law doctrine, *forum non conveniens* avoids comprehensive judgments about which legal system should take priority in recurring categories of regulatory conflict. Under conventional *forum non conveniens* analysis, the choice of forum is postponed until a dispute occurs in a particular case.¹²³ At that point, the choice depends on factors such as “the relative ease of access to sources of proof” that are difficult, if not impossible, to predict before a dispute

the standards described here when considering whether to dismiss an action in favor of litigation in another forum. *See, e.g.,* *Brummett v. Wepfer Marine, Inc.*, 490 N.E.2d 694, 696 (Ill. 1986).

115. 330 U.S. 501 (1947), *partially superseded by statute*, 28 U.S.C. § 1404(a).

116. 330 U.S. 518 (1947).

117. 454 U.S. 235 (1981).

118. *Gulf Oil*, 330 U.S. at 508-09.

119. *Id.* at 508.

120. *Koster*, 330 U.S. at 524.

121. *Piper Aircraft*, 454 U.S. at 254.

122. *Id.* at 254 n.22 (emphasis added).

123. GEORGENE M. VAIRO ET AL., *MOORE’S FEDERAL PRACTICE – CIVIL* § 111.91 (3rd ed. 2013).

occurs.¹²⁴ The use of a multifactor standard to make forum decisions also allocates substantial authority to trial courts, which make findings and balance the factors in the first instance. Indeed, *forum non conveniens* allocates *more* authority to trial courts than choice of law, because trial courts' *forum non conveniens* rulings are protected by a deferential standard of appellate review. Whereas choice of substantive law raises a pure question of law,¹²⁵ the Supreme Court held in *Piper* that “[t]he *forum non conveniens* determination is committed to the sound discretion of the trial court.”¹²⁶

Forum non conveniens also fails to deal with legal systems' use of different enforcement mechanisms in a reasoned manner. Even after *Piper*, the doctrine insists on some form of private enforcement as a condition of deferring to another forum. “[I]f the remedy offered by the other forum is clearly unsatisfactory,” jurisdiction must be retained.¹²⁷ Thus, where the United States makes use of civil litigation to regulate a harm, other legal systems must provide a private cause of action to receive deference under *forum non conveniens*.

The point is best seen through an illustrative example. Suppose that a foreign country establishes a comprehensive administrative scheme to regulate a harm—say, dangerous product design—that in the United States is regulated through private litigation. The foreign scheme includes strict controls on market entry, ongoing monitoring of product design and manufacturing by a dedicated government agency, and severe criminal sanctions for individuals who are involved in the release of an unreasonably dangerous product into the marketplace. However, no compensation is provided to persons who are injured by defective products; the government relies entirely on public enforcement to regulate product design and manufacturing.¹²⁸ Under current doctrine, a U.S. court could not dismiss a private lawsuit in deference to the foreign administrative scheme. As the foreign scheme does not provide a remedy to an individual injured by an unsafe product, that scheme would not

124. *Gulf Oil*, 330 U.S. at 508.

125. See, e.g., *W. Am. Ins. Co. v. RLI Ins. Co.*, 698 F.3d 1069, 1073 (8th Cir. 2012); *Reino de España v. Am. Bureau of Shipping, Inc.*, 691 F.3d 461, 466 (2nd Cir. 2012); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Am. Eurocopter Corp.*, 692 F.3d 405, 408 (5th Cir. 2012).

126. 454 U.S. at 257. For trenchant criticism of this feature of the doctrine, see Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 752-54 (1982).

127. *Piper*, 454 U.S. at 254 n.22.

128. Something like this scheme perhaps exists in China. See *Product Liability in China: Redress by Relocation*, THE ECONOMIST, June 5, 2010, at 90 (noting “the Chinese courts’ reputation for indifference when it comes to product liability”). But see *Jiali Tang v. Synutra Int’l, Inc.*, 656 F.3d 242, 250-51 (4th Cir. 2011) (describing government compensation fund established for victims poisoned by tainted milk).

constitute an “adequate” alternative forum.¹²⁹

* * *

The traditional approach to regulatory conflict encompasses doctrines beyond choice of law and *forum non conveniens*.¹³⁰ However, the shortcomings of those two doctrines adequately illustrate the difficulties with its response to regulatory conflict. The traditional approach avoided *ex ante* judgments about regulatory conflict, deferring decisions until they could be made in the factually rich context of individual cases. It did not address the full spectrum of conflicts that occur when sovereigns disagree over conduct norms or strategies for enforcing the law. And despite the politically charged character of a legal system’s response to regulatory conflict, the traditional approach allocated authority for managing regulatory conflict to trial courts – in the case of *forum non conveniens*, even protecting their decisions via a deferential standard of appellate review.¹³¹ As the social and economic factors that generate regulatory conflict intensified, it is unsurprising that the way the law responds has undergone fundamental transformation.

III. THE NEW CONFLICTS LAW

As Part II describes, the traditional approach’s reliance on indeterminate standards and refusal to address certain categories of regulatory conflict limited

129. See *Piper*, 454 U.S. at 254 & n.22. Since 2001, two federal circuit courts have held that an administrative proceeding can be an adequate alternative forum for purposes of *forum non conveniens*. *Jiali Tang*, 656 F.3d at 250-51; *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1144-45 (9th Cir. 2001). In each case, however, the administrative system provided compensation analogous to that which would be available in a traditional tort lawsuit. *Jilali Tang*, 656 F.3d at 247 (compensation under Chinese government fund for children and families affected by contaminated infant formula); *Lueck*, 236 F.3d at 1142 (compensation under New Zealand Accident Compensation Act). Given *Piper*’s instruction that the foreign forum must provide some remedy, 454 U.S. at 254, it is doubtful that a foreign government could completely replace an individual-centric compensation scheme with an administrative system for regulating harm.

130. Other candidates for inclusion in the traditional approach include: the doctrine of international abstention, see *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519 (11th Cir. 1994) (holding that propriety of abstention turns on relative strength of U.S. and foreign interests, and following *Hilton v. Guyot*, 159 U.S. 113, 205-06 (1895)); the common law rules governing enforcement of foreign judgments, see *Hilton*, 159 U.S. at 202-03 (conclusiveness of foreign judgment a function of eight factors, including fairness of foreign legal system, prejudice to the losing party, and any “special reason why the comity of this nation should not allow [the judgment] full effect”); and arguably, older statements of personal jurisdiction doctrine, see *Int’l Shoe Co. v. Wash. Office of Unemp’t Comp. & Placement*, 326 U.S. 310, 319 (1945) (“[T]he criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.”).

131. See *supra* note 125 and accompanying text.

its utility. Beginning in the mid-1980s and accelerating in recent terms, a new body of law has emerged that takes a far different approach to regulatory conflict. This Part identifies and explains this trend.

The Part begins by outlining the defining features of the “new conflicts law.” It then presents four doctrines that exemplify its approach to regulatory conflict. The Part closes by considering the hypothesis that the doctrinal changes encompassed within the new conflicts law reflect nothing more than simple hostility to private regulatory enforcement.

A. Defining Features

Though not formally recognized in the Supreme Court’s opinions, the new conflicts law is defined by three functional features. First, doctrines within it interpret indeterminate constitutional and statutory provisions that are not obviously “about” regulatory conflict. Second, those doctrines establish clear *ex ante* limitations on the availability of U.S. courts for private regulatory enforcement and thereby prevent conflicts between U.S. litigation and other legal systems’ efforts to regulate harm. Third, the new conflicts law privileges the regulatory preferences of actors operating across jurisdictional lines over the preferences of litigants seeking to enforce U.S. law. Thus, the most important distributional effect of the new conflicts law is to transfer wealth from U.S. plaintiffs to multinational companies.

The conflicts mediated by the new conflicts law appear primarily at the international level, for it is here that differences among different sovereigns’ regulatory strategies are most pronounced. Perhaps inevitably, however, doctrines that originate in the context of international conflicts mediate conflicts among domestic states as well. For this reason, the new conflicts law can be viewed as a metastasizing phenomenon. Originally conceived as a response to international conflicts, it has implications for the relationship among many of the loci of legal authority within the U.S. government.

Just as regulatory conflicts span the spectrum from substance to enforcement strategy, the new conflicts law encompasses doctrines that are nominally substantive and nominally procedural.¹³² Because the new law began to emerge on the procedure side, this Part begins there and works toward doctrines that address conflicts of substantive law. Taken together, these doctrines reflect a significant new approach to regulatory conflict in U.S. law.

B. Forum Selection

The new approach to regulatory conflict first appeared in doctrine

132. See *supra* note 29 (noting origins of substance/procedure distinction).

governing forum selection agreements.¹³³ Such agreements typically specify that the provider of goods or services may be sued only in the courts of a particular jurisdiction.¹³⁴ They “first were seen in shipping and other international commercial transactions” but “now appear in contracts of every description and, if anything, are being used with greater frequency.”¹³⁵

The dilemma presented by forum selection agreements is seemingly straightforward. Elementary contract theory teaches that parties’ joint welfare is maximized if they are held to their *ex ante* commitments governing the forum for litigation.¹³⁶ *Ex ante*, parties have incentives to select the forum that provides the optimal mix of cost, convenience, and coercive power, whereas *ex post*, choice of forum becomes a mechanism for imposing costs on one’s litigation adversary and thereby manipulating a claim’s settlement value.¹³⁷ But forum selection agreements arguably conflict with jurisdictional statutes that empower courts to hear specified kinds of disputes, and more broadly, with Congress’s intent that courts be available to enforce the law.¹³⁸ No federal statute speaks to the general validity of forum selection agreements, so courts have been left to work out the governing standards in common law fashion.

Historically, courts refused to enforce forum selection agreements on the ground that they impermissibly “ousted” the court’s jurisdiction.¹³⁹ In the 1972 case of *The Bremen*, however, the Supreme Court recognized an exception to the ouster doctrine in a case involving an unsuccessful attempt to tow an oil rig

133. See generally WRIGHT, *supra* note 20, § 3803.1; Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55 (1992); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT’L L.J. 323 (1992).

