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UNIVERSAL PROCEDURALISM

Edward J. Janger*

Eight years ago, I published an Article entitled *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*.¹ The Article focused on the effects of capture and jurisdictional competition on the uniform law drafting process in the United States. I concluded that the desire for uniform and universal adoption of their work product would force uniform law drafters to anticipate (and acquiesce to) the possibility that state legislatures might be captured by affected interest groups or engage in a race to the bottom.² Accordingly, I argued that the uniform lawmaking process should: (1) limit its aspiration to seeking procedural and transactional efficiencies; (2) promote legislation based only on broad-based consensus; and (3) shy away from legal questions with important distributional consequences.³ These are, of course, broad prescriptions, and the devil is in the details. Nevertheless, subsequent events appear to have borne out my predictions about the limits of domestic harmonization efforts.⁴

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1. Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569 (1998) [hereinafter Janger, *Uniform Law Process*]; see also Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994); Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993); Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993).

2. Janger, *Uniform Law Process*, *supra* note 1, at 630–31.

3. *Id.*

4. See, e.g., Robert K. Rasmussen, *The Uneasy Case Against the Uniform Commercial Code*, 62 LA. L. REV. 1097, 1100–01 (2002) (reviewing the most recent efforts to revise U.C.C. Articles 2, 3, 4 and 9); Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 608 (2001) (describing the Article 2 revision process); see also Neil B. Cohen, *Taking Democracy Seriously*, 52 HASTINGS L.J. 667, 670 (2001) (describing interest group participation in the Article 2 revision process); Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 S.M.U. L. REV. 1683, 1689 (1999) (stating that “interest groups have been very active in the Article 2 revision process”).

As soon as I finished the Article, I started thinking about its implications for efforts to harmonize international law. It seemed to me that there was a useful insight there somewhere. I held back, however, out of lack of knowledge and a sense that the efficiencies to be obtained from international harmonization might be greater than the comparatively marginal benefits associated with revising the Uniform Commercial Code. A few years ago, Jay Westbrook tried to nudge me into writing on the subject of transnational insolvency by inviting me to a conference at the University of Texas. Much to his chagrin, I chose to present, instead, on the subject of data privacy in bankruptcy.⁵ Even then, however, a different type of reticence was causing me to hold back. By this time, the poles of the transnational insolvency debate had been defined: Universalism on one side and Territorialism on the other.⁶ With Jay manning one battlement and Lynn LoPucki the other—two scholars I consider friends and, on many things, intellectual fellow travelers—it was like watching one's parents fight. Choosing sides in such situations is frightening, seeking to mediate, dangerous. Better to wait; better to make sure that I knew where I stood. I'm still not 100% sure where I stand, but I am ready to break my silence.

My goal in this Article is to shift the terms of the debate somewhat by using the tools I identified almost a decade ago to ask a more nuanced pair of architectural questions: "When are universalism and harmoniza-

5. See Edward J. Janger, *Muddy Property: Generating and Protecting Information Privacy Norms in Bankruptcy*, 44 WM. & MARY L. REV. 1801 (2003).

6. Compare Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2299 (2000) [hereinafter Westbrook, *Global Solution*] ("[T]he proper long-term, theoretical solution to the problem of multinational insolvency is universalism, whether or not such a solution is achievable in the foreseeable future."), Jay L. Westbrook & Jacob S. Ziegel, *The American Law Institute NAFTA Insolvency Project*, 23 BROOK. J. INT'L L. 7, 24 (1997) ("[R]egional agreements may be the best first step in solving many of the problems of legal harmonization and cooperation coincident to the globalization of trade and investment."), and Jay L. Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 503 (1991) ("I believe that traditional approaches are simply unsuited to current realities. The formal manipulation of rules that purport to make 'territorial' distinctions in multi-territorial transactions offers scant help in analyzing conflicts questions arising from modern multinational enterprise."), with Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 750 (1999) [hereinafter LoPucki, *Cooperation*] ("Cooperative territoriality . . . eliminates the tension between countries by vesting each with bankruptcy power congruent with its sovereignty. No nation need recognize foreign authority over domestic assets or sacrifice the interests of local debtors or creditors in particular cases. The elimination of that universalist tension provides the foundation for cooperation among courts and representatives that will be mutually beneficial in each case.").

tion desirable, and when should territorialism and non-uniformity govern?" Neither Jay nor Lynn take pure positions in favor of universalism or territoriality. Jay now advocates a position of modified universalism,⁷ and Lynn has always advocated cooperative rather than pure territorialism.⁸ Both, however, view their moderation as a concession. Jay hopes the world will eventually be ready for true universalism, and views "modified universalism" as a camel's nose under the tent.⁹ Lynn wishes to head off jurisdictional competition and forum shopping, and views cooperative territoriality as a concession to globalization. Jay seeks one case under one law.¹⁰ Lynn prefers many cases under many laws.¹¹ I start from a more neutral perspective and conclude pragmatically that the most we should hope for is one case under many laws. I advocate a regime that I call "universal proceduralism."¹² Such a regime would consist of "universal" but minimally harmonized rules of transnational bankruptcy procedure, harmonized choice of law, and non-uniform substan-

7. Westbrook, *Global Solution*, *supra* note 6, at 2277 ("Modified universalism . . . is the best answer because its pragmatic flexibility provides the best fit with the problem presented by the current patchwork of laws in the global market, and because it will foster the smoothest and fastest transition to true universalism.").

8. LoPucki, *Cooperation*, *supra* note 6, at 696 ("A system of cooperative territoriality is optimal even though it potentially requires multiple filing and prosecution of claims, cooperation among courts and administrators with respect to particular reorganizations and liquidations, and international agreements to control fleeing assets.").

9. See Westbrook, *Global Solution*, *supra* note 6, at 2299 ("Although I am more optimistic than others, universalism may not be obtainable in the foreseeable future."); see also John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT'L L. 935, 992 (2005) (The Model Law's "gentle incrementalism regarding indirect, non-core areas of the law likely assuaged some hesitant, territorialism-inclined states skeptical about universalism's benefits, and perhaps even tricked (to their paternalistic betterment) some troglodyte states prejudiced against universalism altogether.").

10. See Westbrook, *Global Solution*, *supra* note 6, at 2292 ("There are two elements necessary to a universalist convention for international bankruptcy: a single law and a single forum to govern each multinational case. These two elements are distinct and need not necessarily be conjoined in an international bankruptcy system, although ideally they would be.").

11. LoPucki, *Cooperation*, *supra* note 6, at 742 ("[T]he system I propose . . . is a system in which each country would administer the assets located within its own borders.").

12. As I will discuss later, I think that the UNCITRAL Model Law is an excellent first step toward such a regime. See UNCITRAL Model Law on Cross-Border Insolvency, U.N. GAOR, 52d Sess., 72d plen. mtg. at 11, U.N. Doc. A/52/PV.72 (Dec. 15, 1997) [hereinafter Model Law]. The UNCITRAL Model Law has been enacted by the United States, and Chapter 15 incorporates the Model Law into the Bankruptcy Code with relatively few modifications. See 11 U.S.C. §§ 1501–1532 (2006).

tive law.¹³ Moreover, I propose this not as a palliative, but as a normatively preferred regime.

The analysis is divided into four parts. In the first part, I will briefly review the state of the debate between Jay and Lynn, and stake out my reservations about both approaches—the risks associated with Jay's aspiration to universality and harmonization of bankruptcy law, and the overemphasis by Lynn on the problem of pernicious forum shopping. In the second part, I will develop my model for minimal transparent harmonization, a model that seeks to head off pernicious forum shopping while harnessing the benefits of jurisdictional competition where they exist. I will seek to articulate a minimal set of universal rules for bankruptcy cases that will, to the extent possible: (1) harmonize the few sets of procedures that are necessary to facilitate international bankruptcy cases (and no more); (2) allow jurisdictional competition as to efficient procedures; (3) render the choice of forum irrelevant/transparent as to the substantive law governing the entitlements of parties; and (4) limit the extent to which global economic integration will interfere with local choices about how to structure and govern business affairs. In the third part, I will argue for the normative preferability of my model to either of the "polar" approaches, and explain why I hold an entirely different view with regard to domestic insolvency law. Finally, in the fourth part, I will conclude with an evaluation of Chapter 15 of the U.S. Bankruptcy Code and the E.U. Insolvency Regulation in light of my approach.

I. COMPETING VISIONS OF CROSS-BORDER BANKRUPTCY LAW

When insolvency law was simply a local law for winding up a failed business and distributing its assets, local procedures for liquidation were sufficient, and local law governed.¹⁴ Insolvency law had little to offer, and the law was, for all relevant purposes, harmonized. "Grab-law" prevailed.¹⁵ Starting in the nineteenth century with railroad receiverships,¹⁶

13. I do not oppose convergence or standardization of substantive bankruptcy law *per se*, though I do have reservations with regard to the proper scope of harmonization. These comments are not meant to indict or criticize the efforts under way at UNCITRAL and the World Bank to promulgate legislative guides for insolvency law. *See, e.g.*, U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, U.N. Doc. A/CN.9/WG.VI/WP.31/Add.1 (2007).

