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Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization

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Globalization is sometimes considered to have led to the liftoff of international business transactions from national regulatory oversight. This Article is concerned with the connection between a liftoff of transnational business processes and the laws related to international economic transactions. In particular, the Article examines the "governing" role that national private laws play in transnational business relations through an examination of the regulatory function of private international law. The Article describes how recent "internationalist" reforms in
private international law contribute to a possible liftoff and discusses representative policy justifications for these reforms, such as the facilitation of international commerce, the attainment of interstate cooperation, and the promotion of cosmopolitan fairness to parties. It then explores reasons why the traditional regulatory function of private international law has been obscured in recent internationalist reform, in particular by its ready, if misleading, identification with parochialism. To address such concerns, the Article describes a cosmopolitan account of the regulatory function of private international law in the contemporary era of globalization. It identifies the nature of the regulatory challenges that face private international law in the current international system and makes proposals for the kinds of regulatory role that private international law could play in the constitution of a pluralistic system of governance that might address some of the excesses of economic globalization.

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I. INTRODUCTION

This Article is concerned with the connection between globalization processes and the laws related to international economic transactions. In particular, the Article examines the "governing" role that national private laws play in overseeing transnational business conduct through the regulatory function of private international law.

The traditional legal understanding of the law of international business transactions considers such transactions to be regulated by a legal framework of a multiplicity of different, often overlapping, state jurisdictions with which a transaction has contacts.\(^1\) Under this framework, a number of different legal regimes might have claims to regulate such transactions, both as between the parties and as between transacting parties and third parties. These legal regimes include both public laws and regulation and applicable rules of private law, such as tort and contract.

Under contemporary globalization, this traditional understanding has been disturbed by the increasing ability of transnational business actors to achieve a "liftoff" from the terrain of national regulation. A number of writers have identified the ways in which global economic and social processes have reconfigured national legal practices.\(^2\) At the procedural level, these writers focus on the increase in dispute resolution by means of international commercial arbitration rather than state-based litigation. At the substantive level, these studies have emphasized the importance of the growth of lex mercatoria, a delocalized private law based on the customs of international trade, and other forms of non-traditional rules in the regulation of transnational business conduct and dispute-resolution.

This Article explores the issue of the transnational liftoff of international business transactions from national regulatory oversight through an examination of the regulatory function of private international law\(^3\) in this contemporary era of globalization. It is

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3. This Article uses "private international law" to refer to the subject also known as the conflict of laws; see DICEY AND MORRIS ON THE CONFLICT OF LAWS 33 (Lawrence
important to connect doctrinal reform in private international law with more general public policy debates and academic studies concerning law in an era of globalization. For those interested more generally in globalization and governance, the reform of private international law provides a concrete study of the role of private laws in the constitution of transnational processes that include intersecting roles for state and non-state actors in "governing" transnational conduct in a global economy.

To that end, Part II of the Article describes the role that some recent "internationalist" reforms in private international law play in the increased autonomy of transnational business and briefly discusses some reasons for undertaking such reform. I argue that these reforms are motivated by a liberal internationalist policy vision of an international system that overstates some objectives (i.e., promoting international trade and interstate cooperation) and obscures other worthwhile objectives (i.e., effective transnational regulation).

Part III describes the regulatory function of private international law in relation to the regulatory function of underlying national private laws. This Part then explores how the traditional regulatory function of private international law has been obscured in recent reform, in particular by its ready, if misleading, identification with parochialism. In traditional private international law, the regulatory interest was effectively addressed through deference to local laws and institutions. In recent internationalist reform, in contrast, the policy objective of effective regulation has been obscured and demoted in comparison with supposedly uncontroversial international objectives such as facilitating the international economy and promoting cooperative interstate relations.

Collins ed., 12th ed. 1993) [hereinafter DICEY & MORRIS]. Although the term "conflict of laws" is more often used in common law jurisdictions, I use the term "private international law" because this Article primarily addresses questions of jurisdiction, choice of law, and recognition and enforcement of judgments related to transactions that cross national boundaries. In addition, the Article addresses policy concerns and policy arguments about the international system rather than federal systems.

In this charged policy setting, it is difficult to make an argument for the regulatory function of private international law without seeming to fall into parochialism.

Part IV, therefore, attempts to elaborate a cosmopolitan\textsuperscript{5} account of the regulatory function of private international law in the contemporary era of globalization. This Part will explain how problems of transnational regulatory coordination create regulatory gaps and regulatory competition for the international system. It will then elaborate on further regulatory challenges that may arise when transnational business networks become autonomous and closed norm systems and will explore the idea that countervailing networks of regulatory oversight, such as transnational human rights networks, will develop.

Finally, in Part V, I will argue that national private laws, and therefore private international law, can contribute to an effective system of transnational governance. This Part will suggest that private international law can contribute to the constitution of a pluralistic system of governance of economic globalization. National private laws, as coordinated by private international law, may not be the best tools for regulating transnational business conduct, but they can retain relevance in regulation as part of the mechanism used by various state and non-state actors in a pluralistic system of regulation.

The concerns of this Article are clearly related to issues concerning globalization that dominate policy-making today. Political issues such as the relation of economic globalization to non-trade objectives, the status of sovereignty, the decline in state effectiveness, the spread of ideologies of neo-liberalism, and the problems of less-developed societies are clearly reflected in private international law. In some sense they dwarf the subject of this Article. However, a careful consideration of the role of private international law in transnational business autonomy responds to the need for a more refined sense of how the terrain of economic globalization is constituted. In addition, and perhaps more importantly, the policy debate around private international law

\textsuperscript{5}. I use parochialism and cosmopolitanism in the sense described in Part II: cosmopolitanism as a normative standpoint that includes the interests and values of individuals and societies outside of a defined state's boundaries; parochialism as the restriction of concern in normative judgments to the interests and values of the individuals and society in a single state jurisdiction. At various points in Part II, I also refer to "cosmopolitan fairness" or "cosmopolitan non-discrimination" as a description of the narrower liberal policy goal of treating foreign and domestic individuals alike. A cosmopolitan standpoint could go well beyond such conceptions of fairness towards a broader conception of cosmopolitan justice and order. This is the subject and objective of Parts III, IV, and V.
reforms related to transnational business autonomy offers a strong example of how the policy discourse about internationalism and globalization can obscure worthwhile political objectives, such as effective regulation, that could and should be part of law's function in a global society.

II. THE AUTONOMY OF INTERNATIONAL BUSINESS AND THE INTERNATIONALIST REFORM OF PRIVATE INTERNATIONAL LAW

For international business networks to free themselves from the regulation of domestic private law, doctrinal reforms have been required in a number of subjects of private international law. Especially in the past two decades, treaties, legislation, and court decisions have instituted reforms in private international law that have facilitated the increased autonomy of transnational business dispute-resolution. A focus on these reforms highlights the process of the constitution of a global legal regime and some of its unanticipated or overlooked consequences, including consequences for regulatory objectives.