134. See, e.g., *Hancock v. Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1252 (10th Cir. 2012) (“[I]n the event of litigation, AT & T and U-verse customers ‘agree to submit to the . . . jurisdiction of the courts located within the county of Bexar County, Texas’”); *In re Atl. Marine Constr. Co.*, 701 F.3d 736, 737-38 (5th Cir. 2012) (“[D]isputes ‘shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division.’”), *cert. granted*, 133 S. Ct. 1748 (2013).

135. WRIGHT, *supra* note 20, § 3803.1.

136. See generally Benjamin E. Hermalin et al., *Contracts*, in 1 HANDBOOK OF LAW AND ECONOMICS 3, 24 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

137. On the relationship between litigation costs and settlement value, see, for example, ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* 94 (2003).

138. See, e.g., 28 U.S.C. § 1331 (2006) (granting district courts jurisdiction to hear “all civil actions arising under the Constitution, laws, or treaties of the United States”); *id.* § 1332(a)(1) (granting district courts jurisdiction to hear civil actions between citizens of different states).

139. See, e.g., *Nashua River Paper Co. v. Hammermill Paper Co.*, 111 N.E. 678, 680 (Mass. 1916); *Benson v. E. Bldg. & Loan Ass’n*, 66 N.E. 627, 628 (N.Y. 1903).

from Louisiana to Ravenna, Italy.¹⁴⁰ After the rig was destroyed by a storm in the Gulf of Mexico, its owner sought to recover damages from the tow company in the Southern District of Florida, where federal admiralty law would determine the standard of care and measure of damages.¹⁴¹ The tow company sought to have the case heard in London, pursuant to a forum selection agreement. The Supreme Court ruled that a “freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power” should be enforced, because doing so would avoid “much uncertainty and possibly great inconvenience to both parties.”¹⁴²

The watershed event, however, was the Court’s 1991 decision in *Carnival Cruise Lines, Inc. v. Shute*.¹⁴³ At issue was a clause in the ticket for a cruise to Puerto Vallarta, Mexico, which specified that the cruise line could only be sued in Florida.¹⁴⁴ The plaintiffs—an elderly couple pressing a slip and fall claim—credibly argued that they had been unaware of the forum clause when they purchased the ticket, that they would have incurred a substantial financial penalty if they had objected to the clause and returned their ticket, and that enforcing the clause would wipe out the value of their claim.¹⁴⁵ Nonetheless, the Supreme Court ruled that the clause should be enforced according to its terms.¹⁴⁶ Only where enforcement of a forum selection agreement offended “fundamental fairness” could a court ignore a forum selection clause and exercise the jurisdiction conferred by law.¹⁴⁷ Given that such unfairness is difficult to prove,¹⁴⁸ *Carnival Cruise* establishes a policy of near-total deference to forum selection agreements, even when the clauses are contained within standard form contracts of adhesion.

As an application of contract theory, *Carnival Cruise* is suspect. Even

140. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 3, 13 (1972), *partially superseded by statute*, 28 U.S.C. § 1404(a).

141. *Id.* at 3-4.

142. *Id.* at 12-13.

143. 499 U.S. 585 (1991).

144. *Id.* at 587-88.

145. See Brief for Respondents at 26-28, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (No. 89-1647), 1990 WL 508102. Justice Blackmun’s opinion for the Court states that the plaintiffs’ conceded notice of the forum clause, 499 U.S. at 590, but the statement is inaccurate. In fact, plaintiffs wrote that they “do not contest . . . that the forum selection clause was reasonably communicated to the respondents, *as much as three pages of fine print can be communicated.*” Brief for Respondents, *supra* note 145, at 26 (emphasis added).

146. 499 U.S. at 595.

147. *Id.*

148. The Court stated that a forum selection agreement was fundamentally unfair only if it was “a means of discouraging [customers] from pursuing legitimate claims” or obtained through fraud or overreaching. *Id.*

authorities taking a liberal approach toward “buy now, terms later” transactions recognize that for market forces to provide meaningful regulation of contract terms, parties must be able to reject unwanted terms without incurring serious penalties.¹⁴⁹ The *Shutes* could do no such thing, for a provision of the cruise ticket specified that “[t]he Carrier shall not be liable to make any refund to passengers in respect of . . . tickets wholly or partly not used by a passenger.”¹⁵⁰ The Court opined “that passengers who purchase tickets containing a forum clause . . . benefit in the form of reduced fares.”¹⁵¹ But price only approaches cost in a competitive market,¹⁵² and the Court had no information before it on whether the market for cruises is competitive.¹⁵³

The more compelling justification for the *Carnival Cruise* rule is alluded to briefly in the Court’s opinion. The applicable test for the enforceability of a forum selection agreement in admiralty is “reasonableness.”¹⁵⁴ Explaining why *Carnival*’s contract satisfied this test, the court observed that “[b]ecause a cruise ship typically carries passengers from many locales . . . a mishap on a cruise could subject the cruise line to litigation in several different fora.”¹⁵⁵ In such circumstances, enforcing forum selection agreements “dispel[s] any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions.”¹⁵⁶

As this passage recognizes, forum selection agreements have a significant mediating effect on regulatory conflict. Disputes arising out of multijurisdictional transactions can generally be litigated in multiple forums.¹⁵⁷ When parallel litigation occurs, interjurisdictional conflict is practically inevitable. As we have seen, the pendency of litigation in one forum can

149. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (Easterbrook, J.) (noting difficulties raised by the case in which computer purchasers “were first alerted to the bundling of hardware and legal-ware after opening the box and wanted to return the computer in order to avoid disagreeable terms, but were dissuaded by the expense of shipping”); see also *Nw. Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 376 (7th Cir. 1990) (Posner, J.) (“If ever there was a case for stretching the concept of fraud in the name of unconscionability, it was *Shute*; and perhaps no stretch was necessary.”).

150. 499 U.S. at 597 (Stevens, J., dissenting).

151. *Id.* at 594.

152. *E.g.*, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 88 (1989).

153. See Brief for Petitioner at 2-6, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (No. 89-1647) 1991 WL 11007793.

154. *Carnival Cruise*, 499 U.S. at 592.

155. *Id.* at 593.

156. *Id.* at 594.

157. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981).

undermine other states' ability to regulate harm authoritatively.¹⁵⁸ More urgently, parallel litigation encourages courts to interfere directly with one another's exercise of jurisdiction. In a suit lacking an exclusive jurisdictional home, self-interested litigants will select a forum based on the forum's perceived receptivity to the litigant's position and seek to deploy the forum's coercive power to frustrate adjudication of the dispute in other forums through devices such as the anti-suit injunction and "negative declaration."¹⁵⁹ Such devices formally are directed at litigants *in personaem*.¹⁶⁰ But they "restrain the conduct of litigation in another jurisdiction" and thus interfere directly with other sovereigns' ability to regulate harm.¹⁶¹

Enforcing forum selection agreements therefore secures a benefit beyond the usual gains from holding parties to their *ex ante* commitments and conserving judicial resources. Enforceable forum selection agreements preclude *intergovernmental* conflicts caused by the combination of permissive jurisdictional provisions and multi-jurisdictional economic activity. Notably, enforcement of forum selection agreements secures this benefit regardless of whether an agreement is influenced by robust bargaining or competition. *Carnival Cruise*, on this account, is primarily a conflict-mediating rule.

Part IV considers the costs and benefits of that rule. For now, it is enough to note that the rule illustrates the essential characteristics of the new conflicts law: Indeterminate legal materials—here, general jurisdictional statutes—are interpreted in a way that privileges the regulatory preferences of actors doing business within multiple jurisdictions. Private litigants' ability to access U.S. courts for regulatory enforcement is restricted, heading off conflicts between U.S. litigation and coordinate regulatory regimes.

C. Arbitration

Once contract designers are given power to control the forum in which disputes are heard, it is a small step to give them authority over other features of the dispute resolution process. And indeed, around the same time that *Carnival Cruise* transformed the law of forum selection agreements, the Supreme Court began to give contract designers unprecedented power to structure the format of disputes between parties with a pre-existing contractual

158. See *supra* Part 0.

159. See Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237, 245 (2010); Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314, 315-19 (1997); George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 589 (1990).

160. Bermann, *supra* note 159, at 589.

161. *Id.*

relationship. The vehicle for this change is Section 2 of the Federal Arbitration Act (FAA), a once-obscure provision which provides that an agreement to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁶²

The use of arbitration as a device for managing regulatory conflict is a recent phenomenon.¹⁶³ When Congress enacted the FAA in 1925, arbitration was considered “a new procedural remedy, particularly adapted to the settlement of commercial disputes.”¹⁶⁴ Due to its commercial orientation, courts did not read the FAA to require arbitration of claims arising under regulatory statutes.¹⁶⁵ Nor was the FAA understood to apply in state court or preempt state regulation of dispute resolution.¹⁶⁶

Beginning in the 1980s, the Supreme Court charted a new course. The first move was to expand the category of *claims* subject to mandatory arbitration. In 1985, the Court ruled that the FAA permitted mandatory arbitration of private damages claims under the Sherman Act,¹⁶⁷ which led to a line of precedents permitting contract drafters to require arbitration of virtually any cause of action.¹⁶⁸ Summarizing these precedents in 2011, the Court wrote that Section 2 requires enforcement of mandatory arbitration agreements “even when the claims at issue are federal statutory claims, unless the FAA’s mandate has been

162. 9 U.S.C. § 2 (2006). See generally Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008); Paul D. Carrington & Paul H. Haagan, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1996); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 113 (2011); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631 (2005).

163. “Arbitration” refers to “dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding.” BLACK’S LAW DICTIONARY (9th ed. 2009).

164. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 279 (1926).

165. See *Wilko v. Swan*, 346 U.S. 427, 438 (1953), *overruled by* 490 U.S. 477.

166. Cohen & Dayton, *supra* note 164, at 275. See David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 445-46 (2011) (collecting sources and observing “the vast majority of scholars believe that Congress understood the statute to be a federal procedural rule”). But see Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 107 (2002) (arguing that the legislative history of the FAA does not “rule out” the possibility that the FAA was intended to apply in state court).

167. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

168. See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (Truth in Lending Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (Age Discrimination in Employment Act); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 240 (1987) (Securities Exchange Act of 1934, RICO).

‘overridden by a contrary congressional command.’”¹⁶⁹

At the same time, the Court reconceived the relationship between the FAA and state regulation of arbitration. Section 2, the Court concluded, “embodies Congress’ intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause.”¹⁷⁰ Therefore, the command that arbitration agreements “be valid, irrevocable, and enforceable” binds state as well as federal courts,¹⁷¹ and preempts state regulations that “singl[e] out arbitration provisions for suspect status.”¹⁷²

Most recently, the Court concluded that Section 2’s unadorned reference to “arbitration” contemplates specific forms of dispute resolution and therefore precludes efforts to ensure that arbitration preserves features of public court litigation that are critical to private regulatory enforcement. In 2010, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* interpreted the FAA to establish a “rule[] of fundamental importance” according to which a contractual reference to “arbitration” prohibits class actions.¹⁷³ In two subsequent cases, the Court invalidated a pair of doctrines designed by the California Supreme Court and Second Circuit that mandated the availability of class-action arbitration as a check against corporate wrongdoing.¹⁷⁴ “Class arbitration,” the Court opined, changes the nature of “arbitration,” and therefore is preempted by the FAA.¹⁷⁵

Commentators have justifiably excoriated the Court’s reinterpretation of the FAA.¹⁷⁶ Setting aside the failure to follow *stare decisis*,¹⁷⁷ Section 2 is not naturally read to preclude access to the federal courts for enforcement of federal regulatory law,¹⁷⁸ to regulate state courts at all,¹⁷⁹ or to require the use

169. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

170. *Perry v. Thomas*, 482 U.S. 483, 490 (1987).

171. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

172. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

173. 559 U.S. 662, 664 (2010).

174. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

175. *AT&T*, 131 S. Ct. at 1750-52.

176. *See, e.g., Carrington, supra* note 162, at 402; *Resnik, supra* note 162, at 113.

177. *See CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 451-52 (2008).

178. This is particularly true with respect to statutes that contain anti-waiver provisions, such as the Securities Act, 15 U.S.C. § 77n (2006) (“Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.”).

179. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 469 (1989) (observing that “[t]he FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration”).

of specific procedures in arbitration.¹⁸⁰ Indeed, the FAA was enacted prior to the adoption of the Federal Rules of Civil Procedure in 1938 and the passage of major regulatory statutes such as the Civil Rights Act of 1964. To find that Section 2 governs the relationship among arbitration, modern procedural devices, and private enforcement of regulatory statutes, the Court therefore has been forced to resort to a form of “dynamic statutory interpretation” anathema to its textualist Justices.¹⁸¹ As Justice O’Connor observed, “the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”¹⁸²

As with forum selection agreements, however, the reinterpretation of the FAA has a mediating effect on interjurisdictional regulatory conflict that provides a powerful explanation for the Court’s doctrinal creativity. To see how, it is helpful to distinguish between the effect of the new arbitration law on high-value claims that do not require a subsidy to prosecute and low value claims that require subsidization. For high value claims, the reinterpreted FAA has effects similar to *Carnival Cruise*.¹⁸³ By holding parties to an ex ante forum choice, the new arbitration law prevents conflicting exercises of adjudicatory power.¹⁸⁴ This forum selection regime is even more robust than *Carnival Cruise*’s, however, thanks to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which sharply restricts the grounds on which an award may be challenged.¹⁸⁵

For low value claims, the mechanism for eliminating regulatory conflict is more blunt. Here, the defining feature of the new law is that it effectively disables aspects of the U.S. regulatory-enforcement framework that foreign governments and multinational businesses abhor. This reflects the interests of the party that designs arbitration agreements. Empirical research has found that

180. See *id.* at 476 (“There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”).

181. “Dynamic” statutory interpretation accepts that “[t]he interpretation of a statutory provision by an interpreter is not necessarily the one which the original legislature would have endorsed.” WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 5 (1994). Avowedly textualist authors of the Court’s arbitration decisions include Justices Scalia, Thomas, and Alito.

182. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring).

183. See *supra* text accompanying note 157.

184. See Laurence Shore, *Applying Mandatory Rules of Law in International Commercial Arbitration*, 18 AM. REV. INT’L ARB. 91, 92 (2007).

185. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

in areas likely to generate low value claims, arbitration agreements are overwhelmingly drafted by businesses, contained in standard form contracts, and presented on a take-it-or-leave-it basis.¹⁸⁶ In theory, the business designers of arbitration provisions could recreate the regulatory environment of public courts and provide procedures such as liberal discovery, aggregation, and trial by jury that facilitate the assertion of claims.¹⁸⁷ However, the imperative to minimize legal costs ensures that this possibility remains entirely theoretical.¹⁸⁸ By routinely enforcing arbitration agreements according to their terms, the new arbitration law moves U.S. regulatory enforcement in a direction that, in comparative perspective, is marginally less distinctive. In place of juries, an “expert” lawyer resolves factual disputes and applies the law. In place of the broad discovery available under the Federal Rules of Civil Procedure,¹⁸⁹ parties are permitted to investigate the information an arbitrator (or the rules of an arbitration association) deems relevant. In place of proceedings where the claims of many persons are aggregated “into something worth someone’s (usually an attorney’s) labor,”¹⁹⁰ claimants proceed individually.

The new arbitration law therefore represents a double-edged response to regulatory conflict. In it, limitations on forum as well as procedure operate to minimize spillover from U.S. regulatory enforcement.

D. Jurisdiction

At the same time that the regulatory power exercised by private adjudicators has increased, the power exercised by public courts has decreased. The first significant area where this has occurred is personal jurisdiction.

186. See, e.g., Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 62-74 (2004); Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 884 tbl.3, 885 tbl.5, 893 (2008). Cf. Theodore Eisenberg & Geoffrey P. Miller, *Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 351 tbl.2 (2007).

187. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681-85 (2010).

188. See David L. Noll, *Rethinking Anti-Aggregation Doctrine*, 88 NOTRE DAME L. REV. 649, 664-65 (2012). Two commentators predict that lawyers who fail to include class action waivers in standard form contracts “will someday face malpractice liability for not including the waiver in contracts—as a sort of standard vaccine, like a rabies shot.” Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 632 (2012).

189. See FED. R. CIV. P. 26(b)(1) (permitting discovery of “any nonprivileged matter that is relevant to any party’s claim or defense”).

190. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

1. *The Shrinking Reach of State Authority*

Within American constitutional law, there is a long-running debate over the circumstances in which an actor who places a product into the “stream of commerce” thereby becomes subject to the power of states the product affects, including the obligation to respond to lawsuits.¹⁹¹ Since the Supreme Court divided on this question in *Asahi Metal Industry Co. v. Superior Court of California*, two basic positions have dominated the debate.¹⁹²

The first position, articulated in *Asahi* by Justice Brennan, holds that an actor is subject to a state’s jurisdiction if the actor benefits from the state’s market and is aware of that fact.¹⁹³ The second, advanced by Justice O’Connor, requires an additional showing of “action of the defendant *purposefully directed* toward the forum State.”¹⁹⁴ Justice O’Connor contemplated, however, that a variety of activities would satisfy this requirement.¹⁹⁵ And she contemplated that a foreign defendant’s efforts to market to the entire United States would permit individual states to exercise jurisdiction. Her *Asahi* opinion endorsed an Eighth Circuit decision that found an Iowa court lacked jurisdiction over a foreign defendant who “did no business in the United States,” “had no office, affiliate, subsidiary, or agent in the United States,” and “manufactured its component parts outside the United States and delivered them to Toyota Motor Company in Japan.”¹⁹⁶

Given the stability of the Brennan and O’Connor positions in the doctrine,¹⁹⁷ it came as a surprise when, in June 2011, two Supreme Court decisions appeared to establish substantial new limits on states’ regulatory authority. The less controversial of the pair, *Goodyear Dunlop Tires*

191. See generally Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1980); Howard B. Stravitz, *Personal Jurisdiction in Cyberspace*, 49 S.C. L. REV. 925 (1998); Russell J. Weintraub, *A Map out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531 (1995).

192. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

193. *Id.* at 117 (Brennan, J., concurring) (“As long as a participant in this [product distribution] process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit.”).

194. *Id.* at 112 (emphasis added).

195. “[D]esigning the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State” all established jurisdiction. *Id.*

196. *Id.* at 111 (quoting *Humble v. Toyota Motor Co.*, 727 F.2d 709, 710-11 (8th Cir. 1984)).

197. For a bibliography of authorities following the Brennan and O’Connor positions, see E.H. Schopler, Annotation, *Products Liability: In Personam Jurisdiction Over Nonresident Manufacturer or Seller Under “Long-Arm” Statutes*, 19 A.L.R.3d 13 (2011).

Operations, S.A. v. Brown, involved an attempt to hold Goodyear's North American parent company liable for defective tires produced by a Turkish subsidiary.¹⁹⁸ The Supreme Court reaffirmed that a state may exercise "general" personal jurisdiction over a defendant—that is, jurisdiction over any cause of action against the defendant—only if the defendant is "essentially at home in the forum State"—for example, because its headquarters are located there.¹⁹⁹

The more significant and controversial case, *J. McIntyre Machinery v. Nicastro*, addressed the conditions in which a state may exercise *specific* personal jurisdiction over a non-resident defendant—that is, when the state may exercise regulatory authority related to the defendant's in-state activities.²⁰⁰ As Professor Adam Steinman observes, one must take care in interpreting *Nicastro* because the case did not produce a majority opinion.²⁰¹ Even so, the views advanced by the Justices mark an important development in the new conflicts law.