14. Indeed, this is still the default. *See, e.g.*, Jennifer Greene, Note, *Bankruptcy Beyond Borders: Recognizing Foreign Proceedings in Cross-Border Insolvencies*, 30 BROOK. J. INT'L L. 685, 704–05 (2005); Sara Isham, Note, *UNCITRAL's Model Law on Cross-Border Insolvency: A Workable Protection for Transnational Investment at Last*, 26 BROOK. J. INT'L L. 1177, 1180–81 (2001).

15. Bruce Mann describes the early U.S. debt collection process as follows:

and maturing in the last quarter of the twentieth century with the adoption of Chapter 11 of the U.S. Bankruptcy Code, a legal architecture developed, premised on two ideas: (1) the value of an insolvent enterprise might be maximized for the benefit of its creditors by continuing to operate the business as a going concern rather than selling it off piecemeal; and (2) the market might need a little bit of help in arranging such "efficient" reorganizations.¹⁷ Going concern reorganizations are difficult enough to achieve where a business operates in one place, with one establishment and one corporate governance structure. The procedures used for accomplishing such reorganizations are highly contested.¹⁸ The complexities and controversies multiply when a corporate group is involved, and multiply exponentially when the enterprise crosses jurisdictional boundaries. The challenge for the practitioners of transnational

Since priority among unsecured creditors was determined by the order in which they served process on the debtor, and among secured creditors by the order in which they took security in the same property, time was, indeed, money. Creditors who acted earlier took precedence over creditors who acted later. Once one creditor sued, all creditors had to sue to claim a place in line.

BRUCE MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 48 (2002).

16. See DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 48–70 (2001) (also discussing railroad receiverships); Douglas G. Baird & Robert K. Rasmussen, *Control Rights, Property Rights, and the Conceptual Foundations of Corporate Reorganizations*, 87 VA. L. REV. 921, 925–31 (2001) (discussing railroad receiverships).

17. See Douglas G. Baird, *A World Without Bankruptcy*, 50 LAW & CONTEMP. PROBS. 173, 181–86 (1987).

18. Compare Ted Janger, *Crystals and Mud In Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559 (2001), and Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197 (2005), with Barry E. Adler, *A World Without Debt*, 72 WASH. U. L.Q. 811 (1994), Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751 (2002), Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573 (1998), Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1078–79 (1992) ("Chapter 11 should be repealed, abolishing court-supervised corporate reorganizations and, in effect, precluding residual claimants from participating in any reorganization of the firm."), Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 53–54 (1992), and Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1821–22 (1998). For a response to Schwartz, see Lynn M. LoPucki, *Contract Bankruptcy: A Reply to Alan Schwartz*, 109 YALE L.J. 317 (1999), and for a surreply, see Alan Schwartz, *Bankruptcy Contracting Reviewed*, 109 YALE L.J. 343 (1999).

insolvency law is to figure out how to achieve the benefits of reorganization across national boundaries.¹⁹

A. Universalism (Jay) Versus Territorialism (Lynn)

For Jay, the answer lies in a bankruptcy regime that is symmetric with the market it governs.²⁰ Under such a regime, one case, and one bankruptcy regime would govern the insolvency of a transnational entity.²¹ As a pragmatic transitional approach, he advocates what he calls "modified universalism." Under a modified universalist regime, the insolvency case is governed from the debtor's center of main interest (COMI). Assets in multiple jurisdictions are administered (at least in the first instance) by the local courts, but those courts defer to the main proceeding for administration of the case.²² This is the approach embodied in the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law")²³ enacted as Chapter 15 of the United States Bankruptcy Code ("Chapter 15") and also by the E.U. Regulation on Cross-Border Insolvencies (the "E.U. Reg.").²⁴

For Lynn, universalism is a quixotic dream and modified universalism a dangerous Trojan horse, likely to do more harm than good. His principal concern is forum shopping.²⁵ Lynn has done path-breaking research on the effect of jurisdictional competition and forum shopping in the United States, and concludes that, on balance, cases that are forum shopped to Delaware or New York do worse for their stakeholders than cases that are handled in other courts.²⁶ The reason for these poor results

19. It is important, as a preliminary matter, to distinguish the goal of allowing efficient transnational reorganizations from the goal of "exporting" a U.S. model for Chapter 11. While the U.S. model is perhaps the most advanced, it is no longer unique, and it is far from perfect. The question we all pose is whether an international effort to harmonize insolvency law can facilitate efficient reorganizations, and, if they can, are related costs excessive. I propose to remain agnostic (at least for the purposes of this piece) on the "best" way to run a reorganization.

20. Westbrook, *Global Solution*, *supra* note 6, at 2283 ("The central theoretical point is 'market symmetry': the requirement that some systems in a legal regime must be symmetrical with the market, covering all or nearly all transactions and stakeholders in that market with respect to the legal rights and duties embraced by those systems.").

21. *Id.* at 2292.

22. *Id.* at 2300.

23. See Model Law, *supra* note 12, arts. 15–24.

24. See Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC).

25. LYNN M. LOPUCKI, *COURTING FAILURE* 30 (2005).

26. *Id.* at 137–81 (finding that bankruptcy cases handled by Delaware and New York courts were prone to several abuses, including exaggerated professional fees, rubber-stamping of prepackaged plans, and retention of failed and corrupt managers).

turns, in his view, on an agency problem coupled with a race to the bottom.

The dynamic works this way. Under U.S. bankruptcy law, incumbent management chooses the bankruptcy attorneys and continues to operate the debtor in bankruptcy. They therefore have control over venue choice. Accordingly, the venue chosen is likely to be the one most favorable to incumbent management and/or its attorneys.²⁷ Bankruptcy judges, according to Lynn, enjoy handling large, high-profile cases more than a steady diet of consumers and failed real estate partnerships.²⁸ These courts therefore compete for large cases by offering the best package to the “case placers”—incumbent management and their attorneys.²⁹

Under Lynn’s view, this competition among courts in the United States has had a pernicious effect on bankruptcy law and upon the results in actual cases. His concern is that universalism in international bankruptcy will simply take judicial competition global and replicate the poor results of Delaware in the 1990s internationally.³⁰ For this reason he opposed the adoption of Chapter 15, and opposes further enactment of the UNCITRAL Model Law.³¹

I have concerns about both Jay’s and Lynn’s approaches to transnational insolvency law—about modified universalism *and* cooperative territorialism. On the one hand, my articulated concerns about uniform lawmaking are applicable to international harmonization efforts and make me worry about the universalist approach. On the other hand, I think that Lynn’s concerns are overdrawn, and that the benefits of efficient reorganization of corporate groups across jurisdictional lines are considerable. Because Lynn and I are both motivated by concerns about jurisdictional competition, I will first lay out the differences between my views and his.

B. LoPucki and the Oversimplification of Jurisdictional Competition

Lynn has a point. The possibility of jurisdictional competition is an important dynamic that must be considered when seeking to harmonize any area of law. However, it is not enough to say, “Jurisdictions will compete, therefore we must not create a regime that will facilitate forum shopping.” There are two intuitive problems with this assertion. First,

27. *Id.* at 138.

28. *See id.* at 248–49.

29. *Id.* at 249–51.

30. *Id.* at 183–205.

31. *See id.* at 207–232 (arguing that forum shopping and its failures will flourish under the UNCITRAL Model Law).

competition is not always bad.³² Second, harmonization generally reduces rather than increases the stakes of forum shopping.³³

The common wisdom views competition among market participants as a good thing. Markets are not perfect, but when they work, they reward efficiencies and punish inefficiency.³⁴ Competition among jurisdictions can fit this model. LoPucki, however, analogizes jurisdictional competition in the bankruptcy context to the competition for corporate charters by Delaware, and labels it a "race to the bottom."³⁵ He does this by administering a powerful one-two punch to the usual assumptions about competition. First, he introduces an agency problem: incumbent management will choose the jurisdiction that will most willingly allow them to loot the company.³⁶ Second, he strips away the principal institution situated to prevent such looting—judges applying the law.³⁷ Lynn abstracts the judges away by branding the Delaware and New York judges as corrupt and antinomian competitors for big case business.

32. See Ralph K. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 256 (1977) (arguing that competition among states to attract corporations results in a "race to the top" which actually benefits shareholders); see also Roberta Romano, *The Need For Competition In International Securities Regulation*, 2 THEORETICAL INQUIRIES L. 387, 392–93 (2001).