A. Transnational Liftoff?—Puzzles Concerning The Increasing Autonomy of International Business in Dispute Resolution

As in other areas, systems of non-state rules have pre-existed and co-existed with state laws in the area of business relations. Historians of merchant law and commercial law have shown how the state law system was a late arrival with respect to the "governing rules" of business relations. Legal pluralist approaches to modern business relations emphasize how even with the rise of state courts and state law, many kinds of business relations remain governed by non-legal rules such as trade custom or usage, and by non-legal enforcement mechanisms such as retention of security, reputational

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damage, and vertical integration.\textsuperscript{8} In addition, state law has often incorporated the rules and customs found in trade custom and practice.\textsuperscript{9} Nonetheless, state law certainly plays a role in modern business relations, and the development of an applicable system of reliable third-party enforcement by private law is considered by many to be necessary to expand the scale and scope of transactions in a complex modern economy.\textsuperscript{10}

The standard view that state law is relevant to modern business transactions is reflected in the way in which the law of international business transactions is understood as involving the laws of a number of different state jurisdictions.\textsuperscript{11} The state laws include both public laws, such as labor law and tax laws, and private laws, including tort-delict, property, and contract.

More recently, the importance of state law in governing business relations is thought to be receding, as transnational business networks lift off from the terrain of state systems, governed by a mix of alternative forms of norms and processes.\textsuperscript{12} Recent studies by Yves Dezalay and Bryant Garth and by Gunther Teubner offer innovative analyses of the return to prominence of trade custom and non-state based dispute resolution specifically in the context of transnational business networks.

In their study of international commercial arbitration, Dezalay and Garth conduct extensive participant interviews that document the

\begin{itemize}
\item \textsuperscript{8} See generally, DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985).
\item \textsuperscript{9} In England, for example, largely through the work of Lord Mansfield, the common law claimed some priority over the law merchant, but "it is a triumph of a peculiar sort: the victorious system in effect adopted as its own the form and substance of the vanquished.". ARTHURS, note 6, at 55. \textit{See also} TRAKMAN, \textit{supra} note 6, at 27–29.
\item \textsuperscript{10} NORTH, \textit{supra} note 8, at 54–60.
\item \textsuperscript{11} VAGTS, \textit{supra} note 1. This can become quite intricate and complex. For example, under the idea of \textit{dépeçage}, there is the potential for variation in governing laws across a "single" business relationship. For example, different laws may be applicable to each of the sales, carriage, and credit aspects of an international sales relationship. On \textit{dépeçage}, see, \textit{e.g.}, Rome Convention on the Law Applicable to Contractual Obligations, June 19, 1980 [hereinafter Rome Convention], 1605 U.N.T.S. 59, arts. 3(1) and 4(1); DICEY & MORRIS, \textit{supra} note 3, at 1205–08; THE CANADIAN LAW AND PRACTICE OF INTERNATIONAL TRADE, WITH PARTICULAR EMPHASIS ON EXPORT AND IMPORT OF GOODS AND SERVICES 171 (J.G. Castel et al., eds., 2d ed. 1997) [hereinafter CANADIAN LAW AND PRACTICE].
\item \textsuperscript{12} A popular version of this idea, not explored here, is the growth of transnational ethnic networks, such as the Overseas Chinese, who rely primarily on non-state tools for governing business relations. \textit{See}, \textit{e.g.}, JANET T. LANDA, TRUST, ETHNICITY AND IDENTITY: BEYOND THE NEW INSTITUTIONAL ECONOMICS OF ETHNIC TRADING NETWORKS, CONTRACT LAW, AND GIFT-EXCHANGE (1994); JOEL KOTKIN, TRIBES: HOW RACE, RELIGION AND IDENTITY DETERMINE SUCCESS IN THE NEW GLOBAL ECONOMY (1992).
\end{itemize}
rapid rise of arbitration in international business relations and demonstrate how the construction of this new order is linked to the political, legal, and moral entrepreneurship of various participants in the arbitration community—including academics, lawyers, arbitrators, and business actors.13 Dezalay and Garth argue that the legal field of international commercial arbitration was produced from a complex mix of competition and cooperation among a variety of interests. For example, Dezalay and Garth identify a tension between two principal groups of supporters of arbitration. The “grand old men” typically are an older generation that includes more Europeans, academics, generalists, and supporters of a more informal, diplomatic vision of arbitration as part of a larger international order. In contrast, the “new technocrats” are a younger generation that includes more Americans, specialists, practitioner-litigators, and supporters of arbitration as a commercially efficacious and economically valuable service for clients.14 Although these and other groups compete with each other for arbitration business, they also have acted cooperatively to promote the increased use of arbitration by business actors and to persuade state actors to accept the use of arbitration instead of courts for international dispute-resolution among business actors.

In Teubner’s striking studies of transnational legal pluralism, transnational business relations in which disputes are resolved by international commercial arbitration and lex mercatoria are a primary example of systems which “break the frame” of national laws.15 Teubner argues that contemporary global society must be viewed as comprised of multiple norm systems, each of which has its own participants and norms.16 The result is “global law without a state,” in which systems of transnational commerce and multinational corporations, as well as transnational systems of human rights and labor actors, challenge the supremacy of state-based legal systems for pre-eminence in the production of social norms.17

13. Dezalay & Garth, supra note 2, at 34.
14. Id. at 34–41.
17. See generally the studies in Global Law, supra note 2.
While filled with insights, both of these works also leave significant questions unanswered. At the descriptive level, the puzzle that interests me is the role of state governments and state legal systems in the development of global law. The studies show how a host of interest groups—including business actors and various service-providers in the arbitration sector—were in favor of, and acted to promote, the expansion of the arbitration regime in international transactions. But why is it that different states around the world permitted and indeed, to some extent, promoted the "liftoff" of this realm of commercial arbitration from the applicability of national laws and the oversight of national courts? What motivates legislators and judges in state legal systems to accept arbitration, given that arbitration does not offer these actors any obvious pecuniary or status gains? To better understand this puzzle, it is useful to examine related developments in private international law as a key factor in the connection between state laws, policies, and actors, on the one hand, and the "liftoff" of transnational business actors, on the other.

At the prescriptive level, I am interested in the consequences for regulatory concerns of an increase in the relative autonomy of international commercial dispute resolution from traditional state legal systems. To accept completely the "reality" that effective power has shifted to non-state actors is to accept too readily the effective "privatization" of private law. Private law and private international law can potentially serve public purposes, even if they are too often not deployed in that way. A careful consideration of private international law may produce a better sense of the role that state-generated national private laws and private international law could play in the regulation of the transnational conduct of private actors, either through direct regulation or through coordination with other regulatory mechanisms, including public laws and non-state actors.