The question in *Nicastro* was whether New Jersey could entertain a products liability lawsuit against the British manufacturer of a shearer, "a recycling machine used to cut metal."²⁰² When the manufacturer entered the U.S. market, it contracted with an independent Ohio company to market and distribute its equipment.²⁰³ The manufacturer did not aim to sell its equipment within a specific region or state; instead, sales representatives attended trade shows with a national audience, and company e-mails showed the manufacturer intended to sell anywhere U.S. buyers could be found.²⁰⁴ This choice of distribution structure was motivated by a desire to avoid U.S. product liability law. In an email to the Ohio distributor, the manufacturer's president wrote: "All we wish to do is sell our products in the [United] States—and get paid!"²⁰⁵ While operating one of the manufacturer's shearers in Saddle Brook, New Jersey, the plaintiff Robert Nicastro severed four fingers.²⁰⁶ The Ohio distributor had gone bankrupt prior to the accident,²⁰⁷ so Nicastro brought a

198. 131 S. Ct. 2846 (2011).

199. *Id.* at 2851.

200. 131 S. Ct. 2780 (2011). For the leading statement of the distinction between general and specific personal jurisdiction, see Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

201. Adam N. Steinman, *The Meaning of McIntyre*, 18 SW. J. INT'L L. 417, 419 (2012).

202. *Nicastro v. J. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 577 (N.J. 2010).

203. *Nicastro*, 131 S. Ct. at 2786.

204. *Id.* at 2796-97 (Ginsburg, J., dissenting).

205. *Id.* at 2786 (Ginsburg, J., dissenting).

206. *Id.* at 2786.

207. *Id.* at 2796 n.2.

products-liability suit directly against the manufacturer. The New Jersey courts determined the manufacturer was subject to jurisdiction in New Jersey.²⁰⁸

The Supreme Court held that this assertion of jurisdiction violated due process.²⁰⁹ Justices Breyer and Alito provided the deciding votes. They found the case indistinguishable from *World-Wide Volkswagen Corp. v. Woodson*²¹⁰ and *Asahi* and would have gone no further.²¹¹ Four Justices, however, joined a far-reaching plurality opinion authored by Justice Kennedy, which concluded that New Jersey's exercise of jurisdiction violated due process because the manufacturer did not "manifest an intention to submit to New Jersey's power."²¹²

Viewing personal jurisdiction fundamentally as a question of state authority, the plurality posited that "[a]s a general rule, the sovereign's exercise of power requires some act by which the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'"²¹³ All-purpose consent to the sovereign's authority could be inferred from "[p]resence within a state at the time suit commences through service of process," "[c]itizenship or domicile," or "explicit consent."²¹⁴ But selling goods "permit[ted] the exercise of jurisdiction only where the defendant can be said to have *targeted* the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State."²¹⁵ Moreover, the relevant sovereign for this analysis was the specific one asserting regulatory power: "it is [the manufacturer's] purposeful contacts with *New Jersey*, not with the *United States*, that alone are relevant."²¹⁶

Having determined that only actions targeted at New Jersey mattered, the plurality easily found that New Jersey's exercise of jurisdiction violated due process. Neither the fact that the manufacturer targeted the United States, the fact that its representatives attended tradeshows with a national audience, nor the fact that the shearing machine was used in New Jersey showed purposeful targeting of the state.²¹⁷ Accordingly, New Jersey's courts were "without

208. *Nicastro v. J. McIntyre Mach. Am., Ltd.*, 987 A.2d 575 (N.J. 2010); *Nicastro v. J. McIntyre Mach. Am., Ltd.*, 945 A.2d 92 (N.J. Super. Ct. App. Div. 2008).

209. *Nicastro*, 131 S. Ct. at 2791.

210. 444 U.S. 286, 312 (1980).

211. *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring in the judgment).

212. *Id.* at 2788 (plurality opinion).

213. *Id.* at 2787 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

214. *Nicastro*, 131 S. Ct. at 2787.

215. *Id.* at 2788 (emphasis added).

216. *Id.* at 2790 (emphasis added).

217. *Id.*

power” to judge the safety of the shearer or provide a remedy to the plaintiff.²¹⁸

2. Personal Jurisdiction and Regulatory Spillover

From the perspective of traditional jurisdictional theory, the plurality’s analysis is odd. As Justice Ginsburg observed in dissent, the idea that a foreign manufacturer can target the whole of the United States without targeting individual states of the union is illogical and formalistic.²¹⁹ But again, what appears to be senseless when approached from a traditional doctrinal perspective takes on new coherence when seen as a response to regulatory conflict.

The key in this context is the United States’ distinctive approach to regulating product safety. The United States relies heavily on ex post litigation to control unsafe product design and manufacturing.²²⁰ And the standards applied in such litigation—such as the rule of strict product liability—are often unique to the United States.²²¹ This system “frees individuals from total dependence on collective bureaucratic remedies and gives them a personal stake in the administration of justice,”²²² but also leads to predictable regulatory conflicts. Most pressing is the problem of regulatory spillover. Product liability law is administered by fifty state legal systems, each of which can judge the safety of any product that enters its local market. But “[e]conomies of scale in mass production and mass distribution effectively require the manufacturer to sell the same product on a nationwide basis.”²²³ Because the

218. *Id.* at 2791.

219. *Id.* at 2800 (Ginsburg, J., dissenting).

220. See, e.g., Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 810 (2003) (quoting Geraint G. Howells, *The Relationship Between Product Liability and Product Safety—Understanding a Necessary Element in European Product Liability Through a Comparison with the U.S. Position*, 39 WASHBURN L.J. 305, 306 (2000)) (observing that “Europe has tried to create a product safety regime based on regulations administered by public authorities’ while the United States has more recently been committed to deregulation”); see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt.a (1998).

221. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) (observing that because the action was transferred from United States to Scotland, plaintiffs would not be able to rely on strict products liability theory); see also *id.* at 252 n.18 (listing other differences between U.S. and foreign approaches to product safety regulation, including availability of jury trial, availability of discovery, and availability of contingent fee litigation financing).

222. Richard B. Stewart, *Crisis in Tort Law?: The Institutional Perspective*, 54 U. CHI. L. REV. 184, 198 (1987).

223. Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 950 (1996).

states exercise overlapping regulatory authority, any single state's standards have the potential to become a de facto international default "regardless of whether they represent either an efficient solution or the national consensus."²²⁴

The *Nicastro* plurality's rule is a powerful, if indirect, response to that problem. As noted, the point of innovation involved the jurisdiction targeted by a foreign manufacturer: the plurality required an out-of-state manufacturer to target a specific state, not the nation as a whole, for the state to exercise jurisdiction.²²⁵ By requiring that a manufacturer specifically target a state, the plurality would limit state courts' power to establish design standards through ex post litigation to the atypical case in which a manufacturer or distributor takes special steps directed at the local market.²²⁶ For the much larger universe of cases in which undifferentiated products are sold in the national and international market, state courts are stripped of authority to establish safety standards because they lack jurisdiction to adjudicate.²²⁷

The plurality's reconceptualization of personal jurisdiction thus embodies the defining features of the new conflicts law. As Professor Arthur R. Miller observes, the rule privileges the regulatory preferences of businesses operating across international borders; under *Nicastro*, "a corporate defendant may be able to structure its distribution system and send products to all fifty states, while avoiding the reach of any, or almost any, individual state's courts."²²⁸

224. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1386 (2006); accord Michael W. McConnell, *A Choice of Law Approach to Products-Liability Reform*, in NEW DIRECTIONS IN LIABILITY LAW, 37 PROC. ACAD. POL. SCI. 90, 91-92 (W. Olson ed. 1988). For a comparative perspective, see Anu Bradford, *The Brussels Effect*, 107 NW. L. REV. 1 (2012).

225. *J. McIntyre Mach. Am., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011).

226. To be sure, a state could continue to establish standards that operate as a national or international default through mechanisms other than ex post litigation. For example, if California passed a statute requiring every toaster sold in the state to include a childproof lock, that standard would likely become a national default due to the size of the California market and the benefits of mass production. As noted above, however, litigation is the dominant mode of product safety regulation in the United States. See also Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 382 (2007) (noting feebleness of the U.S. Consumer Product Safety Commission).

227. Formally, *Nicastro*'s approach to personal jurisdiction does not limit the territorial reach of U.S. regulatory law. A New Jersey plaintiff injured by a defective product manufactured in the United Kingdom can go to the United Kingdom and ask the U.K. court to apply U.S. law. As a practical matter, however, *Nicastro* has similar effects. Procedural matters are determined by the law of the forum, so a litigant forced to litigate in a foreign forum cannot avail herself of claim-enabling features of U.S. procedure. And in many cases, the costs of travelling to the distant forum will overwhelm the expected value of a judgment.

228. Arthur R. Miller, *McIntyre in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 475 (2012).

However, the rule also establishes conditions that minimize regulatory conflict. Lacking authority to adjudicate, states are deprived of power to establish standards that conflict with the standards and regulatory strategies of other legal systems.

E. Extraterritoriality

The other significant area in which the regulatory power of public courts has decreased involves the territorial reach of regulatory statutes or the “presumption against extraterritoriality.”²²⁹ Just as *Nicastro* links a foreign manufacturer’s exposure to state regulation to its undertaking an act directed at the state, a reconceived presumption against extraterritoriality ties the applicability of U.S. regulatory statutes to an actor undertaking a predetermined transaction within the United States. Again, interjurisdictional regulatory conflict lies at the heart of the doctrinal change.

The presumption against extraterritoriality encapsulates the common sense idea that “legislation of Congress . . . is meant to apply only within the territorial jurisdiction of the United States.”²³⁰ The technical function performed by the presumption—separating permissible territorial applications of a statute from impermissible extraterritorial functions—is famously challenging. Congress does not ordinarily specify where liability-triggering facts must occur, so a court confronted with a multijurisdictional transaction must decide if the statute (or statutes) invoked by the plaintiff apply to the transaction.²³¹

Courts traditionally took an ecumenical approach toward the facts that supported the application of U.S. law.²³² To be sure, courts disagreed over whether the presumption against extraterritoriality required conduct in the United States, effects on the U.S. market, or a combination of the conduct and effects.²³³ Once that decision was made, however, a wide range of evidence could support the application of U.S. law. In a leading Second Circuit case, the court applied Section 10(b) of the Securities Exchange Act to a fraud that culminated in trades on the London Stock Exchange, based on the delivery of a

229. See generally William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85 (1998); Jonathan Turley, *When in Rome: Multinational Misconduct and the Presumption against Extraterritoriality*, 84 NW. U. L. REV. 601 (1990); Thomas W. Bennett, Note, *The Canon at the Water’s Edge*, 87 N.Y.U. L. REV. 207 (2012).