Regulatory competition subjects government agencies to fluctuating inflows and outflows of regulated entities as firms transfer their activities to come under the jurisdiction of the regulator whose regime they prefer. Such competition is desirable because it reduces the possibility that a regulator will be able to transfer wealth across different regulated entities or redistribute wealth from the regulated sector to preferred individuals or organizations.

Id.

33. See Gregor C. Heinrich, *Funds, Transfers, Payments, and Payments Systems—International Initiatives Towards Legal Harmonization*, 28 INT'L LAW. 787, 788 ("[H]armonization of rules reduces the risk that a problem will be treated and solved differently in other countries, thus curtailing a tendency towards 'forum shopping.'")

34. See, e.g., Arthur R. Pinto, *The Internationalization of the Hostile Takeover Market: Its Implications for Choice of Law in Corporate and Securities Law*, 16 BROOK. J. INT'L L. 55, 63 (1990) (stating that "increased competition within and between [securities] markets provides benefits, such as lower costs of capital for firms, and allows investors to further diversify their investments").

35. See LOPUCKI, *supra* note 25, at 243 ("[T]here was no longer any reason to believe that the courts were engaged in a race to the top. . . . The bankruptcy court competition is not a market but a market failure.").

36. *Id.* at 241–42 ("Most managers facing bankruptcy . . . seek a court that will not investigate them too carefully, will pay them bonuses, and will allow them to negotiate a graceful exit.").

37. *Id.* at 247–49.

Lynn extends both concerns to the international context by analogy, and tars universalist harmonization efforts with the “Delaware” brush. He assumes that jurisdictional and judicial competition in the international context will be uniformly pernicious, and he fears that adoption of the Model Law will facilitate this competition by centralizing the control of a case in one court. The same centralizing force that creates the ability to reorganize an international entity may increase the harm that a judge can do if he or she answers to the interests of incumbent management rather than the best interests of the estate.³⁸ Whether or not Lynn’s descriptions of U.S. law and, in particular, U.S. judges are correct, I leave to another day.³⁹ Still, one certainly cannot assume their accuracy in the international context. In my view, both Lynn’s economic and his institutional critiques of the Model Law are important but overstated. While he may be right about the results of forum shopping in Delaware in the 1990s, Lynn’s proclamation that forum shopping leads inevitably to a “race to the bottom” is debatable; he fails to distinguish good competition from bad, and he ignores the existence of competing institutions in the international context that might operate as brakes on the pernicious competition that he fears.

My initial focus will be on Lynn’s economic account of jurisdictional competition. I will offer a more nuanced account of the effects of jurisdictional competition on legal harmonization efforts, and will seek to show that Lynn is drawing too many conclusions about the Model Law from the Delaware example.

C. The Model

Where efforts to harmonize international law are involved, jurisdictional competition does not operate overtly. It enters by the back door—through concerns about enactability. When international organizations such as UNCITRAL or UNIDROIT promulgate model laws, their enactments are not self executing. Therefore, the drafters must consider the

38. *See id.* at 231.

39. I am considerably more sanguine about the ethics and abilities of U.S. bankruptcy judges than Lynn, who describes the judicial appointment process as follows:

When a bankruptcy judgeship becomes available, the community seeks to install one of its own. More often than not, the effort succeeds. As with any position of leadership, the one chosen incurs a debt to his or her supporters. Those supporters expect a certain amount of loyalty. If a judge forgets how he or she got the job, the judge will be reminded if and when the judge seeks a second term.

Id. at 20.

possible effects of jurisdictional competition and interest group capture on national legislatures. It is by now, therefore, axiomatic that model or uniform laws only achieve wide adoption in two circumstances: (1) where they provide considerable benefits over the status quo⁴⁰; and (2) where there is a consensus about what the right rule is.⁴¹ In my earlier

40. See James J. White, *Ex Proprio Vigore*, MICH. L. REV. 2096, 2096 (1991).

The National Conference of the Commissioners on Uniform State Laws (NCCUSL) is a legislature in every way but one. It drafts uniform acts, debates them, passes them, and promulgates them, but that passage and promulgation do not make these uniform acts law over any citizen of any state. These acts become the law of the various states only *ex proprio vigore*—only if their own vitality influences the legislatures of the various states to pass them.

Id.

41. See Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, U. ILL. L. F. 321, 327 (1962) (“Difficult legislation like this without a popular appeal can seldom be passed without a broad consensus of agreement of interested parties.”). However, the consensus may be the product of a strong interest group with disorganized opposition. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 638–43 (1995) (discussing the influence that banks had on the creation and revisions of Articles 3 and 4); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783, 1822–47 (1994) (examining the influence of interest groups on the Article 9 revision process); see also Edward Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 584–88 (1998) (discussing the impact of capture by interest groups upon the ALI and NCCUSL uniform law drafting process). In a previous Article, I made this point in the following manner:

[Uniform law drafters must] draft a statute where state competition will not induce states to enact nonuniform versions of the code. On the one hand, this competition will encourage drafters to produce a good product—a statute that is well drafted and substantively superior to competing nonuniform laws regulating the same subject matter. However, they must also anticipate the likely results of interstate competition and neutralize it. In the uniform law drafting process, the desire for universal and uniform adoption drives the drafters to predict and follow the direction that state competition will lead. If state competition will encourage a race to the top, the drafters will be driven to create an efficient rule. But if competition will yield a race to the bottom, the drafters, if they are to preserve uniformity, *must* scrape the bottom as well.

Janger, *Uniform Law Process*, *supra* note 1, at 591. This idea has been similarly seconded by Robert Rasmussen:

[T]he U.C.C. competes not against academic visions of optimal regulation but against products of other flawed institutional processes. Bringing interest group analysis to the private legislature has not removed interest groups from public legislatures. With our new understanding of the drafting process of the U.C.C., the question becomes one of comparative political economy—which of the many imperfect institutions should have the primary authority for crafting

Article, I borrowed from Lucian Bebchuk's 1992 Article on jurisdictional competition for corporate charters to discuss how the desire for uniform enactment can interact with the dynamics of jurisdictional competition for both good and ill.⁴² Bebchuk argues that competition is generally a good thing, but that it goes awry in the face of "interjurisdictional" externality and intra-firm agency problems.⁴³ Where a small state can attract firms through legal rules that harm people in other states, or where one corporate constituency (managers, shareholders, or secured creditors) can advantage themselves at the expense of a disenfranchised constituency within a firm, competition will be pernicious.

Where the effects of competition are likely to be pernicious, the desire of harmonizers for uniform enactment compounds the mischief. First, if the "benefits" of a proposed law are narrowly concentrated on a particular interest group and the costs are widely disbursed, the perceived consensus behind a proposed uniform or model law may actually reflect rent

commercial law. Here, the U.C.C. does have advantages over public legislatures that have been under appreciated in the recent debate. Primarily, the structure of the U.C.C. drafting and revision process suggests that it will produce a more technically competent set of laws than would a public legislature. Much legislation produced by public legislatures is a slapdash affair. On average, it is going to have more gaps and internal inconsistencies than legislation produced via the U.C.C. process. In addition, the U.C.C. may reduce rent extraction by public legislatures. The need to adhere to the U.C.C. constrains the ability of legislators to offer favors to interest groups. Finally, even in areas where interest group dynamics suggest that there will be predictable flaws in the rules generated by the U.C.C. drafting process, the current situation which allows selective intervention by the federal government may be preferable to one that lodged initial lawmaking responsibility either in the state legislatures or the federal government.

Rasmussen, *supra* note 4, at 1104.

42. Janger, *Uniform Law Process*, *supra* note 1, at 589–90 (citing Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992) for the proposition that competition in state rule-making can lead to either a race to the top or a race to the bottom).

43. Bebchuk, *supra* note 42, at 1484; *see also* Edward J. Janger, *The Death of Secured Lending*, 25 CARDOZO L. REV. 1759, 1779–80 (2004).

[I]t is possible to predict whether state competition will be efficient or inefficient by asking two questions about the statute. First, does it give rise to the possibility of intra-firm externality by allowing one corporate constituency (such as shareholders or managers) to impose costs on another (such as creditors or rank and file employees)? Second, does the statute give rise to the possibility of interstate externality, by allowing one state to impose costs on the citizens of another state?

Id.

seeking by a particular group, rather than a universally recognized social benefit. Enactment of a proposed uniform law under these circumstances benefits the interested group virally, at the expense of the general public. Second, problems can arise where a small state can impose costs on the rest of the world. Where one jurisdiction can benefit itself at the expense of others, the harmonizers must anticipate the effect of captured legislatures and jurisdictional competition in order to obtain or preserve universal adoption. Uniform laws are helpless in the face of, and may even further, these effects.⁴⁴

By contrast, in the absence of these perverse dynamics, competition is a good thing. States may seek to compete based on various criteria: procedural innovations, well-run courts, economic infrastructure, well-trained work force, legal predictability, or legal creativity.⁴⁵ These types of competition should be encouraged, even though they may pose problems for harmonization. Uniformity should not, where possible, stand in the way of innovation or experimentation.