B. The Changing Role of the State: The Internationalist Reform of Private International Law

Private international law is an excellent location from which to view the connection between state systems and non-state business actors. In turn, recent reforms in private international law offer the chance to view some of the changes that are occurring in the relations of state systems and non-state actors, and to consider how that change has occurred. This Part will briefly survey a set of reforms to the rules of private international law that have been geared towards
augmenting the autonomy of private actors and increasing the efficiency of transnational dispute resolution.

I. Internationalist Reform in Private International Law

Significant doctrinal reforms in private international law have promoted the autonomy of transnational dispute-resolution among private actors with respect to the key subjects of private international law. With respect to jurisdiction, many reforms have been implemented to rationalize and limit assumption of jurisdiction by state courts. Reforms in this vein have included the enforcement of forum selection clauses and the use of forum non conveniens in common law jurisdictions, and the allocation of jurisdiction of courts under treaties such as the Brussels and Lugano Conventions in Europe. With respect to choice of law rules, efforts have been made to enforce contractual choice of law clauses and to increase the predictability and objectivity of choice of law in tort. With respect

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18. For a comprehensive survey, see DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW (J.J. Fawcett ed., 1995) [hereinafter DECLINING JURISDICTION].


21. The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1262 U.N.T.S. 1653 [hereinafter Brussels Convention] and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1659 U.N.T.S. 13 [hereinafter Lugano Convention] employ an “international” method of rationalizing the assumption of jurisdiction among national courts in Europe. The conventions strictly allocate jurisdiction among the courts of the contracting states based on mandatory criteria agreed to by international negotiation. Overlapping actions are avoided by requiring a stay of actions commenced in a second jurisdiction if jurisdiction has been assumed by the courts of another member state. Furthermore, the conventions provide an integrated system of mandatory recognition and enforcement of judgments from courts which have assumed jurisdiction in accordance with the conventions (art. 21).

22. E.g., Rome Convention, supra note 11, art. 3. For the laws of the United Kingdom, see DICEY & MORRIS, supra note 3, at 1211, Rule 175. For the laws of the United States, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

23. E.g., Jensen v. Tolofson, [1994] 3 S.C.R. 1022; [1995] 1 W.W.R. 609 (Can.) (reinstating the rule for choice of law in tort to a form of the lex loci delicti, the law of the place of the tort). For commentary, see Peter Kincaid, Jensen v. Tolofson and the Revolution
to the recognition and enforcement of judgments, common law courts and the Brussels and Lugano Conventions have restricted the grounds for review or refusal of recognition and enforcement of foreign judgments. More recently, the Hague Conference on Private International Law has been the venue for discussions for an international treaty with respect to foreign judgments.

2. Arbitration

The internationalist reform of private international law is most apparent in the greater willingness of state courts to both compel parties to arbitration when there is an arbitration clause and enforce the arbitral awards that result. The willingness to support arbitration is common to many different kinds of legal jurisdictions. Treaties and legislative enactments have been important in this respect, in particular the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Among other provisions, the Convention requires a state court to decline jurisdiction when faced with a valid arbitration agreement and to


24. E.g., Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 (Can.). Under article 26 of the Brussels Convention, supra note 21, foreign judgments shall be recognized without special proceedings. Only limited exceptions are provided (arts. 27 and 28).


26. See generally DEZALAY & GARTH, supra note 2.

recognize and enforce foreign arbitral awards. The Convention has been signed by major commercial nations ranging from the United States to China, and has been implemented in various pieces of state legislation. In addition, the UNCITRAL Model Law on International Commercial Arbitration, a model law that provides more details on arbitration procedures and that elaborates on provisions of the New York Convention, has influenced legislation or been adopted in a number of jurisdictions.

Common law courts have supported the turn to arbitration by limiting the ability of parties to resist enforcement of arbitration clauses or arbitral awards. Courts, for example, have shown greater willingness to enforce arbitration clauses even where the claim was that the contract was void for reasons such as duress or illegality, if the claim of invalidity of the contract did not apply specifically to the arbitration clause as well. Courts increasingly permit arbitration

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28. Id. art. II(3).

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III provides that each Contracting State “shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedures of the territory where the award is relied upon” under the conditions set out in the other articles of the Convention.

29. Indeed, it has been argued that states have gone beyond even what is required by the terms of the Convention in restricting review by their national courts of foreign arbitral awards. See W. Michael Reisman, Systems of Control in International Adjudication and Arbitration 109–15 (1992). For current information on parties to the Convention, see http://www.un.org/Depts/Treaty. See also Treaties Chart, in International Litigation: A Guide to Jurisdiction, Practice, and Strategy, ch. 1 (David Epstein, Jeffrey L. Snyder & Charles S. Baldwin eds., 3d ed. 1998).


C. Internationalist Visions and the Policy Concerns of the Legal Decision Maker

Understanding why the rules of private international law have changed requires a consideration of the role of state actors—in particular legislators and courts—in promoting or acquiescing in the "transnational liftoff" of arbitration and the use of non-state norms for resolving transnational civil and commercial disputes. Interests narrowly defined—as in the pecuniary interests or social capital of arbitrators or business lawyers—cannot readily and completely explain the behavior of judges and legislators. Nor can simple economic and political power, from which the judges and legislators

33. DICEY & MORRIS, supra note 3, at 576–79, Rule 57(1); UNCITRAL Model Law, supra note 30, arts. 16 and 28.

34. E.g., UNCITRAL Model Law, supra note 30, art. 16 (competence of arbitral tribunal to rule on its own jurisdiction, with possibility for request for decision by a state court on any preliminary decisions of a tribunal); INTERNATIONAL COMMERCIAL ARBITRATION, supra note 32, at 524–526, 645–56; Thomas Carboneau, Mitsubishi: The Folly of Quixotic Internationalism, 2 ARB. INT’L 116, 135 (1986) [hereinafter Carboneau, Mitsubishi]; Thomas Carboneau, The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi, 19 VAND. J. TRANSNAT’L L. 265 (1986).

35. The sharpest debate has occurred in the United States, as in the debate surrounding the controversial decision of the U.S. Supreme Court in Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth Inc., 473 U.S. 614 (1985), which will be discussed below. A key earlier case was Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). In First Options of Chicago v. Kaplan, 514 U.S. 938 (1995), the U.S. Supreme Court emphasized that arbitrability may depend on what the specific intention of the parties was with respect to whether an issue was arbitrable.

are relatively insulated. Instead, one must further investigate the kinds of values and beliefs that key legal decision-makers have about the international system as it is and as it should be.

The values and beliefs of common law judges are important in part because effective implementation of treaty obligations relies on state legislators and judges accepting and promoting the working of the arbitration process. In addition, international conventions cover only a limited number of internationalist reforms and are not binding on many jurisdictions. As a result, reform in private international law in common law jurisdictions has been effected through domestic legislation and, above all, through court decisions concerning jurisdiction, choice of law, recognition, and enforcement.