230. *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991)).

231. See Dodge, *supra* note 229, at 87; Bennett, *supra* note 229, at 243.

232. See Dodge, *supra* note 229, at 88.

233. See *id.*

proposal and financial statements in New York, phone calls placed from England to New York, and the delivery of mail to a New York office.²³⁴

In the 1990s, doctrine began to shift in a more categorical direction. Initially, the shift took the form of rules-based exclusions from federal statutes in cases with a foreign element. *EEOC v. Arabian American Oil Co (Aramco)* carved out “employment practices of United States employers who employ United States citizens abroad” from the coverage of Title VII.²³⁵ And *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* read the Foreign Trade Antitrust Improvements Act to exclude from the Sherman Act conduct with an “adverse foreign effect” independent of any effect on the domestic market.²³⁶

In 2010, the Court went further still. *Morrison v. National Australia Bank Ltd.* ruled that § 10(b) of the Securities Exchange Act applies only to frauds that culminate in “transactions in securities listed on domestic exchanges, and domestic transactions in other securities.”²³⁷ Quoting selectively from the Exchange Act’s text, the Court reasoned that this “transactional test” reflected the purchase-and-sale transactions that were “the focus of the Exchange Act.”²³⁸ Critically, the transactional test also alleviated “interference with foreign securities regulation” complained of by the United Kingdom, the Commonwealth of Australia, the Republic of France, and a variety of industry associations.²³⁹

The Court invoked the same concerns the past term to justify a new, territorial limitation on the reach of the Alien Tort Statute. As explained above, the Court had ruled in *Sosa v. Alvarez-Machain* that the ATS permits federal courts to recognize a cause of action for the violation of an international law norm that is specific and universally accepted.²⁴⁰ Taken together, that holding, the ATS’s specific reference to the law of nations, the fact that one of the three paradigm norms identified in *Sosa* was piracy, and the practical importance of remedying foreign torts that place the United States in breach of its international obligations suggest the ATS applied to some actions outside the

234. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1331-32, 1334 (2d Cir. 1972).

235. *Aramco*, 499 U.S. at 246.

236. 542 U.S. 155, 164 (2004).

237. 130 S. Ct. 2869, 2884 (2010).

238. *Id.* at 2894.

239. *Morrison*, 130 S. Ct. at 2886 (citing amicus curiae briefs of the Commonwealth of Australia, the United Kingdom of Great Britain and Northern Ireland, the Republic of France, and the International Chamber of Commerce, the Swiss Bankers Association, the Federation of German Industries, the French Business Confederation, the Institute of International Bankers, the European Banking Federation, the Australian Bankers’ Association, and the Association Francaise des Entreprises Privées).

240. 542 U.S. 692, 725 (2004).

United States.²⁴¹ But in *Kiobel v. Royal Dutch Petroleum*, the Court ruled that unless a claim “touch[es] and concern[s] the territory of the United States,” federal courts are without power to recognize a cause of action under the ATS.²⁴² Given that domestic activities are usually covered by domestic laws, application of the presumption against extraterritoriality in *Kiobel* reduced the causes of action permitted by *Sosa* to something approaching a null set.

The degree of interpretative creativity in *Morrison* and *Kiobel* is striking. But the deeper significance of the decisions lies in how and by whom territorial applications of a statute are identified. *Morrison* transforms the presumption against extraterritoriality from a generalization about Congress’s intent into a license to generate rules that determine the territorial reach of U.S. law. Instead of inquiring whether Congress intended to reach a particular transaction, a court following *Morrison* selects an empirical trigger that reflects the “focus” of a regulatory statute and applies the statute (or not) based on whether the trigger is satisfied.²⁴³

The Supreme Court has not acknowledged this change in approach, much less attempted to justify it. However, it is difficult not to see the influence of interjurisdictional regulatory conflict at work. Insofar as it permits U.S. courts to assert regulatory power whenever they perceive an interest in regulating a transaction, a flexible, standards-based approach to extraterritoriality invites regulatory conflict. The new approach, by contrast, limits the applicability of U.S. law to situations where multinational actors opt-in to U.S. regulation by undertaking a triggering transaction.

The new conflicts law has thus come to inform a question so basic as how far U.S. law extends. By establishing clear conditions for the application of U.S. legislation, the reconceived presumption against extraterritoriality enables actors doing business across international borders to anticipate when they will be subject to U.S. law with a high degree of certainty. As such, it minimizes

241. See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 21-28 (D.C. Cir. 2011).

242. 133 S. Ct. 1659, 1669 (2013).

243. See, e.g., *Tañedo v. E. Baton Rouge Parish Sch. Bd.*, No. SA CV10-01172 JAK (MLGx), 2012 WL 5378742, at *6 (C.D. Cal. Aug. 27, 2012) (identifying “focus” of Trafficking Victims Protection Act); *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 474 (S.D.N.Y. 2010) (identifying “focus” of RICO). Although the methodology of extraterritoriality has changed, the Court does not appear prepared to revisit the conclusion that certain market-regulating statutes apply extraterritorially. See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (Sherman Act); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287-288 (1952) (Lanham Act). Indeed, between *Aramco* and *Morrison*, the Court concluded that the Sherman Act not only applies extraterritorially, but is not limited by principles of international comity unless compliance with both the Act and a foreign regulatory scheme is literally impossible. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993).

interjurisdictional regulatory conflict.

F. Is There an Alternate Explanation?

The doctrines described in this Part originate in different areas of the law—jurisdictional statutes, procedural statutes, the Due Process Clause, and unwritten canons of statutory interpretation—and occupy different points along the spectrum between substance and enforcement. Yet they are united by a common functional logic. Interpreting indeterminate legal provisions, the doctrines give the force of law to the regulatory preferences of actors operating across national and international jurisdictional lines. The doctrines thereby minimize regulatory conflicts generated by the operation of U.S. litigation and other regulatory schemes in space no sovereign has exclusive authority to regulate.²⁴⁴

It is because of this functional similarity that this Article presents *Carnival Cruise*, the new arbitration law, the 2011 jurisdiction rulings, and the reconceived presumption against extraterritoriality as exemplars of a new conflicts law. Before accepting that classification, however, one might consider the possibility that other forces explain the same group of doctrinal changes. In particular, it might be argued that the changes described in this Part are nothing but examples of the “hostility to litigation” that, some scholars believe, provides the “organizing theme” for the Rehnquist (and now Roberts) Court’s jurisprudence.²⁴⁵ According to this view, “hostility to the institution of

244. The functional logic of the doctrines within the new conflicts law raises the question whether that law also encompasses the Supreme Court’s modern preemption doctrine. Like the doctrines within the new conflicts law, preemption cases deal with the compatibility or incompatibility of overlapping regulatory schemes – paradigmatically, state tort litigation and a federal regulatory scheme. *See, e.g.*, Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228-29 (2000); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 459 (2008). Where state tort litigation interferes with the intended operation of the federal regulatory scheme, state law is often held preempted. *E.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000).

But, for two reasons, modern preemption doctrine should not be considered part of the new conflicts law. First, preemption decisions do not consistently limit court access in the manner of the doctrines discussed herein. While the Court has held many forms of state tort litigation preempted, *see id.*, it has permitted state tort litigation to exist alongside federal regulation in cases where the regulatory schemes arguably conflict, *see, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 501-02 (1996); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 68 (2002). Second, due to this variability, preemption doctrine as a whole does not permit defendants to manage their exposure to U.S. regulatory systems in the manner characteristic of the new conflicts law. For businesses, if preemption is a scalpel, the new conflicts law is a chainsaw.

245. Siegel, *supra* note 12, at 1108. *See also* Miller, *supra* note 228, at 475 (“[A]cceleration of case disposition has come about because courts have erected a sequence of procedural stop signs over the past twenty-five years.”); Resnik, *supra* note 162, at 80

Litigation” explains recent developments in the law of remedies, official immunity, access to courts, punitive damages, federalism, and even *Bush v. Gore*.²⁴⁶ If hostility to litigation explains these developments, could it also explain the doctrinal changes within the new conflicts law?²⁴⁷

The explanation is not entirely implausible. Each doctrinal change within the new conflicts law makes it more difficult for private litigants to enforce the law in U.S. courts, so it is possible that the changes reflect nothing more than simple hostility to private regulatory enforcement. The more likely explanation, however, is that the doctrinal changes within the new conflicts law reflect concern with regulatory conflict *as well as* more generalized hostility to litigation. There is no logical reason why a Supreme Court preoccupied with the costs of private regulatory enforcement could not also be preoccupied with the negative effects of U.S. litigation on coordinate regulatory regimes. And the Court’s stated justifications suggest more is at work than skepticism about private regulatory enforcement.²⁴⁸

On this account, the Court’s general skepticism about private regulatory enforcement is particularly pronounced when private enforcement interferes with coordinate regulatory schemes. Whatever the costs of private regulatory enforcement generally, they become too high when private enforcement has spillover effects for foreign regulation.

Understanding the new conflicts law this way captures two benefits. First, it lends insight into the stated justifications for recent doctrinal changes. The Court many times has justified changes to doctrines governing the availability of a U.S. forum on the ground that the changes are necessary to avoid regulatory conflict,²⁴⁹ and attention to the mechanics of regulatory conflict

(“[T]he constitutional concept of courts as a basic public service provided by government is under siege.”); Meltzer, *supra* note 12, at 343 (noting that “the Court has sought, across a broad range of subject matters, to reduce the role of judicial lawmaking and to refuse to take responsibility for shaping a workable legal system in the everyday disputes that come before the judiciary without great fanfare.”).