Harmonizers must therefore anticipate these dual dynamics when constructing a law for which they seek uniform adoption. They must beware of pernicious competition and avoid facilitating it, while either anticipating beneficial competition or, better yet, permitting it to flourish. This is not an inevitable indictment of harmonization efforts. Instead, it raises questions. First, can the scope and content of a harmonization effort be designed to foster beneficial competition and head off pernicious competition? Second, is the pernicious competition a permanent or transitory problem that will ultimately be forestalled or corrected by other institutions? Even 'pernicious' jurisdictional competition is not likely to succeed in the long run unless it is linked to a permanent (or at least persistent) agency problem.⁴⁶ Where a jurisdiction is adopting an inefficient rule in order to compete for some form of business, market discipline should correct the problem over time. Only where there is an interested

44. See Janger, *Uniform Law Process*, *supra* note 1, at 578 (noting that competition exists among states to enact uniform laws that will enhance a state's attractiveness to business).

45. See generally Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J. L. ECON. & ORG. 225 (1985).

46. Since in the corporate context the corrective to the race to the bottom is the market for corporate control, Bebchuk is particularly skeptical about Delaware laws that undercut transparency or discourage takeovers. Bebchuk, *supra* note 42, at 1462-63. In the Article 9 context, I argued that a race to the bottom may be created by the disenfranchisement of certain non-consensual and non-adjusting creditors. Janger, *Uniform Law Process*, *supra* note 1, at 592 ("The problem of intrafirm externality exists whenever there is a conflict of interest between corporate managers and one corporate constituency that cannot make its voice heard.").

group that is consistently on the receiving end of an externality (because it lacks a voice in the choice of forum) will forum shopping lead to the permanent adoption of an inefficient rule.⁴⁷

D. Applying the Model—Territoriality, Constrained Venue Choice, Choice of Law, and the Benefits of Competition

With these principles in mind, I argued that domestically, in the context of commercial law, the uniform law process ought to focus on procedural efficiencies and avoid distributive choices.⁴⁸ Distributive questions should be addressed at the local (non-uniform) level to allow for competition and diversity of approach, or, where uniformity is necessary or pernicious competition inevitable, at the federal level.⁴⁹

When evaluating an international harmonization effort in this light, it is crucial to identify the key attributes of the legal scheme and to allocate them to the appropriate lawmaking level—local or harmonized. Unlike lawmaking in the United States and European Union, there is no “federal” or supranational authority that can command uniformity.⁵⁰ My concerns about both Lynn and Jay’s positions turn on the failure to distinguish among: (1) rules for choice of forum (which carries with it choice of procedure); (2) rules for choice of law; and (3) rules creating substan-

47. Of course, the short-run/long-run argument does nothing in the abstract. If short run costs can be prevented through regulation (without adverse consequences), so much the better.

48. My argument went as follows:

Because the uniform law process appears to have both relative advantages and disadvantages over the federal and nonuniform law drafting processes, it might seem wise to self-consciously adopt an approach of selective abstention. When there is no reason to expect the uniform law process to fail, it should be allowed to function and do what it does well. However, when capture, anticipated capture, or an anticipated race to the bottom are likely to drive the uniform law process, the ALI/NCCUSL should decline to regulate the area and leave the question to federal law or nonuniform state law.

Janger, *Uniform Law Process*, *supra* note 1, at 593.

49. *Id.*

50. Where transnational insolvency is concerned, a crucial element of the calculus is that there is no federal government that can compel the compliance of all participants across jurisdictions. On the other hand, a second institution is present in the international context, which is missing in the United States—strong states (not subject to the supremacy clause or commerce clause) willing to defend their sovereignty.

tive entitlements.⁵¹ Jay and Lynn both collapse these three types together, and therefore draw their prescriptions too broadly.

The UNCITRAL Model Law focuses on the first question and does not speak to the last two.⁵² As John Pottow has pointed out, this narrow procedural focus is politically expedient.⁵³ For Jay, it is only a first step in a larger program to harmonize both procedure and substance.⁵⁴ For Lynn, it is already a step too far.⁵⁵ For me, it is also a first step on the way to an even more important second step, harmonizing choice of law principles, but I would, for the most part, stop there.⁵⁶

It is here that I think Lynn's critique takes a wrong turn. Lynn sees the Model Law as enhancing the power of the debtor's chosen forum, and hence increasing the stakes of jurisdictional competition.⁵⁷ He is right that the universalist aspects of the Model Law increase the importance of the "main" forum, but Lynn ignores the fact that the Model Law simultaneously constrains forum choice. Lynn's mistake here is to ignore (or at

51. For our purposes, while choice of forum, rules for choice of procedure, and rules of procedure can be conceptually distinguished, jurisdictions always apply their own procedures. Choice of forum, therefore, carries with it choice of procedure.

52. See Pottow, *supra* note 9, at 995 ("[T]he Model Law sought to focus on matters of procedure and thereby . . . minimized the likelihood it would be perceived as a substantial threat to sovereignty.").

53. *Id.*

54. See Westbrook, *Global Solution*, *supra* note 6, at 2279 ("While the current reforms are only first steps, they go well beyond what most observers would have predicted just five years ago.").

55. See LoPUCKI, *supra* note 25, at 222 ("The problem [of jurisdiction in multinational bankruptcies] cannot be solved merely by providing that all members of the group should file in the home country of the group."). For LoPucki, harmonization (even procedural harmonization) is likely to have undesirable substantive consequences:

Harmonization is a euphemism for forcing commercially less important countries to adopt the remedies and priorities of the commercially more important countries. (Some Machiavellians may have endorsed universalism in the first place hoping it would lead to this forced harmonization.) That harmonization would be painful for people in countries that would be forced to change the basic rules of their economic cultures—for example, elevating secured banks to priority over employees. Such harmonization would greatly reduce the incentives for forum shopping. But it would hardly eliminate the international competition for cases.

Id. at 231–32.

56. With regard to efforts to achieve international convergence in bankruptcy law currently under way at UNCITRAL and the World Bank, I have reservations. However, both projects appear to be moving forward with a healthy recognition of the risks I articulate here. I hope to discuss them in a later article.

57. LoPUCKI, *supra* note 25, at 231.

least minimize) the limit imposed by the requirement that the main case be located at the debtor's center of main interest. He therefore overstates the change worked by the Model Law. Lynn also underestimates the independent importance of choice of law in the forum shopping equation. Just because a single court administers a case does not necessarily mean that the court will apply its own law of substantive entitlements. First, a court must decide what substantive law applies to the dispute. Courts do this all the time. In this regard, I think that Lynn's concerns about pernicious forum shopping are excessive.⁵⁸ Lynn also fails to appreciate the fact that competition, to the extent that it focuses on and is limited to issues of procedure and efficiency, is actually a good thing.

E.. Applying the Model—Universalism and the Risks of Excessive Harmonization

My concerns with the universalist approach to international insolvency also derive from the model discussed above, but they are not as complicated. While I think that Lynn's concern about the Model Law and Chapter 15 is excessive, because he ignores its limited focus on choice of forum and procedure, Jay has frequently described modified universalism as a stopping point on the way to true universalism, where substantive law would be harmonized and true market symmetry attained.⁵⁹ I do not

58. Here, however, I differ with the views articulated by Jay in his contribution to this symposium, Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 1019 (2007), and with the approach taken by the UNCITRAL Legislative Guide on Insolvency with regard to choice of law for bankruptcy cases. Jay argues that once a main case has been identified, that choice should carry with it what he calls the "big four" choice of law decisions associated with a bankruptcy case—control, priority, avoidance, and reorganization policy. Recommendation 31 of the UNCITRAL Legislative Guide on Insolvency follows a similar approach. UNCITRAL, LEGISLATIVE GUIDE ON INSOLVENCY LAW 69, 73 (2004), available at www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf. For reasons that I will explore in a subsequent Article, I believe that this approach places too much power in the hand of the forum court and will place undue stress on the nascent cross-border architecture.

59. Westbrook, *Global Solution*, *supra* note 6, at 2283; Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 9 (2002).

There is no doubt that national insolvency laws differ greatly, especially as to priority in distribution, and that these differences will continue to exist for some time. Modified universalism responds to this difficulty by proposing a pragmatic development of universalism, moving toward the ultimate goal within the practical limits established by the markets and by local laws at any particular time and place.