In addition, common law judges are expected to provide a set of public justifications for their decisions. The policy reasons provided by common law judges provide an unusually good insight into the policy ideals and visions of the international system that have been present in the minds of key legal decision-makers who have facilitated the increased use and autonomy of private dispute-resolution among transnational business actors. More generally, the reasoning in private international law provides evidence of the beliefs about the international system that are held by actors with influence on lawmaking. The policy arguments deployed by judges in internationalist reform may also be representative of the thinking of such other actors as legislators, litigants, and the general populace.

37. The New York Convention, supra note 27, is by far the most significant development in international law in the area related to international litigation for areas outside Europe. The two Hague Conventions on judicial assistance are widely in effect, but concern minor reforms in the relatively insignificant subjects of the taking of evidence abroad and service abroad. Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 658 U.N.T.S. 163; Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 847 U.N.T.S. 241. Other than these conventions, the only relevant international conventions were the private international law provisions of specialized conventions such as the Warsaw Convention on Air Carriage. Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 137 L.N.T.S. 11; as amended by the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371 (the "Hague Protocol").

38. For example, the legislative revision of English choice of law rules for tort contained in Part III of the Private International Law (Miscellaneous Provisions) Act 1995, supra note 23.

39. Supra, Part II.B.1. In Wai, In the Name of the International, supra note 36, I argue that internationalist reform by common law judges in private international law is an example of judicial activism in the name of the international.
D. The Policy Discourses of Liberal Internationalism

The policy thinking evidenced in the reform of private international law with respect to dispute resolution in transnational business partakes of the broader contemporary policy discourses of liberal internationalism.\(^\text{40}\) In particular, internationalist reform in law is supported by three distinct sets of policy objectives for the international system: (1) an economic objective of facilitating international commerce, (2) a political objective of increasing interstate cooperation and order, and (3) a moral objective of avoiding parochialism and promoting non-discrimination. In internationalist reform, these three distinct policy objectives are argued to reinforce each other in support of a common set of programmatic reforms.\(^\text{41}\)

These economic, political, and moral policy discourses have their origins in the traditions of international liberalism in which the interests of autonomous sovereignties are reconciled with each other through belief in the non-controversial benefits to each sovereign entity of international trade, international cooperation, and cosmopolitan non-discrimination.\(^\text{42}\) This powerful vision of the international order argues for the development of laws, institutions, and norms that would convince individual states to avoid policies which are geared to short-term self-interest in order to achieve potential long-run cooperative benefits. These policy discourses are particularly influential in international trade law and public international law, but they also have had much recent influence in the field of private international law.

\(^{40}\) See Wai, Commerce, Cooperation, Cosmopolitanism, supra note 36.


These liberal internationalist policy objectives have a complex but structured role in the legal and policy argumentation surrounding legal reform in private international law, including with respect to arbitration. Sometimes the objectives of facilitating international commerce, promoting international cooperation, or ensuring cosmopolitan fairness are invoked directly by judges, legislators, or other policy makers. A striking example of this style of policy reasoning is found in the judgment of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, which liberalized common law rules concerning recognition and enforcement of judgments. This judgment initiated a dramatic series of judgments of the Supreme Court of Canada that led to the internationalization and constitutionalization of private international law in Canada. In an influential passage from that judgment, Justice La Forest writes that:

The common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th Century. This principle reflects the fact, one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states.

The world has changed since the above rules were developed in 19th Century England. Modern means of travel and communications have made many of these 19th Century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and peoples across state lines has now become imperative. Under these circumstances, our approach to the recognition

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44. I have written more generally of the internationalist vision of the Supreme Court of Canada and of Justice La Forest, the leading Canadian judge of international law of this generation, in Robert Wai, *Justice Gérard La Forest and the Internationalist Turn in Canadian Jurisprudence, in Gérard V. La Forest at the Supreme Court of Canada 1985–97, 421* (Rebecca Johnson & John McEvoy eds., 2000).
and enforcement of foreign judgments would appear ripe for reappraisal.45

In addition to judges, many academic articles and treatises in private international law invoke the need for reform for the purposes of commerce, inter-state cooperation, and cosmopolitan fairness. In particular, these liberal policy frames seem important to private international law scholars who have turned to interdisciplinary approaches such as economic theory,46 international relations theory,47 and moral and political theory.48

Internationalist policy objectives also operate indirectly. First, these objectives can influence the application of doctrine in particular cases. The values can form a vague but powerful background for the interpretation of the facts of a case and the interpretation and application of a rule to the facts. Second, doctrinal reforms are commonly justified in terms of intermediate policy values such as certainty, uniformity, harmonization, comity for foreign law and institutions, and party autonomy and choice.49

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48. E.g., BRILMAYER, supra note 47, ch. 5 ("Rights, Fairness and Choice of Law").

49. Although I focus on the example of Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth Inc., 473 U.S. 614, in the U.S. context, examples also exist in other jurisdictions. For example, the need for uniformity and certainty in economic transactions to facilitate the workings of the common market were significant objectives identified by the Commission in the policy background to the Rome Convention, supra note 11. See Report on the Convention on the Law Applicable to Contractual Obligations, 1979 O.J. (C59) 1, 4–5 (the Giuliani-Lagarde Report), reprinted in RICHARD PLENDER, THE EUROPEAN CONTRACTS CONVENTION: THE ROME CONVENTION ON THE CHOICE OF LAW FOR CONTRACTS, Annex V (1991); DICEY & MORRIS, supra note 3, at 1195. For a sophisticated account of the tension between different policy objectives and legal disciplines in the "Europeanisation" of private law, see Christian Joerges, The Europeisation of Private Law as a Rationalisation Process and as a Contest of Disciplines—an Analysis of the Directive on Unfair Terms in Consumer Contracts, 3 EUROPEAN REVIEW OF PRIVATE LAW 175 (1995).
One such example is the decision of the U.S. Supreme Court in *Mitsubishi Motors v. Soler.* In *Mitsubishi,* the U.S. Supreme Court enforced an arbitration clause even in the presence of antitrust claims based on U.S. laws. In the course of his majority decision, Justice Blackmun cites the earlier Supreme Court decision in *The Bremen,* which identified the policy reasons for enforcement of a choice-of-forum clause:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Justice Blackmun then discusses the policy reasons identified by the Court in *Scherk v. Alberto-Culver Co.* in support of enforcing an arbitration agreement that included disputes related to U.S. securities regulation:

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. . . .

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . . [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of

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businessmen to enter into international commercial agreements. 52

Justice Blackmun concludes that the enforcement of the arbitration clause in the case before the Court should proceed. He observes that:

As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration," Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F. 2d 978, 985 (CA2 1942), and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration. 53

Justice Blackmun summarizes the policy reasons for the majority of the court by noting that:

[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreements, even assuming that a contrary result would be forthcoming in a domestic context. 54

It is debatable whether policy objectives such as comity and predictability can be defended as desirable ends in themselves, or whether they instead rely for their justification on an informing vision


54. Id. at 629.
of an international system that would maximize global economic benefits, promote international political cooperation and peace, and limit parochial discrimination.\textsuperscript{55} Regardless, the reasoning in \textit{Mitsubishi} is exemplary in showing how, whether through the direct or indirect promotion of liberal internationalist policy values, significant internationalist reform in private international law is justified and achieved. The common incidence of internationalist policy justification in cases such as \textit{Mitsubishi} and \textit{Morguard} also demonstrates how a decentralized process of reform can lead to similar results because of the prevalence of certain types of policy arguments in the mindsets of key decision-makers.