246. Siegel, *supra* note 12, at 1117-91.

247. Thanks to Professor David Franklin for pressing this point.

248. See, e.g., *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2885-86 (2010) (noting regulatory conflicts caused by extraterritorial application of the Securities Exchange Act, and fears that the United States “has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets”); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981) (observing that if plaintiffs’ choice of substantive law were given controlling weight, “the *forum non conveniens* doctrine would become virtually useless” given that plaintiffs “select that forum whose choice-of-law rules are most advantageous”).

249. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2794 (2011) (Breyer, J., concurring) (“It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its

shows that these claims are not necessarily pretextual. Perhaps more importantly, focusing on regulatory conflict has payoffs for normative analysis of the new conflicts law and advocacy that seeks to change it. As the following Part demonstrates, even if one accepts the basic impulse underlying the new conflicts law, the specific design choices the law makes are contestable. Approaching the new conflicts law as a genuine response to regulatory conflict allows those choices to be evaluated and challenged on their merits. By contrast, seeing that law as nothing but hostility to litigation leaves one with no option but begging the Court to be kinder to plaintiffs.

IV. TAKING STOCK

Until this point, the burden of this Article has been to show the existence of the new conflicts law, illuminate its defining features, and show how the law prevents regulatory conflict. As the prior Parts explain, the Supreme Court in recent decades has created a new body of law that operates through clear *ex ante* rules, limits the availability of U.S. courts for regulatory enforcement, and privileges the regulatory preferences of actors doing business across territorial borders. The new law thereby prevents conflicts between U.S. litigation and foreign regulatory schemes.

In this final Part, the focus of the Article shifts in a critical direction. The Part offers a preliminary assessment of the new conflicts law based on its consequences for economic welfare and enforcement of U.S. regulatory policy, and explains the implications of that analysis for the design of specific conflict-mediating doctrines. The basic theme is that the new conflict law makes a number of questionable design choices. While the impulse to avoid regulatory conflict is understandable, the new law does not necessarily improve welfare or adopt a sound approach to enforcement of U.S. regulatory policy.²⁵⁰

products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good.”); *Carnival Cruise v. Shute*, 499 U.S. 585, 593–94 (1991) (“[A] clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended”); *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516–17 (1974) (“A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction”)).

250. Of course, how one evaluates the new conflicts law depends on one’s choice of evaluative framework. In considering the new law’s effects for welfare and regulatory enforcement, the Article makes use of two frameworks central to American legal scholarship.

A. Welfare

One way of approaching the new conflicts law is to consider its consequences for economic welfare: will the law improve global welfare through rules that allocate resources efficiently?²⁵¹ Two features of the new law particularly lend themselves to economic analysis: the switch from standards to rules, and the adoption of rules that permit multinational actors to determine when they are subject to U.S. regulatory systems.

1. From Standards to Rules

As Part III describes, the new conflicts law foregoes the use of indeterminate standards to manage regulatory conflict. Instead, the law links the applicability of U.S. regulatory systems to specific empirical or transactional triggers: the selection of a U.S. forum via a forum selection agreement or arbitration clause, or activity triggering the applicability of U.S. regulation.

This move improves welfare, if only because of its effect on litigation costs. Under the traditional approach, litigants and courts must identify and balance the interests various legal systems take in regulating a transaction, a notoriously costly undertaking.²⁵² Among other things, the analysis requires a court to identify the purpose (or purposes) of various states' regulatory systems, whether and to what degree those purposes are furthered by applying a state's statutes to a particular transaction, and which among several states has the *stronger* interest in regulating the transaction.²⁵³ Under the new conflicts law, by contrast, a court need only determine whether a trigger is satisfied to determine the applicability of a U.S. regulatory regime. Compared to the analysis required by the traditional approach, the costs of that determination are negligible.

Decreased decision costs are a feature of all rules, and the choice of rules

251. For other applications of economic theory to problems of regulatory conflict, see, e.g., Guzman, *supra* note 13; Michael I. Krauss, *Product Liability and Game Theory: One More Trip to the Choice-of-Law Well*, 2002 BYU L. REV. 759; McConnell, *supra* note 224; O'Hara & Ribstein, *From Politics to Efficiency in Choice of Law*, 2000 U. CHI. L. REV. 67; Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989).

252. See, e.g., Roosevelt, *supra* note 14, at 10; Gottesman, *supra* note 14, at 12; Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 957 (1981).

253. See RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 (1971). Cf. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501 (1947) (holding that choice of forum turns on: administrative convenience, accessibility of the litigation to persons it affects, local interest in having localized controversies decided at home, and the forum's interest in elaborating its own law).

over standards ordinarily involves a tradeoff with accurate application of the law's underlying objectives.²⁵⁴ The context of regulatory conflict, however, is an exception. While it may be sensible to attribute a purpose to a statute or common law rule that unquestionably governs a transaction,²⁵⁵ the presence of regulatory conflict means, by definition, that legitimate policymakers differ over the objective the law serves or how those objectives should be accomplished.²⁵⁶ When more than one regulatory system potentially applies to a transaction, the question is not how to efficiently further the law's underlying purposes, but which regulatory system applies. Accordingly, it does not necessarily entail diminished fidelity to the underlying purposes of the law.

Defenders of the traditional approach might respond that the law in conflict situations seeks to promote system values such as the protection of parties' "justified expectations," and that standards vindicate those values more accurately than rules.²⁵⁷ The difficulty with this argument is that legal systems no more agree on the objectives the interstate and international systems serve than they do on other questions of regulatory policy.²⁵⁸ Even the Restatement (Second), which purports to identify choice of law principles suitable for all fifty states, lists seven objectives courts should be guided by in conflicts cases, and they often conflict.²⁵⁹

In short, the move from standards to rules captures gains in litigation costs without the usual sacrifice of fidelity rules entail. From a welfare perspective, the move is beneficial.

254. See, e.g., SCHAUER, *supra* note 9, at 33; Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 992 (1995).

255. But see John F. Manning, *Textualism and Equity of the Statute*, 101 COLUM. L. REV. 1, 19 (2003) (noting textualists' skepticism "that judges [can] discover an actual (but unexpressed) legislative 'intent'").

256. See Guzman, *supra* note **Error! Bookmark not defined.**, at 896 ("[T]he very existence of a conflict demonstrates that the relevant jurisdictions have different views on which is the best law, so the governments will be unable to reach consensus on which law is better.").

257. See Shore, *supra* note 184, at 92 (observing that "some arbitrators seek to rely on the parties' 'legitimate expectations' or to formulate some type of connection to the dispute to justify the application or non-application of a mandatory rule").

258. See William F. Baxter, *Choice of Law in the Federal System*, 16 STAN. L. REV. 1, 5 (1963) ("Every choice-of-law case involves several parties, each of whom would prevail if the internal law of one rather than another state were applied. . . . Fact situations which differ only in that they are internal to a single state have been assessed by the different groups of lawmakers, and each has reached a different value judgment on the rule best calculated to serve the overall interest of its community.').

259. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 (1971).

2. *Privileging Private Regulatory Choice*

The more controversial feature of the new conflicts law is that it enables regulated actors to determine when they are subject to U.S. regulatory systems. For example, the *Nicastro* Court's understanding of personal jurisdiction permitted the manufacturer in that case to take advantage of the U.S. market while avoiding product safety standards established by the state of New Jersey.²⁶⁰ Because the manufacturer targeted the United States as a whole rather than New Jersey specifically, the state was "without power" to demand the manufacturer's appearance in proceedings to assess the safety of its shearer.²⁶¹

Drawing on seminal work of Charles Thiebout²⁶² and Albert O. Hirschman,²⁶³ law-and-economics scholars have argued that rules which permit parties to select the legal regime governing their affairs improve social welfare because they create a market in regulation or "law market."²⁶⁴ When parties are permitted to select a legal regime, these scholars posit, the parties will select the regime that provides optimal protection of their interests, and the threat of "exit" to other regulatory regimes will encourage lawmakers to enact efficient laws.²⁶⁵ In the account of Professors Erin O'Hara and Larry Ribstein, "the exit option may not only give people and firms a way to avoid undesirable laws, but also provide a mechanism for pressuring governments to change those laws."²⁶⁶

Whether permitting parties to select a regulatory regime in fact leads to efficient laws is the subject of considerable empirical debate and a question this Article does not take up.²⁶⁷ Yet even proponents of the "law market" theory acknowledge that certain basic conditions must be satisfied for competition among legal regimes to lead to more efficient regulation. And by and large, the new conflicts law is indifferent to those conditions.

260. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011).

261. *Id.* at 2786 (Ginsburg, J., dissenting).

262. Charles M. Thiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

263. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

264. *See supra* note 13.

265. *See, e.g.,* Guzman, *supra* note 13, at 897; ROMANO, *supra* note 13, at 5; Winter, *supra* note 13, at 258.

266. O'HARA & RIBSTEIN, *LAW MARKET*, *supra* note 13, at 27-28.

267. The most developed literature considers the consequences of permitting corporate directors to choose the legal regime governing a corporation's affairs by selecting the state of incorporation. For a useful bibliography, see Kagan Kocaoglu, *A Comparative Bibliography: Regulatory Competition on Corporate Law* (Mar. 2008) (Georgetown Law Working Paper), available at <http://ssrn.com/abstract=1103644>.

a. Notice

First, for private regulatory choice to promote welfare, the parties to a transaction must be able to determine which legal system they are agreeing to ex ante. If this is impossible, neither bargaining nor market competition will discipline the parties' choice of legal regime. Assuming it acts in its short-term self-interest, the party with superior information will simply use that choice to extract private gain.²⁶⁸

The new conflicts law probably satisfies this condition for transactions involving sophisticated parties. For example, it is reasonable to expect purchasers of individual securities to be aware of *Morrison's* rule that only frauds that culminate in a transaction on a domestic exchange are covered by the Securities Exchange Act's anti-fraud regime.²⁶⁹ At the same time, there are areas in which the new conflicts law practically encourages powerful economic actors to obfuscate the governing legal regime. Consumer contracts provide "notice" of the governing legal regime in a form that few consumers comprehend.²⁷⁰ Similarly, the user of a potentially dangerous product has no way to know whether the manufacturer has specifically targeted a jurisdiction. Thus, under the rule of the *Nicastro* plurality, the manufacturer's susceptibility to suit turns on a fact that cannot reasonably be ascertained from the product itself.²⁷¹

b. Plasticity

A second condition for successful regulatory competition involves the plasticity of the governing legal regime. Proponents of the law market theory assume that the applicable legal regime is, if not negotiable, at least constrained by competition among sellers.²⁷² Again, if this condition does not hold, there is

268. See O'HARA & RIBSTEIN, *LAW MARKET*, *supra* note 13, at 28.

269. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010).