Id.

share Jay's broader aspiration. Like Lynn, Jay tries to analogize in the international context from a domestic model, and the analogy does not work for him either. When Jay speaks of market symmetry, he envisions and aspires to a world that works like one country, indeed, like the United States, with a national bankruptcy law that allows an enterprise's failure to be adjudicated by one court under one law.⁶⁰ Jay wishes for something—attainable in the United States because we have a strong federal government—that is simply not attainable internationally. No such strong central government exists, nor is one likely to exist any time in the foreseeable future.

Seeking the ideal of "one law" is a dangerous aspiration where it cannot practically be attained. In the international context, uniform laws can only be accomplished through harmonization and convergence. Such harmonization is only possible where there is consensus around a single rule. Such consensus is difficult to obtain, so the scope of harmonization will necessarily be narrow. Moreover, some consensus may be misleading. When one group benefits from harmonization, the consensus may be driven by the disenfranchisement of other affected groups (usually because of collective action problems). Therefore, in my view, the aspirations of international harmonization efforts should be kept minimal, both for pragmatic reasons (consensus is difficult to obtain), and for normative ones (consensus, where it exists, is often driven by a dominant interest group).

F. Minimal Transparent Harmonization

Unlike Lynn, I am not compelled by my concerns about jurisdictional competition to abandon an aspiration for efficient reorganization of corporate groups coordinated by a court at the entity's center of main interest. Unlike Jay, I do not seek more than that. My goal is an international bankruptcy regime that I call "universal proceduralism." By choosing a forum, one elects a particular bankruptcy procedure, but that procedure should be "transparent" with regard to substantive rights across national boundaries. Through a regime of harmonized "choice of law," the effects of forum choice on substantive rights can and should be minimized. Like Jay, I think Chapter 15 is a welcome first step toward my preferred regime.

II. UNIVERSAL PROCEDURALISM

When one defines a system of insolvency laws, one starts with a nation's rules for creating and enforcing substantive entitlements. In the

60. Westbrook, *Global Solution*, *supra* note 6, at 2292.

absence of special insolvency rules, parties have a strong incentive to grab whatever they can, as quickly as possible, off the carcass of a failing business.⁶¹ In this guise, insolvency law is indistinguishable from the law of contracts and the law of property. Judgments are obtained, judgments are enforced. First in time is first in right—end of story. Insolvency law morphs into bankruptcy law when one envisions a collective system for liquidating claims and distributing the proceeds under court supervision.⁶² With this additional layer, one adds rules for determining the priority of property claims and for prioritizing contractual debt claims. Up to this point, the system is largely one of substantive entitlements defined by local law. One procedural mechanism is added, a stay of actions that preserves the status quo, allows the various claims to be adjudicated, and allows the various assets to be distributed in an orderly fashion.⁶³ If an entity is being liquidated piecemeal, no particular efficiencies are created by global administration.

The need for market symmetry, for a bankruptcy regime that is coextensive with the reach of the business entity, emerges when reorganization merges with governance. At some point in the development of a modern bankruptcy system, somebody asks the question, “Wouldn’t we be better off continuing to run the business rather than liquidating?” So long as an entity is solvent, this governance problem is submerged, because the firm is governed by its shareholders and managers. Once it goes into default, the entity faces a practical and legal governance problem.⁶⁴ Creditors, who have no governance rights, do have the power to

61. See Edward J. Janger, *Privacy Property, Information Costs, and the Anticommons*, 54 HASTINGS L.J. 899, 925 (2003) (“When a debtor with a viable business becomes insolvent, creditors face a coordination problem. Unless they act quickly to grab the assets of the debtor, others may get there first.”).

62. See Douglas G. Baird & Thomas H. Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55 U. CHI. L. REV. 738, 749–50 (1988) (“Because bankruptcy is a collective proceeding, the bankruptcy judge has the power in some cases to bind nonconsenting parties. Without such a power, there would be no way to overcome the collective action problem that is the justification for bankruptcy in the first instance.”); Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 50–51 (1997) (noting that the state law collective action problem creates a need for bankruptcy law).

63. See 11 U.S.C. § 362(a) (2006) (automatic stay provision).

64. See *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.*, 1991 WL 277613, at *34 (Del. Ch. Dec. 30, 1991) (stating that “where a corporation is operating in the vicinity of insolvency,” its officers and directors owe a duty to creditors as well as shareholders). New York law takes a similar approach to the management of insolvent companies. See *New York Credit Men’s Adjustment Bureau v. Weiss*, 110 N.E.2d 397, 398 (N.Y. 1953) (“If the corporation was insolvent . . . it is clear that defendants, as officers and directors thereof, were to be considered as though trustees of the property for the

pull apart an insolvent business. The creditors are diffuse and face coordination problems. The insight of modern bankruptcy systems is that by barring the exit door and giving creditors governance rights, the stakeholders are more likely to continue the firm in business where it is efficient to do so than they are to force an inefficient liquidation.⁶⁵ The puzzle of transnational bankruptcy law is how to facilitate efficient going concern reorganization without encouraging pernicious forum shopping, driven by a favorable set of priorities or governance rules. To complicate matters further, such a regime should also allow courts to compete over procedural efficiencies, and allow legal systems to make substantive choices about how to define entitlements within their own jurisdictions. This puzzle and the model described above suggest a typology for evaluating laws that are candidates for harmonization: (1) procedures where uniformity is not necessary and competition (and innovation) is likely to be helpful; (2) procedures where coordination is required in order to obtain the benefits of reorganization; (3) choice of law rules which should be harmonized where possible; (4) substantive provisions where convergence is desirable; (5) substantive provisions where local variety is tolerable or even desirable. Harmonization is desirable in categories 2, 3, and 4, and undesirable in categories 1 and 5.

According to Lynn, the Model Law is an attempt to harmonize procedural rules that fall into the first category.⁶⁶ Lynn's critique of Delaware focuses on the principal reason for pernicious forum shopping—agency problems.⁶⁷ The unsung anti-heroes in his story are what he calls the “case placers,” an unholy alliance between incumbent management, lawyers at a few select New York law firms, and the bankers who finance the cases.⁶⁸ For them, the beauty of Delaware is that the courts have

corporate creditor-beneficiaries.”); *see also* *Cooper v. Parsky*, 1997 WL 242534, at *22 (S.D.N.Y. Jan. 8, 1997) (“Under New York law, creditors are owed a fiduciary duty by officers and directors of a corporation only when the corporation is insolvent.”).

65. In the United States, this governance decision is facilitated through a number of devices that straddle the line between procedure and substance. While the automatic stay can be viewed as procedural, insofar as it seeks to preserve the status quo by stopping collection efforts, regulation of governance is substantive. U.S. law places the power of governance in the debtor in possession, supervised by committees and the court. *See* 11 U.S.C. § 1107(a) (2006).

66. LOPUCKI, *supra* note 25, at 221–26.

67. *Id.* at 255 (“Instead of squeezing failed executives out, the [Delaware] courts allowed more of them to stay and even approved multimillion-dollar bonuses to ‘retain’ them.”).

68. *Id.* at 17 (“The lawyers, corporate executives, banks, and investment bankers who chose the courts for their cases—the ‘case placers’—had the power to make winners or

demonstrated a willingness to allow incumbent management and its helpers to maintain control of the case, and hence of the company.⁶⁹ Lynn's concern about the Model Law is that by centralizing the administration of a case in the court located at the debtor's COMI,⁷⁰ the Model Law gives jurisdictions something to compete over and the power to deliver benefits to the parties who place cases with them.⁷¹

In my view there are four responses to Lynn's concerns about Chapter 15. In articulating this response to Lynn with regard to the Model Law, I will develop these four responses into the four guiding principles of the "universal proceduralist" approach. This approach is generally consistent with, though not coextensive with the approach taken in Chapter 15 and the Model Law. It seeks to harness jurisdictional competition where it is beneficial and render it pointless where it is pernicious. The four principles are: (1) minimal procedural harmonization; (2) legal transparency through choice of law principles; (3) COMI-based venue choice; and (4) comity principles including limited articulated bases for non-cooperation. I will discuss each of these in order.

A. Minimal Procedural Harmonization

The first principle that Universal Proceduralism offers in response to LoPucki is minimal procedural harmonization. For Lynn, even the procedures created by the Model Law, centralizing an international bankruptcy case at the debtors COMI, create too much of an opportunity for pernicious competition. Lynn is right that there are risks to procedural harmonization, but Lynn focuses on the wrong risks. As I will discuss below, the risks of pernicious competition caused by procedural harmonization are tolerable. The greater risk associated with procedural harmonization is that it will preclude competition and innovation that might lead to greater efficiency.

Thus, the first element of "universal proceduralism" is to identify the minimum set of procedures that will allow reorganization to happen on an entity-wide level without disturbing the relative priority of local entitlements or disturbing local governance rights. This approach is not de-

losers of the courts. The case placers wanted more money for themselves and freedom from the restrictions of bankruptcy law and procedure.").

69. *Id.* at 255.