E. \textbf{The Dangers of Internationalist Policy Formalism}

Liberal internationalist policy argumentation in private international law can serve valuable ends. The ability to reconcile conflict among the contrasting interests and ideas of international order through liberal internationalist visions of international cooperative benefit may partly explain how tensions were bridged between the visions of "grand old men" and the "new technocrats" in Dezalay and Garth's account of international arbitration. Liberal internationalist policy visions may also bridge tensions between state actors, such as national judges, and private actors, such as arbitrators or international businesses, as well as between the differing conceptions of the international system of metropolitan public international lawyers and cosmopolitan international economic lawyers.\textsuperscript{56} Most significantly, liberal internationalist arguments have helped to convince policy-makers grounded in particular state systems to promote reforms that potentially promote the better protection of international interests.

Predictably, however, liberal internationalist policy visions of private international law have a number of limitations. Policy debate about internationalist legal reform in private international law frequently adopts a technical and necessitarian approach,\textsuperscript{57} which fails to recognize that societies have alternative strategies in adapting national laws to the challenges of global society. Simplistic legal reform too often results from policies that are claimed to be necessary

\textsuperscript{55} See Wai, \textit{Commerce, Cooperation, Cosmopolitanism}, supra note 36.


\textsuperscript{57} See, e.g., ROBERTO M. UNGER, \textit{FALSE NECESSITY} (1987).
because of global conditions or because of the need to promote "the" international system.

Liberal economic, political, and normative frameworks identify policy dimensions for consideration, rather than determining a necessary set of legal reforms for all cases. In practice, however, internationalist reform based on these open-ended structures has not been so pluralistic. Open-ended structures of policy argumentation can take on an overstated determinacy and exclusion of policy alternatives when placed in particular historical contexts such as the sociological and ideational context of law reform in an era of neoliberalism,58 or of a particular national tradition of liberal internationalism.59

When situated in sociological and ideational contexts, the partiality of internationalist policy argumentation partly explains why the regulatory function is often obscured in current internationalist reform of private international law. General policy objectives such as commerce, cooperation, and cosmopolitan fairness derive their appeal as primary objectives for the international system from their seemingly uncontroversial basis in either consent or cooperation.60 However, the lack of controversy about such policy goals is overstated. First, these objectives are erroneously thought to decide particular substantive disputes in private international law in a determinate way, such as through support for rulings that enforce arbitration clauses and arbitral awards. However, the same policy objective is often indeterminate with respect to a number of different kinds of doctrinal reform.61 For example, it is far from clear whether


59. See, e.g., Wai, supra note 44.

60. I elaborate on the significance and the limits of ideas of consent and cooperative benefit to internationalist policy reasoning with respect to a specific example from international law in Wai, supra note 58, at 228–39.

61. This is a version of Oliver Wendell Holmes's general proposition: "General propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes J., dissenting). A modern, critical understanding of policy reasoning in law as overstated in its claims to determine legal implications has been best articulated by Duncan Kennedy; see, e.g., Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976) [hereinafter Kennedy, Form and Substance]; Duncan Kennedy, The Structures of Blackstone's Commentaries, 28 BUFF. L. REV. 205 (1979); Duncan Kennedy, A Semiotics of Legal Argument, 42 SYRACUSE L. REV. 75 (1991); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIECLE, chs. 5–6 (1997). Specifically, with respect to the limits of reasoning based on economic efficiency, see Duncan Kennedy & Frank Michelman, Are Contract and Property Efficient?, 8 HOFSTRA L. REV. 711 (1980);
more international transactions would occur in a situation where all foreign judgments or arbitration awards were recognized and enforced. It may be that, \textit{ex ante}, parties prefer such certainty, but it is equally possible that at least some parties would prefer less oversight by national courts during the enforcement process. As yet another alternative, some parties may prefer more flexibility for dispute-resolution to adjust to a long-term changing relationship, for example, through bilateral processes of negotiation or mediation.\footnote{This suggests an alternative idea of pluralism and self-governance among business actors reflecting the spectrum of forms of alternative dispute resolution; see, eg., D. Paul Emond, \textit{Introduction} to Special Issue, \textit{Alternative Dispute Resolution: Consensus or Confusion}, 36 OSGOODE HALL L.J. 617 (Winter 1998).}

Moreover, where there is a conflict among different policy objectives, none of international commerce, cooperation, or cosmopolitan fairness can select solutions among conflicting interests in a determinative manner. Hence, the supposed non-controversial nature of internationalist policy objectives is often overstated.

Second, internationalist policy reasoning in private international law often narrows the range of policy objectives considered appropriate for private international law. The goals of commerce, cooperation, and cosmopolitan fairness are important, but they can exclude other worthwhile policy objectives such as distributive justice, democratic political governance, or effective transnational regulation. It is important to demonstrate that objectives such as effective regulation are as worthy as international objectives such as promoting international commerce.

One way to state this challenge is to understand that the policy goals of international commerce, interstate cooperation, and cosmopolitan fairness do not exhaust the definition of an international or cosmopolitan normative viewpoint. Rather, what policies advance cosmopolitanism (and internationalism) is contested by different groups with different agendas. In general, cosmopolitanism requires a normative standpoint that includes the interests and values of individuals and societies outside of a defined state's boundaries, but it could involve a substantial commitment to a range of objectives that would meet requirements of substantive and procedural justice. Thus a cosmopolitan standpoint could go well beyond cosmopolitan fairness or non-discrimination in the narrower sense of treating foreign and domestic individuals alike. A truly cosmopolitan approach to justice and order in the international system would contemplate other objectives such as effective regulation or

distributive fairness. It is this sense of a cosmopolitan viewpoint that
I use in the remainder of this Article in describing the challenge of
articulating an international and cosmopolitan policy defence for
using private international law to promote the effective regulation of
transnational private actors.

III. THE ELUSIVE REGULATORY FUNCTION OF PRIVATE
INTERNATIONAL LAW

For the most part, international law discussions about
transnational regulation have focused on the possibilities for public
international law and institutions, in particular in functional subject
areas such as taxation or environmental regulation, and to some extent
in international trade law. Private law and private international law
have been largely ignored in discussions about international
regulation and international public policy. But it seems clear that the
private law foundations of the international economy must be
interrogated by those concerned about the regulatory consequences of
an international system where transnational business conduct is
expanding.