270. See *supra* note 143 and accompanying text. On consumer comprehension of standard form contracts, see also Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* (N.Y.U. Law & Econ. Working Paper No. 195, Oct. 1, 2009); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1230-34 (2003). In light of evidence that almost no consumers comprehend non-salient terms in standard form contracts, see Bakos, *supra*, it is doubtful whether the choices of an informed minority will be able to protect consumers as a class from inefficient legal regimes selected by sellers. See generally Alan Schwartz & Louis Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 662-63 (1979).

271. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789-90 (2011).

272. See, e.g., Guzman, *supra* note 13, at 914 ("The transactions that parties choose to make will be both welfare-increasing and value-maximizing because the parties to the transaction will seek the highest possible return."); ROMANO, *supra* note 13, at 229-30 ("In

no reason to think that negotiation or market competition will drive the parties' choice of law toward an efficient result.

The regulatory choices enabled by the new conflicts law, however, are not consistently negotiable or constrained by competition. In transactions involving sophisticated parties, parties may actually bargain about the governing law or forum for dispute resolution.²⁷³ But in consumer transactions, the governing legal regime is dictated by sellers in standard form contracts of adhesion, and the available evidence gives little reason to think that adhesive terms are constrained by competition.²⁷⁴ To the contrary, an emerging body of empirical research suggests that contract terms governing the forum and procedures for dispute resolution quickly become industry defaults, as sellers who fail to make use of state-of-the-art liability protections place themselves at a competitive disadvantage to less scrupulous rivals.²⁷⁵

c. Externalities

Lastly, for regulatory competition to succeed, the parties' choice of law must not generate harmful effects on third parties or the public that overwhelm the gains of private regulatory choice.²⁷⁶ There are situations in which the new conflicts law generates such externalities, however. For example, the restrictions on aggregation ratified in the Supreme Court's most recent arbitration decisions are perfectly rational when approached from the perspective of the contracting parties; the defendant company eliminates a costly form of liability, while individual consumers gain access to a subsidized dispute-resolution forum.²⁷⁷ Yet the system eliminates any incentive for private

response to [exit or market sanctions], managers will want to incorporate in the state offering the most favorable legal package for shareholders, in an effort to increase – or at least maintain – firm value, thereby protecting their jobs.”).

273. See O'HARA & RIBSTEIN, *LAW MARKET*, *supra* note 13, at 34 (“[P]arties [in high-value transactions] are typically represented by lawyers and have strong incentives and [the] ability to negotiate the terms of their contract.”).

274. For a recent overview of evidence showing that competition does not constrain adhesion contract terms, see OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012). For an interesting counterpoint that does not necessarily call into question the validity of the general point, see Robert Brendan Taylor, *Consumer-Driven Changes to Online Form Contracts*, 67 N.Y.U. ANN. SURV. AM. L. 371 (2011) (describing cases in which massive online protests prompted firms to change adhesive terms of service).

275. See Eisenberg, *supra* note 186, at 887-88; Demaine & Hensler, *supra* note 186, at 63 Table 2.

276. O'HARA & RIBSTEIN, *LAW MARKET*, *supra* note 13, at 33-34; Guzman, *supra* note 13, at 914.

277. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (quoting the district court's observation that AT&T's dispute resolution scheme was “sufficient to

parties to pursue claims of systematic wrongdoing by eliminating the cost-sharing permitted by aggregation.²⁷⁸ In a legal system lacking strong public enforcement, the result is that a part of the economy effectively operates without legal regulation.

d. Implications

The foregoing suggests that the new conflicts law is far too willing to defer to private choice of the governing regulatory regime. Private choice may generate welfare gains when parties have notice of the controlling regime, the choice of regulatory regime responds to negotiation or competition, and externalities do not overwhelm the welfare gains created by private regulatory choice. But the new conflict law applies to many transactions where one or more of those conditions does not hold.

Implications vary. In doctrines where one party's actions serve as a de facto selection of the governing regulatory regime—personal jurisdiction and extraterritoriality—courts should at a minimum demand that the affected parties be aware of that choice *ex ante*. Thus, in cases like *Nicastro*, courts should inquire whether the parties were aware of the business structuring that the manufacturer used to evade U.S. jurisdiction. If the parties are not aware of the manufacturer's intention to avoid jurisdiction in any U.S. court, the argument that the manufacturer "purposefully availed" itself of the forum is stronger. If the parties were aware of that intention, the case for purposeful availment is weaker.

In doctrines where a contract memorializes a choice of regulatory regime, the question is how to separate situations in which private regulatory choice improves welfare from those in which it does not. Direct judicial analysis of that question is probably unworkable. Courts can determine if a party had notice of a contract term, but are poorly equipped to assess the plasticity of contractual terms and determine a term's overall social costs.²⁷⁹ The better approach—already followed in some states—permits parties to select a regulatory regime if the value of the underlying transaction surpasses a pre-

provide incentive for the individual prosecution of meritorious claims that are not immediately settled," notwithstanding that the scheme prohibited aggregation).

278. See Noll, *supra* note 188, at 664-65.

279. By way of comparison, studies of the plasticity of contractual terms have attempted to measure how terms respond to exogenous events through statistical analysis of relatively large datasets. See, e.g., Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The CARD Act and Beyond*, 97 CORNELL L. REV. 967, 992-99 (2012); Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240 (2013).

determined threshold such as a million dollars.²⁸⁰ To be sure, this proxy does not align perfectly with the conditions set out above. But in high value transactions, parties are more likely to protect their interests, and the transaction is less likely to generate impermissible externalities as enforcement of a forum selection agreement or arbitration clause is less likely to lead to the de facto elimination of rights.

The benefits of a high stakes/low stakes approach can be seen by considering its effect on *The Bremen* and *Carnival Cruise*. The complaint in *The Bremen* demanded damages of \$3.5 million, or approximately \$20 million in inflation-adjusted dollars,²⁸¹ so the parties' agreement to litigate disputes in London would be enforced. By contrast, the approach would change the outcome in *Carnival Cruise*, because the potential recovery fell below any reasonable threshold for automatic enforcement of a forum contract.²⁸² In the high stakes case where negotiation could reasonably be expected to maximize welfare, a forum contract is enforced; in the low stakes case where enforcement of a forum contract frustrates regulatory enforcement, courts continue to exercise jurisdiction conferred by law.²⁸³

B. Regulatory Enforcement

Another way of approaching the new conflicts law is to consider its effect on the enforcement of U.S. regulatory policy. Of course, U.S. policy is not necessarily good, wise, or efficient.²⁸⁴ But from a self-interested nationalist perspective, the impact of the new conflicts law is relevant and important. Policies embodied in legislation and regulation enjoy a unique claim to

280. See N.Y. GEN. OBLIG. § 5-1402 (McKinney 2012) (providing that "any person may maintain an action or proceeding . . . where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made . . . and which . . . is a contract . . . in consideration of . . . not less than one million dollars").

281. *Zapata Off-Shore Co. v. M/S Bremen GmbH (In re Unterweser Reederei, GmbH)*, 428 F.2d 888, 889 (5th Cir. 1970).

282. The complaint sought an unspecified quantum of damages for a slip-and-fall injury. Joint Appendix at 5AA, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

283. There is no doctrinal barrier to the Court following a high stakes/low stakes approach. Doctrine governing forum selection agreements is a pure creature of federal common law, established and revised in common-law style. While doctrine governing arbitration agreements is governed by the Federal Arbitration Act, § 2 of the Act provides that an agreement may be denied enforcement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The fact that a consumer contract contains unreasonable, adhesive terms is a ground that exists in law and equity for revocation of the contract. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

284. See, e.g., 31 U.S.C. § 3101 (2006 & Supp. VI).

legitimacy within our system of government. Thus, doctrines that frustrate them should be viewed with suspicion.

Seen from this perspective, the new conflicts law's first-order effects are obvious. The new approach to forum selection agreements and arbitration limits courts' remedial power by precluding them from exercising jurisdiction absent the parties' assent. The new law of personal jurisdiction limits courts' power over out-of-state defendants to the rare situation where the defendant specifically targets the jurisdiction in which the court sits. And the reconceived presumption against extraterritoriality literally contracts the reach of U.S. law, and with it, the reach of the courts' regulatory power. The changes have varying effects on federal and state courts. For example, the new arbitration doctrine applies equally to state and federal courts, while the new law of personal jurisdiction has the greatest bite for state courts. But the overall effect is unmistakable. The new conflicts law denies U.S. courts as a class the power to regulate interstate and international harms.

The practical consequences are significant. One commentator observes that to evade the Exchange Act's anti-fraud regime, "anyone selling a complex financial instrument [need only] insist that buyers complete transactions outside of the borders of the United States."²⁸⁵ Or consider a foreign manufacturer that sells a product for free on board a ship at a foreign port.²⁸⁶ If the product proves to be lethal to end users, the 2011 jurisdiction decisions raise the possibility that no U.S. jurisdiction can require the manufacturer to defend the safety of its products.²⁸⁷ Under the rule of the *Nicastro* plurality, the fact that the manufacturer did not target a specific market within the United States means *no* state may exercise jurisdiction over the manufacturer.²⁸⁸

Worrying as these consequences may be, they do not prove that the Court has necessarily erred in designing the new conflicts law. As shown above, the law also avoids inter-governmental conflicts created by civil litigation in U.S.