70. See Model Law, *supra* note 12, art. 17(2)(a); see also 11 U.S.C. § 1517(b)(1).

71. LOPUCKI, *supra* note 25, at 216 ("[F]orum-shopping multinationals . . . will choose among courts that are plausibly their home country courts. The chosen courts will, of course, be competitive ones. Those courts will hold quick hearings, declare themselves to be the home country courts, open the proceedings, and declare those proceedings to be main.").

signed to stop forum shopping, but to limit its pernicious effects and encourage it where beneficial. Parties should shop for "good" judges, and favor "well run" courts. They should not shop for biased judges who will favor the party making the forum choice, or for biased local law. In this regard, it seems to me that the Model Law strikes an appropriate balance. It formulates a set of rules that fall within the second category. They facilitate the administration of a case between and among courts, and little else.

The Model Law's major provisions can be set forth quite succinctly: (1) it provides procedures for a representative of a foreign proceeding to obtain recognition and open a case domestically;⁷² (2) it puts in place an automatic stay;⁷³ (3) it describes the relief available to a foreign representative in such a way that administering the case will not interfere with cases pending in other countries;⁷⁴ (4) it defines which proceeding is the "main" proceeding;⁷⁵ (5) it creates mechanisms to permit communication among courts with cases pending involving the debtor;⁷⁶ (6) it creates principles for coordinating pending proceedings;⁷⁷ and (7) it creates a rule to prevent claimants from double dipping where there are multiple cases pending.⁷⁸

With these exceptions, the Model law leaves most of a country's bankruptcy rules untouched. It does not establish priorities. It does not confer avoidance powers. It does not establish governance rules, rules for administering a case, or rules for confirming a plan of reorganization. All of these other crucial aspects of bankruptcy law are left to local law (including choice of law).

B. Harmonized Choice of Law

The second principle of "universal proceduralism" is harmonization of choice of law principles. Lynn's critique ignores choice of law entirely. Lynn assumes that with choice of forum goes choice of law.⁷⁹ The forum jurisdiction, he asserts, will generally apply its own law to the bank-

72. See Model Law, *supra* note 12, art. 9; see also 11 U.S.C. § 1515.

73. See Model Law, *supra* note 12, art. 20(1); see also 11 U.S.C. §§ 1520–1521.

74. See Model Law, *supra* note 12, art. 19(4); see also 11 U.S.C. § 1519(c).

75. See Model Law, *supra* note 12, art. 2(b); see also 11 U.S.C. § 1502(4).

76. See Model Law, *supra* note 12, art. 25(2); see also 11 U.S.C. § 1525(b).

77. See Model Law, *supra* note 12, art. 29; see also 11 U.S.C. § 1529.

78. See Model Law, *supra* note 12, art. 23; see also 11 U.S.C. § 1530.

79. LOPUCKI, *supra* note 25, at 232 (arguing that if court competition prevails, "multinational companies [will be] free to choose the courts in which they will reorganize or liquidate and the law that will govern the rights of their creditors and other stakeholders").

ruptcy cases that are filed there.⁸⁰ This assumption is not logically compelled. Choice of forum and choice of law are two distinct inquiries. Courts can and do apply the law of other jurisdictions to disputes that come before them.⁸¹ They also can, and do, apply the law of other countries.⁸²

Indeed, while the Model Law does not attempt to do this, the risk of pernicious forum shopping could be considerably reduced through the harmonization of choice of law principles. Where choice of law principles are harmonized, choice of forum does not alter the substantive law that applies to a case. This is not a novel approach. Under Article 9 of the Uniform Commercial Code, one public filing will perfect a security interest in all fifty states, because all fifty states have adopted a uniform choice of law rule.⁸³ Even without formal harmonization, there exists broad commonality about certain choice of law principles. Property rights are generally determined by the law of the jurisdiction where the property or the debtor is located.⁸⁴ Contracts are governed by the law of the jurisdiction with the most significant interest in the transaction—the situs of the contract.⁸⁵ There are certainly variations in approach for intangible property and for contracts that have no obvious location, but for many disputes the answers are predictable. For example, an employment contract between an American company and a French employee working in France will likely be governed by French labor law. To the extent that choice of law principles can be harmonized, choice of forum will diminish in importance.

The harder question is how such a multi-law case should be administered. U.S. bankruptcy law provides a model, and the Model Law does not preclude it. In a case involving a corporate group, multiple cases could be administratively consolidated in one court yet decided according to the bankruptcy law of multiple jurisdictions. While such a regime sounds facially implausible, and working out the details will require

80. *Id.* at 231.

81. *See, e.g.*, 16 AM. JUR. 2D *Conflict of Laws* § 5 (1964).

82. *See id.* §§ 9–11.

83. *See* U.C.C. § 9-301 (1998).

84. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223(1) (1971) (“Whether a conveyance transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs.”). Under Article 9 of the Uniform Commercial Code, certain property rights are governed by the law of the jurisdiction where the debtor is located. *See* U.C.C. § 9-301 (1998).

85. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971) (“The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties . . .”).

more space than is available here, it is still preferable to, or at least no more complicated than, the “cooperative territorial” approach advocated by LoPucki. Indeed, to a certain extent, this approach has already been used in at least one bankruptcy case.⁸⁶

An example might help here. If one imagines the case of a debtor with three subsidiaries in three different countries, there are three possibilities available to the main court for administering the proceeding. Once it has opened ancillaries in the countries where assets or subsidiaries are located, it could: (1) administer the assets of the subsidiary through the ancillary proceedings with the cooperation of those courts in a proceeding not unlike the “cooperative territoriality” described by LoPucki;⁸⁷ (2) it could centrally administer all of the assets, but handle the claims of the subsidiary’s creditors under the law of the subsidiary’s jurisdiction, much as a court does in the United States when a case is administratively (but not substantively) consolidated; or (3) the case might be substantively consolidated. Universal proceduralism would follow the second approach. Universalism would favor the third.

Universal proceduralist principles can also be applied to the case of a single corporate debtor with assets and operations spread across the globe. Assets might be centrally administered in the main case, but the location of the assets, local law governing those assets, and the law governing the claimants against those assets might be respected rather than collapsed.

Substantive consolidation is the result that LoPucki assumes will always occur, because it is easier to administer, and because he assumes that the home country court is unconstrained by an appellate court or federal law.⁸⁸ Here he misapprehends the dynamics of the international bankruptcy system. The decision to consolidate is not unconstrained. Unlike a U.S. case where the orders of one bankruptcy court are self-executing and enforceable throughout the United States. (but subject to appellate review),⁸⁹ the judge in a main case must still obtain the cooperation of foreign courts.

While the Model Law will make cooperation among courts administratively easier to obtain, cooperation is not a given. Local courts that perceive that their citizens are being harmed may resist cooperation, and

86. The *Collins & Aikman Group* case, described by Gabriel Moss in his contribution to this symposium, appears to have followed this approach. See Gabriel Moss, *Group Insolvency – Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 BROOK. J. INT’L L. 1005 (2007).

87. See LoPucki, *Cooperation*, *supra* note 6, at 750.

88. LoPUCKI, *supra* note 25, at 231.

89. See 28 U.S.C. 1334(e) (2005).

Article 21 of the Model Law, along with section 1522 of Chapter 15, allow them to resist actions taken by the court in the main case that violate local law. The need for cooperation and the threat of non-cooperation place significant constraints on the ability of debtors to use the main case to ignore creditor expectations through forum choice.

C. Constrained Venue Choice

The third principle of universal proceduralism is constrained venue choice. LoPucki heaps particular scorn on the peculiarity in U.S. law that combines state of incorporation as a basis for venue and the so-called “venue hook.”⁹⁰ This pair of rules allows all members of a corporate group to file wherever an affiliate has a case pending. Thus virtually any corporate group can file in Delaware, and reorganize all affiliates in that court, regardless of where the business’s operations, assets, and executives are actually located. LoPucki’s extension of this critique to the UNCITRAL Model Law and the E.U. Reg. turns on his view that the “center of main interest” approach used in those statutes is the functional equivalent of U.S. law and will give forum shopping free reign.

LoPucki is correct that the COMI standard is a standard rather than a rule, but he is wrong to equate it with the U.S. rule (which is clear but offers little constraint). While it is true that multiple jurisdictions may lay claim to status as the COMI for a multinational enterprise, the standard is not completely manipulable. It is unlikely that more than two or three jurisdictions will be in a position to claim that they are a debtor’s COMI. Management, significant assets, or business operations must be present for a jurisdiction to qualify as the COMI.