A. The Transnational Regulatory Function of Domestic Private
Laws

Concern about the deregulatory impact of internationalist
reform in private international law is mainly premised on the
important regulatory functions of the underlying domestic private law
regimes. In the domestic context, it is well understood that there are

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63. Cf. Friedrich Juenger, Jurisdiction, Choice of Law and the Elusive Goal of
Decisional Harmony, in LAW AND REALITY: ESSAYS ON NATIONAL AND INTERNATIONAL
PROCEDURAL LAW IN HONOUR OF CORNELIUS CAREL ALBERT VOSKUIL 137 (Mathilde
Sumampouw et al. eds., 1992) (criticizing the idea that decisional harmony should be
the overriding policy goal of private international law and arguing for an approach that promotes
substantive justice through, among other techniques, restricting generous jurisdictional rules).

64. E.g., Paul, Isolation, supra note 4; David Kennedy, A New World Order: Yesterday,
Today and Tomorrow, 4 TRANSNAT'L L. & CONTEMP. PROBS. 329 (1994) [hereinafter
Kennedy, New World Order]; David Kennedy, Receiving the International, 10 CONN. J.
INT'L L. 1, 6 (1994); A.Claire Cutler, Global Capitalism and Liberal Myths: Dispute
Settlement in Private International Trade Relations, 24 MILLENNIUM: JOURNAL OF

65. For the purposes of this Article, I distinguish regulatory concerns from distributive
concerns. Distributive concerns address underlying or created problems of inequality in the
distribution of the benefits of material goods or intangibles. The distributive concern is
significant national, societal, and individual interests in regulating conduct through private law, such as tort law. The approaches of legal realism and critical legal studies have emphasized that the private law rules of property, tort, and contract, as well as the laws of corporations, commercial and financial transactions, insolvency, and bankruptcy, are (a) necessary for the functioning of a "free" market and (b) just as much matters of public policy as public law, regulation or administrative interventions. Regulatory concerns relate both to the protection of third parties from externalities of business conduct and to the regulation of conduct as between transacting actors.

1. The Regulatory Function of Private Laws as the Protection of Third Parties

The major regulatory concern addressed by private law regimes is the protection of third parties from the harmful effects of private transactions. While contractual relations are arguably the result only of the voluntary interaction of consenting parties, many kinds of harm with which private law is concerned involve non-consenting third parties, whether they be individuals, social groups, or other segments of society at large.

Economic analysis of law explains the regulatory concern as primarily a problem of externalities. The distinction between private

fundamental to many critiques of the role of private law in domestic and global markets; see Duncan Kennedy, Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563 (1982). However, this Article is concerned with the negative impact of conduct of certain parties on others, regardless of the underlying distributive consequences, although of course such conduct will also have consequences for distribution of benefits.

66. This appreciation of the public policy importance of private international law is central to the influential governmental interest analysis of choice of law in the United States. See BRILMAYER, supra note 47, ch. 2.

67. Cass Sunstein summarizes this point by noting that:
The notion of "laissez-faire" is a grotesque misdescription of what free markets actually require and entail. Free markets depend for their existence on law. We cannot have a system of private property without legal rules, telling people who owns what, imposing penalties for trespass, and saying who can do what to whom. Without the law of contract, freedom of contract, as we know and live it, would be impossible. . . . Moreover, the law that underlies free markets is coercive in the sense that in addition to facilitating individual transactions, it stops people from doing many things that they would like to do. This point is not by any means a critique of free markets. But it suggests that markets should be understood as a legal construct, to be evaluated on the basis of whether they promote human interests, rather than as a part of nature and the natural order, or as a simple way of promoting voluntary interactions.

costs and social costs is a central problem for policy-making in many areas, and private law is no different in this respect.\textsuperscript{68} A central concern of law-making, in this view, is to structure incentives and punishments such that private actors rationally act in a way that is socially optimal. Through laws, some of the externalized costs will be internalized by the private actor. A Coasean analysis might argue that some forms of private bargaining may occur that help to internalize social costs, but, as Sunstein suggests, these depend on a number of conditions, including absence of transaction costs, wealth effects, and endowment effects.\textsuperscript{69} When these conditions are not met, government intervention may be justified to help align private costs with social costs.

The regulatory function of private law is sometimes hidden because private law is often portrayed as primarily concerned with a facilitative function. Through protection of property and contract rights, it is argued that complex exchange and specialized production will be possible. This kind of exchange and production is argued to be optimal for all parties and for overall social welfare.\textsuperscript{70}

In addition to facilitation, however, private laws clearly serve regulatory functions of deterring socially harmful or wasteful conduct. The regulatory function of private and business law regimes is demonstrated by the role of private law in the mixed regimes of antitrust law and securities laws in the United States. While clearly having a public institutional component, a major feature of the antitrust regime is the existence of private remedies under the Sherman Act, including the possibility of treble damages.\textsuperscript{71} One description of this system has been that it is a regime of “private attorneys general.”\textsuperscript{72} U.S. securities laws are another grouping of laws that have this mixed public and private character. While the regime of securities regulation includes criminal laws and administrative regulations, the securities laws also permit civil


\textsuperscript{69} Sunstein, supra note 67, at 248–52.

\textsuperscript{70} See Coase, supra note 68.


\textsuperscript{72} American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968), cited in Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth Inc., 473 U.S. at 635.
litigation by private actors seeking private remedies. Indeed, private litigants are “rewarded” for the social benefits they provide through deterrence of antitrust or securities violations by virtue of provisions such as treble damages awards. Such regimes of “public laws with private remedies” are more unusual outside of the United States. However, these regimes show how nominally private laws actually include broader regulatory objectives. Private party litigation can have purposes and effects that extend much more broadly than to just the interests of the parties to the litigation.

Although the U.S. reliance on “private” laws of antitrust and securities regulation is unusual, most legal systems have private laws of tort and delict that comprise a key part of the overall social regulation in the relevant jurisdiction. Tort law is used in most jurisdictions as a means of providing compensation to injured parties who are not in a contractual relation to the tortfeasor. In addition to compensation of injured parties who bring tort suits, tort law also aims to contribute (if imperfectly) to the general deterrence of many kinds of socially-disfavored behavior.

Although tort law can be understood as principally concerned with compensation to injured individuals, tort law clearly also aims at the deterrence of behavior that is viewed as immoral or as wasteful of society’s scarce resources,


74. Id. at 223. Other jurisdictions such as the European Union and Canada have adopted mixed regimes that contain more elements similar to the U.S. regulatory regimes, notably in the area of competition law. See Daniela Caruso, The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration, 3 EUR. L.J. 3, 17–22 (1997); see also United States of America v. Ivey, (1995) 139 D.L.R. 674, 689 (Ont. Gen. Div.), aff’d (1996) 39 D.L.R. 570 (Ont. C.A.) (Can.) (characterizing environmental law as another regime of mixed public and civil liability). Moreover, as a historical matter, the regulation of competition via both private remedies, many developed in the common law, and public statutes, such as the Statute of Monopolies, 1623, was already established in Britain long before the U.S. Sherman Act. LORD WILBERFORCE, ALAN CAMPBELL & NEIL ELLES, THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES 17–44 (2d ed. 1966). The British laws even contained precedents for the treble damages remedy. Id. at 23, n.18. Nonetheless, the scope and extent of the current regimes of civil remedies remains less expansive in non-U.S. jurisdictions than in the U.S. antitrust regime.


or both. Any internationalist reform that simply speaks of “respecting party choice” ignores the obvious competing policies at stake in the tort law system. Even where public law and administrative agencies are used to regulate, private laws such as tort laws often remain central to effective regulation. Tort law in North American jurisdictions, for example, clearly plays an important part in social regulation of business conduct in such areas as environmental law or consumer protection, each an area where there is also administrative regulation and public law.