285. Alison Frankel, *Morrison Strikes Again!: Goldman Get \$1 B Fraud Case Tossed*, THOMPSON REUTERS NEWS & INSIGHT, <http://tinyurl.com/bl986r9> (last visited Feb. 4, 2013).

286. In an FOB contract, "[t]he seller's delivery is complete (and the risk of loss passes to the buyer) when the goods pass the transporter's rail. The buyer is responsible for all costs of carriage." BLACK'S LAW DICTIONARY (9th ed. 2009).

287. See Andrew Martin, *Turning Point for Suits Over Chinese Drywall*, N.Y. TIMES, Oct. 13, 2012, at B1 (describing difficulties establishing personal jurisdiction over Chinese manufacturers of lethal drywall). See also Stephanie Glynn, Comment, *Toxic Toys and Dangerous Drywall: Holding Foreign Manufacturers Liable for Defective Products—The Fund Concept*, 26 EMORY INT'L L. REV. 316, 337 (2012) (observing that "[m]ost Chinese companies strategically structure their businesses using independent importers and distributors in an effort to reduce their exposure to lawsuits").

288. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011); Miller, *supra* note 228, at 475.

courts. Recognizing the tradeoff between mediating regulatory conflict and enforcing domestic regulatory policy, however, suggests a second-order analysis that calls into question many of the new conflicts law's design choices.

In most contexts, the restrictions on U.S. regulatory power established by the new conflicts law are effectively permanent. Yet there is no obvious reason why the Court should make the politically charged tradeoff between asserting regulatory power and deferring to the regulatory systems of other nations. To the contrary, the Court's informational limitations and inability to tailor rules with the precision of legislation or regulation suggest the tradeoff is better made by actors within the political branches. The Court has comparatively little information about the structure of foreign regulatory systems, the extent to which U.S. litigation interferes with foreign regulation, whether foreign governments object to the availability of U.S. litigation, or whether those objections are genuine (and if they are genuine, the Court also has little information about whether those objections make a difference for the foreign policy of the United States).²⁸⁹ And the Court's shrinking docket exerts an influence to adopt broad conflict-mediating rules rather than rules that balance sovereigns' regulatory interests with nuance.²⁹⁰

Turning again to doctrinal design, this second-order analysis suggests the new conflict law's real flaw in terms of regulatory enforcement is not the restriction of U.S. regulatory power per se. Rather, it is the failure to establish doctrines that realistically permit political-branch actors—Congress and the agencies—to address regulatory conflict.

Again, the implications differ for the various doctrines that makeup the new conflicts law. With respect to forum selection agreements and arbitration, the stickiness of the lines drawn by the Court result from the fact that the Court is interpreting general framework statutes that, legislative process theory teaches, will be difficult to amend. In both contexts, the Court could increase political-branch actors' ability to modify the lines it draws by linking the enforceability of a forum-selecting agreement to particular statutes. As such interpretations would affect smaller groups of interest, they should be easier to revise via legislation. Having particularized the doctrine, the Court might also afford deference to the primary enforcement agency's views on whether and in

289. See Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 550 (1997).

290. See, e.g., Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422, 427-28 (2012) ("Adherence to [minimal standards of professional judging] probably caps the capacity of the Supreme Court at somewhere between one hundred fifty and two hundred full-dress decisions per Term, roughly what the Court decided at its peak in the early twentieth century.").

what circumstances a forum-selection agreement should be given effect.²⁹¹

In the context of personal jurisdiction, the stickiness of the Court's judgments results from the fact that the Court is interpreting the Fourteenth Amendment's Due Process Clause. Insofar as recent developments in the doctrine respond to the problem of regulatory spillover, the solution is to forego use of due process and instead establish a determinate, preemptive choice of law rule that specifies which state's law applies in product liability actions against a foreign manufacturer—for example, the law of the state of importation or the state in which the manufacturer does the most business.²⁹² Such a rule would regularize the regulatory regime the United States imposes on foreign product manufacturers. But as the product of federal common law, it would be amenable to Congressional revision if it proved unworkable or unwise.²⁹³

Finally, with respect to extraterritoriality, there is reason to think that the new doctrine potentially is working in the manner envisioned by this Article. Following *Aramco*, Congress amended Title VII to govern the relationship between U.S. employers and employees worldwide.²⁹⁴ At the same time,

291. Because the agency interpretation would reconcile multiple statutes, once the agency is charged with administering and one the agency is not charged with administering, the agency interpretation would not carry the force of law under existing *Chevron* doctrine. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 120-166, 105 Stat. 1071. What the Article contemplates is something akin to the form of deference extended to agencies regarding the preemptive effect of federal regulation on state law. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000).

292. Commentators have proposed several choice of law rules that would minimize regulatory spillover. See, e.g., P. John Kozyris, *Choice of Law for Products Liability: Whither Ohio?*, 48 OHIO ST. L.J. 377, 383-85 (1987) (product's intended place of use); McConnell, *supra* note 224, at 98 (place of first retail sale); William A. Niaskanen, *Do Not Federalize Tort Law: A Friendly Response to Senator Abraham*, 1 MICH. L. & POL'Y REV. 105, 109-10 (1996) (law of state in which manufacturer has most employees); Harvey S. Perlamm, *Products Liability Reform in Congress: An Issue of Federalism*, 48 OHIO ST. L.J. 503, 507 (1987) (manufacturer's choice). The rules have different distributional consequences, and there is little consensus on which would lead to the most efficient national liability regime. See Krauss, *supra* note 251, at 804-26. For purposes of addressing regulatory spillover, it does not matter which of these proposals is followed, provided the choice is uniform and determinate.

293. Again there is little question that the Court possesses the authority to recognize such a rule. The Court has established uniform federal rules of decision where necessary to vindicate "uniquely federal interests." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)). And litigation against foreign manufacturers implicates just such an interest, namely, the nation's ability to provide a coherent regulatory scheme to trading partners.

294. Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (codified at 42 U.S.C. §§ 2000e(f), 2000e-1 (2006)).

Congress established a defense for conduct required by foreign law and specified detailed rules for determining the liabilities of foreign corporations in which a U.S. corporation holds an ownership stake.²⁹⁵ In the aftermath of *Morrison*, Congress restored the conduct-and-effects test for actions initiated by the SEC, and directed the Commission to study whether the private right of action under Rule 10b-5 should be similarly modified.²⁹⁶

Based on this limited experience, the Court's restrictive extraterritoriality decisions appear to be prompting Congress to address problems of regulatory conflict, and specifically, to balance vindication of U.S. regulatory interests with respect for other countries' approaches to regulating harm. For the time being, further change to the doctrine is unwarranted.²⁹⁷

295. 42 U.S.C. § 2000e-1(c).

296. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b)(2), § 27(b), 124 Stat. 1376, 1862 (2010). Due to a scrivener's error (the use of the term "jurisdiction" rather than "territorial reach") there is a question about whether the Act overrode *Morrison* in even this limited respect. See Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 HARV. BUS. L. REV. 195, 199-200 (2011).

297. The most serious potential problem with the reconceived presumption against extraterritoriality involves its relationship with another venerable tool of statutory interpretation, the *Chevron* doctrine. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In recent extraterritoriality decisions, the Supreme Court has suggested that courts have exclusive authority to define the territorial reach of a statute and select the transaction triggering application of U.S. law. *Chevron* instructs, however, that courts should "defer to an agency's reasonable interpretation of a statute it is charged with administering." *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 525 (2009). See *Chevron*, 467 U.S. at 842-44. Whereas courts lack technical expertise and democratic legitimacy to make contested policy judgments, agencies are "experts in the field" and "may . . . properly rely upon the incumbent administration's views of wise policy." *Id.* at 865. Furthermore, it is generally an agency, not a court, that Congress tasks with implementing a statute. See *id.* at 864.

There is accordingly a strong case for judicial deference to reasonable agency interpretations of a statute's territorial reach. See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 693 (2000). Less clear is whether the ordinary test of "reasonableness" should apply in this context. Ordinarily, an agency interpretation is reasonable and entitled to deference if Congress did not resolve the question addressed by the agency and the agency interpretation reflects a reasonable accommodation of conflicting policies. While these tests are usually a useful means of determining whether an agency's interpretation falls within its delegated interpretative authority, the delegation of authority in conflicts situations also encompasses an obligation to consider the effect of an interpretation on coordinate regulatory regimes. For the costs of regulatory conflict are significant, and "[n]o legislation pursues its purposes at all costs." *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987)). Thus, there is a strong argument that, to be "reasonable," an agency interpretation that affects other regulatory regimes must take into account the effect of the interpretation on those regimes.

CONCLUSION

The principle that “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory”²⁹⁸ long provided a workable way to avoid conflicting assertions of regulatory power. But the breakdown of the territorial model for allocating jurisdiction, combined with ceaselessly increasing international economic activity, created conditions in which it was common for more than one legal system to regulate the same harm. Given differences in substantive norms and sovereigns’ regulatory strategies, overlapping assertions of regulatory authority create interjurisdictional regulatory conflict. When this occurs, the ordinary operation of U.S. civil litigation can lead to a new and unfamiliar form of political backlash.

This Article has shown that the way in which U.S. law manages regulatory conflict is in the midst of a fundamental transformation. In the latter half of the twentieth century, doctrine managed regulatory conflict through indeterminate standards administered by frontline decisionmakers. In contrast, the new approach utilizes clear, *ex ante* rules that limit the availability of U.S. courts for private regulatory enforcement and privilege the regulatory preferences of actors doing business across territorial borders. By limiting U.S. court access, the new conflicts law unquestionably prevents conflicting assertions of regulatory power. But it has uncertain effects on economic welfare, undermines enforcement of U.S. regulatory systems, and allocates decisionmaking authority to a Supreme Court that is poorly equipped to exercise it.

The doctrinal prescriptions set out in Part IV demonstrate that these consequences are far from inevitable. The more urgent and basic task, however, is simply to recognize the new conflicts law for the important development that it is. To improve the United States’ response to regulatory conflict, we must understand that the Court with little fanfare has dramatically changed the status quo ante.

298. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).