Most importantly, however, LoPucki again ignores the necessarily multi-jurisdictional nature of the cases governed by the Model Law. Under U.S. law, bankruptcy courts have jurisdiction over property “wherever located and by whomever held”,⁹¹ and can gain personal jurisdiction through nationwide service of process.⁹² A bankruptcy court in New York can enforce its judgment against assets in Montana without involving the Montana courts (though it might choose to). While the bank-

90. See LoPUCKI, *supra* note 25, at 252 (“[N]ew rules should eliminate the venue hook—the ability of a parent company to file in the court where the bankruptcy of a subsidiary is pending. Members of a corporate group should be allowed to reorganize together only at the location of the parent company or the group.”).

91. 11 U.S.C. § 541(a); see also *H.K. & Shanghai Banking Corp., Ltd. v. Simon (In re Simon)*, 153 F.3d 991, 996 (9th. Cir. 1998) (holding that the jurisdictional reach of §541(a) extends outside the territorial jurisdiction of the United States), *cert. denied*, 525 U.S. 1141 (1999).

92. See Fed. R. Bankr. P. 7004(d).

ruptcy estate may have extraterritorial reach, U.S. courts, as a practical matter, only have jurisdiction over parties and assets in the United States. This gives U.S. courts expanded reach with regard to many creditors who do business in the United States. However, this power is not global. Courts must generally enforce their orders in foreign jurisdictions by opening a proceeding in that jurisdiction and seeking to have their orders recognized.

While the Model Law makes recognition of the foreign proceeding automatic, and grants a stay of proceedings upon recognition,⁹³ there are many situations in which the Model Law permits the local court to determine whether the relief requested should be granted.⁹⁴ Even where the Model Law does not permit it, such discretion exists as a practical matter. The proceeding contemplated by the Model Law is not self-executing. The court handling the main proceeding must still obtain the cooperation of the foreign court.⁹⁵ While the Model Law instructs a court in a non-main proceeding to defer to the main proceeding,⁹⁶ there is no logical reason why the main/non-main characterization of a case cannot and therefore will not be contested, where an implausible choice has been made. While the debtor may have a number of plausible choices as to which jurisdiction is main and which is non-main, concern about defending that choice will limit the debtor's discretion and the forum court's power.

D. Comity

While principles of comity and the instruction to cooperate contained in the Model Law encourage courts to defer to each other, comity is a double-edged sword. Comity principles also allow a court to conclude that an act of a foreign court is not entitled to respect or cooperation. Even where such behavior is discouraged by statute, foreign courts have the power to say "no." Whenever deciding whether it is the main proceeding, a court must consider whether it is the right court to administer the debtor's case. Whenever seeking cooperation, courts must be careful to articulate the reasons why their orders are entitled to respect.

1. The Limits of Cooperation

Courts faced with these decisions are always cognizant of the risk of a "war of courts." They ignore this concern at their peril. One excellent

93. See *supra* notes 71–72 and accompanying text.

94. See Model Law, *supra* note 12, art. 19; see also 11 U.S.C. § 1521.

95. See Model Law, *supra* note 12, art. 10; see also 11 U.S.C. § 1519.

96. See Model Law, *supra* note 12, art. 28; see also 11 U.S.C. § 1529.

example arises out of the *Yukos* bankruptcy.⁹⁷ There a Russian oil company with virtually all of its assets and operations in Russia created a subsidiary in Texas for the sole purpose of opening a case there. The Texas bankruptcy court opened the case, and the debtor immediately sought to enjoin the sale by Yukos of all of its assets in Russia.⁹⁸ Though the forum shop was blatant, the U.S. court issued the injunction anyway.⁹⁹ The U.S. court ignored the fact that, to enforce its order, it would have to obtain the cooperation of the Russian courts.¹⁰⁰ The sale in Russia went ahead as planned.¹⁰¹ The only effect of the Texas court's order was that certain bidders, who had assets in the United States, did not bid in Russia because they did not wish to disregard the U.S. order (likely reducing the price obtained at auction).¹⁰²

Even in a regime such as that envisioned by the Model Law, comity remains important as a structural principle. The possibility of a war of courts continues to limit the power of the main proceeding. Cooperation must be earned. In the "universal" world that Jay envisions, the goal will be a one-court proceeding with automatic recognition and virtually man-

97. *In re Yukos Oil Co.*, 320 B.R. 130 (Bankr. S.D. Tex. 2004) (order granting initial injunction against auction), and *dismissed*, two months later, 321 B.R. 396 (Bankr. S.D. Tex. 2005) (dismissing Yukos Oil's Chapter 11 petition for "cause" under 11 U.S.C. §1112(b) on the basis that Yukos' ability to successfully effectuate its reorganization plan was severely hindered by the Russian government's apparent unwillingness to cooperate with Yukos, and moreover, Yukos' motives in filing were questionable in light of Yukos' transfer of funds to a U.S. bank account less than one week prior to filing its bankruptcy petition).

98. *Id.* at 132.

99. *Id.* The court perfunctorily concluded "that Debtor maintains significant assets in the Southern District of Texas, and that Debtor has standing to be a debtor under Chapter 11 of the Bankruptcy Code." *Id.*; see also Gregory L. White, Russel Gold & Thaddeus Herrick, *Yukos Seeks Refuge in a U.S. Court*, WALL ST. J., Dec. 12, 2004, at A3.

100. See Gregory L. White & Guy Chazan, *Mystery Russian Company Wins Bid on Yukos Unit—Offer of \$9.37 Billion Seals Fate of Beleaguered Firm, But Many Questions Linger*, WALL ST. J., Dec. 20, 2004, at A1.

101. See Erin E. Arvedlund & Simon Romero, *Kremlin Reasserts Hold on Russia's Oil & Gas*, N.Y. TIMES, Dec. 17, 2004, at A1.

102. *Id.*; see also Guy Chazan, *Intrigue Deepens Over Yukos Buyer—Gazprom Sells Unit Snared In U.S. Court, While Bidder is Tied to Siberia's Surgut*, WALL ST. J., Dec. 22, 2004, at A2. More recently, the Russian debtor sought recognition in an ancillary case under Chapter 15. See Chapter 15 Petition for Recognition of Foreign Proceeding filed by Yukos Oil Co. (In re: Petition of Eduard K. Rebgun, as Receiver of Yukos Oil Co.), No. 06-B-10775 (Bankr. S.D.N.Y. Apr. 13, 2006), available at http://www.chapter15.com/bin/chapter15_view_company?cid=1145244846. Under the current regime, and under the Model Law regime, courts will still have the resources to fight back.

datory cooperation.¹⁰³ In the world that I envision, cooperation will be a strong presumption, but can be withheld. As such, it is necessary to seek to articulate the principles that might disentitle an order of a main proceeding to cooperation.

2. Comity Principles that Permit Non-cooperation

If the goal of an international insolvency law that facilitates efficient cross-border reorganizations is to be realized, the circumstances under which a court should decline to cooperate with a foreign main proceeding must necessarily be limited and carefully defined. There are three appropriate bases under which a court might decline to cooperate with a main proceeding without compromising the goal of efficient case administration: agency, illegality, and violation of creditors' expectations. These principles fit comfortably within general principles of comity, but they are worth articulating and defining with some particularity in the bankruptcy context.

a. Agency

Agency problems create a very limited basis for objecting when a court concludes that the main proceeding is administering the estate in a way that advantages one stakeholder class but harms the estate as a whole. It is important to recognize that this principle does not turn on the distributional scheme of the particular country, but on whether assets are being wasted for the benefit of a particular stakeholder. Needless to say, principles of deference should apply, and it is not sufficient that one court concludes that the other court is not maximizing value. Rather the conclusion must be that the other court is destroying value at the behest of, and for the benefit, of one class of stakeholders.

b. Illegality

A second limited basis for non-cooperation arises when a court can be shown not to be following the choice of law or substantive law principles that its own choice of law or substantive law principles would require. In other words, the court declining to cooperate would have to show that the court with which it was declining to cooperate was acting illegally.

103. See Westbrook, *Global Solution*, *supra* note 6, at 2299 ("[T]he proper long-term, theoretical solution to the problem of multinational insolvency is universalism, whether or not such a solution is achievable in the foreseeable future.").

c. Creditor Expectations

Finally, protection of creditor expectations provides a limited basis for non-cooperation if the act of the main proceeding would defeat the legitimate expectations of domestic creditors. This is not unlike the standard in former section 304 of the U.S. Bankruptcy Code.¹⁰⁴ These legitimate expectations should be judged against the background of the fact that creditors knew they were doing business with a foreign entity. In most instances, choice of law principles applied in the main proceeding should provide sufficient protection to the legitimate expectations of these creditors. Defeated creditor expectations, therefore, should only rarely provide a basis for non-cooperation.

None of these bases for non-cooperation are anything new. Most of them would have operated as bases for non-cooperation under former sections 304 and 305 of the U.S. Bankruptcy Code. The key point here is that these limited bases for non-cooperation should be sufficient to limit the extent of pernicious forum shopping under the COMI standard of the Model Law without foreclosing the legitimate reasons for choosing one court over another, and without stifling the development of local law.