Even in contract law, which is often understood to be about the interests of the two parties to the contract, regulation for third-party interests occurs. The common law of contract, for example, treats as void contracts that are illegal or contrary to public policy. The concern is that private agreements, even where consensually negotiated between private parties, not be used to avoid the laws or policies of the state. For example, common law contract doctrine has long placed limits on the enforcement of contracts in restraint of trade. At least one rationale for this is that a competitive market economy generates benefits to society, in particular to consumers. At a deeper level, as well, the doctrines of contract law are formulated with social objectives concerning the economy in mind. As Fuller and Purdue famously argued, the underlying policy rationales for the various measures of contract damages include the promotion of social reliance on agreements. This is another sense in which private ordering through private law is understood as a social policy, one that can be balanced against or subordinated when in conflict with other policies.

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77. Id. ch. 3. Calabresi's analysis emphasizes how even under purely economic criteria, accident law is concerned with both specific and general deterrence in order to reduce the total costs of accidents.


Agreements can accomplish little, either for their makers or for society, unless they are made the basis for action. When business agreements are not only made but are also acted on, the division of labor is facilitated, goods find their way to the places where they are most needed, and economic activity is generally stimulated.

Id.

81. For example, labor relations in common law jurisdictions are regulated by interrelated regimes of private law, collective bargaining law and statutory employment law. See The Labour Law Casebook Group, Labour and Employment Law: Cases, Materials and Commentary 1–2 (6th ed. 1998).
2. The Regulatory Function of Private Law "As Between the Parties"

Contract law is thought to be key to international transactions. It seems to capture the ideal of promoting mutual promises in order to facilitate mutually valuable transactions. However, even as between the parties to transactions, private law adjudication plays a significant "regulatory" role in seeking to ensure that agreements achieve fairness and justice as between the parties.82

Critical scholars have argued that in addition to regulatory purposes related to the impact of private transactions on third-party interests, private law adjudication is often motivated by, and should be motivated by, considerations as to fairness between the parties.83 Most obvious are the private laws that are concerned with unfair conditions under which agreements are formed. Doctrines of duress, unconscionability, mistake, incapacity, and misrepresentation are standard examples in contract law where private law imposes limits on private ordering to ensure that basic conditions of voluntariness and adequate information are met.84 The imposition of compulsory terms by legislatures and the limits on the enforcement of exclusion clauses is a further example where private law rules clearly play a role in regulating the contractual freedom of parties. The motives for such contractual measures are various, and can include both concerns about correcting for unequal power or inadequate information, and motives of paternalism and distributive fairness.85

The role of these protective motives as between transacting parties is especially significant in a transnational context with respect to contractual provisions for choice of law, choice of forum, and arbitration clauses. As a result of a lack of information, expertise, or advice, many parties, such as consumers,86 may not fully appreciate the significance of such clauses when they appear in a contract.87

82. Singer, Real Conflicts, supra note 4, at 41-42; Kennedy, Receiving the International, supra note 64. Of course, contract law often fails in these aspirations, especially in the actual practice of contract law litigation. See, e.g., Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc'y Rev. 95 (1974).
83. See, e.g., Kennedy, supra note 65.
85. Kennedy, supra note 65.
87. Some of the starkest examples of such transnational issues occur in on-line contracts, where a party can agree, with a click of the mouse, to a series of contractual
This concern is partly recognized, for example, in the preliminary draft of the Hague Conference convention on jurisdiction and recognition of judgments, which excludes both consumer\textsuperscript{88} and employment contracts\textsuperscript{89} from the general provision that supports forum-selection clauses.\textsuperscript{90}

Identifying the potential protective functions of contract law should not obscure the fact that private law has not always effectively served those functions. In many areas, public law has been necessary to correct for these deficiencies. Various forms of statutes expressly identify regulatory and public policy purposes and implement special regulatory regimes that tailor the contract formation process, its terms and its effects to reflect more systemic concerns about contractual transactions of parties in particular sectors. Standard examples include consumer protection statutes\textsuperscript{91} and collective bargaining and employment laws.\textsuperscript{92} As will be discussed below, the difficulty of transferring these public laws to the international level is one of the fundamental challenges for transnational regulation.

Once private law rules are seen to involve fundamental decisions that regulate the behavior of parties for the benefit of all of the parties, third parties, and society at large, the potential for real conflicts across jurisdictions expands significantly.\textsuperscript{93} This is especially so when one factors in disagreement among jurisdictions as to the preferred level and form of regulation. Coordination among different regimes of private law becomes a significant challenge, and the consequent gaps create potential opportunities for transnational business actors to escape regulatory oversight.

\textsuperscript{88} Preliminary Draft Convention, \textit{supra} note 25, art. 7.

\textsuperscript{89} Preliminary Draft Convention, \textit{supra} note 25, art. 8.

\textsuperscript{90} Preliminary Draft Convention, \textit{supra} note 25, art. 4.

\textsuperscript{91} P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 25 (5th ed. 1995); Howells & Wilhelmsson, \textit{supra} note 75.

\textsuperscript{92} LABOUR LAW CASEBOOK GROUP, \textit{supra} note 81.

\textsuperscript{93} Singer, \textit{Real Conflicts, supra} note 4.
B. The Regulatory Function in Traditional Private International Law

In the arguments justifying reform in private international law, traditional private international law is often characterized as being a parochial and conservative field, out-of-touch with the contemporary sociological and normative realities of a global society. Recent internationalist reform is then presented as based on progressive reform of traditional rules in light of the contemporary importance of promoting shared international policy objectives pertaining to international commerce, international cooperation, and cosmopolitan fairness.

This Part of the Article will argue that the understanding of private international law as parochial and regressive is misleading. In traditional private international law, deference to the domestic state sovereign was not simply a matter of formalism about sovereignty or simple parochialism with respect to national interests. Rather, the supremacy of the municipal in traditional private international law served the purpose of advancing cosmopolitan policy interests, such as effective regulation or democratic control, because these values were understood to be best protected through domestic laws and institutions. In more recent internationalist reform, the internationalist values such as commerce and comity have been identified as important policy values in conflict with domestic sovereignty. The problem is that, in the proposed reforms, the policy objectives and functions that the domestic sovereign was expected to protect, such as effective regulation, have not been adequately recognized and protected. It is necessary to consider regulatory functions directly as part of the new internationalist perspective.