E. Conclusion

In practice, there may be relatively little difference between what I describe as universal proceduralism and what Jay describes as modified universalism. The difference lies in aspiration, rather than practical administration. Modified universalism starts small, but retains larger aspirations. It is these larger aspirations that worry me, and they worry me for some of the same reasons that they worry Lynn. There are benefits to harmonization, but it has a dark side too. It can facilitate pernicious jurisdictional competition. It can stifle beneficial jurisdictional competition as well, and because it is limited to areas where there is consensus, it may be substantively watered down. On balance I think the benefit of harmonizing key aspects of bankruptcy procedure outweighs the costs, but I would keep the scope narrow in order to leave room for local legislation.

III. UNIVERSAL PROCEDURALISM BUT DOMESTIC TRADITIONALISM

While I have spent most of my effort in this Article arguing against the limited aspirations of LoPucki's cooperative territoriality, I think that his work demonstrates important limits on the universalist vision of one case

104. See 11 U.S.C. § 304, *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 119 Stat. 146.

and one law. Lynn's view is that neither one case nor one law are achievable goals without giving rise to the unacceptable cost of facilitating a race to the bottom, and perhaps eliminating beneficial legal diversity.¹⁰⁵ In my view, the goal of one case is achievable, but the goal of one law is neither achievable nor desirable.

Under any scenario that I can envision, applying "one law" to a transnational case will either create excessive incentives for forum shopping, or require excessive levels of harmonization. My concern lies in the limits of harmonization. To the extent that harmonization is sought on distributive questions, the likely motivation for the harmonization effort will be to benefit a concentrated interest group at the expense of the public at large. To the extent that harmonization is not achieved, then these same distributive questions will create tremendous pressures on participants in the bankruptcy system to engage in forum shopping. In my view, the best we can hope for is a bankruptcy regime which administers a case in a common coordinated proceeding, but which is transparent as to the major distributive questions regarding property distribution and governance. This may require one court to apply many different laws to different pieces of property and to the different legal entities involved in the case.

The question that Jay might raise is whether such an arrangement is workable enough to allow reorganizations to occur. I believe it will still be a significant improvement over current law. Bankruptcy courts are familiar with cases that are administratively but not substantively consolidated. As such, they are familiar with the need to administer a number of entities in one case, sometimes with multiple plans. Universal proceduralism means that in some of these cases, the court may have to actually administer some of the cases under different bankruptcy laws. In doing so, they may need to seek the assistance of the ancillary courts in other jurisdictions, but the goal should be to gain the collective benefits of coordination without disturbing the expectations of national creditors.

The principles I have articulated here are quite similar to those articulated by Baird and Jackson in their work on the so-called "creditors' bargain" heuristic.¹⁰⁶ In their view, the goal of bankruptcy law should be limited to the steps necessary to correct the collective action problem

105. Lynn M. LoPucki, *Global and Out of Control?*, 79 AM. BANKR. L.J. 79, 102 (2005) ("Harmonization is a euphemism for forcing commercially less important countries to adopt the remedies and priorities of the commercially more important countries.").

106. See Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97 (1984).

created by the race of diligence.¹⁰⁷ Non-bankruptcy entitlements should not be disturbed beyond the minimum necessary to capture the so-called reorganization dividend or going concern value.¹⁰⁸ In other scholarship, I have argued that this approach understates the aspirations of domestic bankruptcy law.¹⁰⁹ Baird and Jackson's argument turns on a combination of contractarian theory, concerns about judicial competence, and concerns about forum shopping. Ronald Mann has pointed out that the "contractarian" argument does not work to the extent that it applies to arguments about how to divide up reorganization surplus.¹¹⁰ I have argued that judicial competence does not generate an argument for proceduralism either.¹¹¹ Finally, the only argument that remains is Baird and Jackson's concern about forum shopping into bankruptcy. That argument too disappears domestically when one realizes that bankruptcy specific priorities condition the negotiations that occur in the shadow of bankruptcy. For these reasons, I am not convinced by the "proceduralist" argument in connection with domestic bankruptcy.

In international bankruptcy, however, the proceduralist's forum shopping argument has bite. To the extent that individual countries make bankruptcy specific choices about legal entitlements, they raise the stakes of true jurisdictional forum shopping and increase the likelihood of a race to the bottom. Thus, to the extent that countries need to be free to experiment with their local bankruptcy policies and to regulate the behavior of local entities inside or outside of bankruptcy, the law of transnational insolvencies should not seek to influence or limit those options.

107. *Id.* at 100 ("[B]ankruptcy law at its core should be designed to keep individual actions against assets, taken to preserve the position of one investor or another, from interfering with the use of those assets favored by the investors as a group.").

108. Baird and Jackson argue as follows:

The relevant bankruptcy goal . . . is not that a firm stay in business, but rather that its assets are deployed in a way that, consistent with applicable nonbankruptcy restrictions, advances the interests of those who have rights in them. When there is no going-concern surplus, a reorganization would seem inappropriate because the firm's assets are worth more (and hence the owners recover more of what they advanced the debtor) if the assets are sold and used by third-party purchasers than they are if kept together. Conversely, when a firm's assets *are* worth more as a going concern, the owners, as a group, are probably better off if the assets are kept together, even though the firm may have defaulted on some of its obligations or may be insolvent.

Id. at 118–19.

109. See Janger, *supra* note 18, at 566–83.

110. See Ronald J. Mann, *Bankruptcy and the Entitlements of the Government: Whose Money is it Anyway?*, 70 N.Y.U. L. REV. 993 (1995).

111. See Janger, *supra* note 18, at 593–98.

IV. UNIVERSAL PROCEDURALISM IN PRACTICE—SOME CONCLUDING THOUGHTS ON CHAPTER 15

The UNCITRAL Model Law on Cross-Border Insolvency is now the law in the United States and nine other countries, including the United Kingdom, Japan, and Mexico.¹¹² In my view, it provides a legal framework that can foster a universal proceduralist regime. Indeed, the pragmatic genius of the Model Law is that it provides a framework for cooperation that can accommodate case structures of almost any type. It clearly favors, however, a regime where cases are opened in the various jurisdictions where an entity has assets, executive offices, operations, or subsidiaries, and that those cases will “defer” to the main proceeding opened in the entity’s COMI.

As implemented in the United States, Chapter 15 gives a foreign representative access to U.S. courts to open either an ancillary case or a full blown case under another chapter of Title 11. Recognition of the proceeding is automatic,¹¹³ and a stay goes into effect with regards to the debtors assets in the United States.¹¹⁴ Other relief is available under U.S. law to the extent the foreign representative requests it, including the power to operate the business. It creates mechanisms that allow courts to communicate and coordinate the proceedings pending in various courts.

To the extent that it addresses the concerns I have raised above, the Model Law satisfies the requirements of universal proceduralism. It harmonizes only the minimal procedures necessary to administer a cross border case. It defines the “main case” as the case opened in the jurisdiction that is the debtor’s center of main interest. As I have discussed above, this is a term that is open to significant interpretation, as the recent *Eurofoods* decision¹¹⁵ under the E.U. Reg. demonstrates, but it provides sufficient constraint on forum shopping to be preferable to the ad hoc mechanisms available under current law. It also contains limits on comity that should prevent a main proceeding from competing in ways that violate the principles of agency, legality, or creditor expectations described above. In particular sections 1507 and 1522 allow the court to deny relief requested by the foreign representative if it is not in the inter-

112. Bob Wessels, *Will UNCITRAL Bring Changes to Insolvency Proceedings Outside the USA and Great Britain? It Certainly Will!*, 3 INT’L CORP. RESCUE 200, 201 (2006) (“Several countries have indeed enacted legislation that—to a varying extent—incorporates the Model Law into domestic law, these countries are Eritrea, Japan, Poland, South Africa, Spain, Mexico and within Yugoslavia, Montenegro, USA and (as of 4 April 2006) Great Britain.”).

113. See Model Law, *supra* note 12, art. 9; see also 11 U.S.C. § 1515.

114. See Model Law, *supra* note 12, art. 20; see also 11 U.S.C. §§ 1520–1521.

115. Case C-341/04, *Eurofood IFSC Ltd.*, 2006 E.C.R. I-3813.

est of creditors or affected parties.¹¹⁶ These provisions are broad enough to allow the court to consider the principles articulated above.

The element missing from the Model Law, and which remains to be accomplished if a system of universal proceduralism is to be realized, is a harmonized set of choice of law principles. This, it seems to me, is the next and most important step in realizing a regime of universal proceduralism.

116. See Model Law, *supra* note 12, arts. 7, 22; see also 11 U.S.C. §§ 1507, 1522.