To better understand the difficulties of articulating a cosmopolitan regulatory viewpoint in private international law, this Part describes some historical aspects of the expression of internationalist objectives in private international law. The historical context of a field such as private international law in the common law shows that the underlying policy concerns of the area are too complex for such simplistic characterizations as internationalist or parochial. This complex history also demonstrates the challenge of articulating a

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95. This rhetoric of internationalist reform oriented against an excessively sovereigntist traditional legal order is a recurring trope throughout the history of public international law. See Kennedy, New World Order, supra note 64.
cosmopolitan account of the regulatory function of private international law for today.

1. The Influential Structures of Public Policy Argumentation in Public International Law

One way to understand how the structure of policy argumentation in private international law may obscure the regulatory function is to begin with the influential and more familiar structure of policy argumentation in public international law. Scholars like Koskenniemi trace the presence at all levels in public international law—in sources, process, substance, cases, and legal theories—of a fundamental tension between national sovereignty and international society. Koskenniemi labels the relevant structures the descending (sovereignty) and ascending (world society) arguments. In legal argumentation in public international law, the descending argument focuses on the importance of state consent; the ascending argument, in turn, focuses on the universal benefits of a global community. Koskenniemi observes that, in practice, international law rarely provides substantive resolution of this tension. Instead, there is an endless process of argumentation pitting the one tendency against the other.

Although Koskenniemi does not associate a political valence with each argumentative structure, the ascending internationalist structure is more readily associated with progressivism in international law circles. The “utopian” label attached by Koskenniemi to this structure is indicative of this implicit connection. Sovereignty conceptions, in contrast, while realistic, are somehow tarnished as concessions to the parochialism of realpolitik; those who argue for state sovereignty are labeled “apologist” for the existing state of affairs. On this point, Kennedy argues that progressivism in international law has been identified with the notion that things function better when they are done internationally.


98. See, e.g., Kennedy, New World Order, supra note 64, at 335–41.

99. Id. at 336.
While this identification of internationalist-oriented institutional and legal reforms as progressive can be misleading in the context of public international law, it is clearly problematic in the context of private international law. In particular, two significant differences between private international law and public international law seem to limit the application of this normative valence of reform in private international law. First, private international law has remained primarily the domain of national laws and national institutions, rather than international treaties and international courts. Second, the conception of public interest and progressivism has not been as readily attached to the ascending argument in the field of private international law as it has been in public international law; instead it has been identified with national laws and institutions.

2. The Regulatory Function in Traditional Private International Law: Deference to the Municipal

The regulatory function of traditional\textsuperscript{100} private international law in the common law tradition is obscured by the manner in which the function is expressed: through deference to municipal laws. In contrast to public international law, private international law is not a field that is unsure of its sources or its status as municipal law.\textsuperscript{101} Moreover, traditional conflict of laws emphasized a strongly

\textsuperscript{100} By traditional private international law, I mean the largely positivist, modern traditions associated with Joseph Story and Albert Venn Dicey in the common law. In earlier periods, many theories related to subjects of private international law were international or transnational in their conception and sources; examples of these theories are found in the traditions of Roman \textit{jus gentium}, the Statutists and the natural law. \textit{See, e.g., MARTIN WOLFF, PRIVATE INTERNATIONAL LAW} 19–29 (1945). For an introduction to these complex debates concerning the early periods of private international law, see Nikitas Hatzimihail, \textit{On Mapping the Conceptual Battlefield of Private International Law}, 13 HAGUE Y.B. INT’L L. 57 (2000). Hatzimihail argues that in some civilian traditions of private international law, such as that discussed in the work of Mancini and the “Latin” school, there remain internationalist conceptions of the subject. In this Part, I argue that international or cosmopolitan interests do form a part of the common law tradition of private international law, but that they are expressed in indirect ways. Clearly, the challenge facing a cosmopolitan articulation of the regulatory function in the civil law tradition may be different because of the different styles of policy argumentation.

\textsuperscript{101} DICEY & MORRIS, supra note 3, at 3, for example, open their treatise with the definitive assertion that:

The branch of English Law known as the conflict of laws is that part of the law of England which deals with cases having a foreign element. By a “foreign element” it is meant simply a contact with some system of law other than English law.

Some earlier civilian conceptions of the field, such as that of Savigny, did view private international law as having an international basis.
territorial definition of sovereignty that prioritized the policy objectives and interests of the state in which the court sat.

It is inaccurate, however, to view the underlying conceptions of traditional private international law as being relentlessly parochial in orientation. Rather, internationalist policy goals, including objectives such as international commerce and international comity were already present as policy values in the traditional conception of private international law. Such international considerations were argued for indirectly, through arguments such as the claim that respecting these values would actually serve the long-run interests of the forum state. For example, both Huber and Story defended respect for comity not on the basis that it was an absolute moral or legal duty, but because of its utility to all states. These internationalist policy objectives were also served by a number of rules and approaches, such as the vested rights approach of Dicey and of Beale, which used jurisdiction-selecting rules based on a number of characteristics of an action, de-emphasized the direct consideration of domestic interests, and so permitted at least some internationalist considerations. While private international law placed internationalist objectives as secondary to the priority of domestic sovereign authority, or hid them under the doctrinal rules, the values were not unprotected. Therefore, it is inaccurate to argue that traditional private international law was simply parochial in its policy orientation.

102. Huber adopted a similar approach to comity. His third general maxim qualified his strongly territorial conception of private international law by stating that:

Those who exercise sovereign authority so act from comity that the laws of each nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the power or rights of another state or its subjects.


103. In Joseph Story, Commentaries on the Conflict of Laws 34 (1934), Story defends comity as based on laws

which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.


106. A choice of law rule in real property, for example, that rigidly selected the lex situs would limit the ability of a forum other than the situs to favor parochial considerations. Although these rules were justified as being neutral doctrine or driven by fairness rather than anti-parochialism, they effectively resulted in some limits on parochialism. Formalism has its complex uses. Kennedy, Form and Substance, supra note 61.
The supremacy of the municipal in traditional private international law also served the purpose of advancing policy interests such as effective regulation of private relations, protection of social interests, and legal diversity. These are also cosmopolitan values, but values that were understood to be best protected through domestic laws and institutions. For example, David Bederman characterizes nineteenth century private international law as a complex public policy compromise where "[t]he specific demands of public policy, not generalized notions regarding sovereignty, animated the 'domestication' of private international law by declaring municipal law supreme." Bederman argues that, in the process of the development of this compromise, two things occurred: (1) the triumph of the view that private international law was unquestionably municipal law with no public international law limits and (2) the simultaneous development of doctrines, based on theoretical underpinnings including comity, commerce, and vested rights, that allowed for application of foreign law, such as the lex loci delicti rule in tort.

The priority of the municipal over the international in private international law influenced very much the manner in which public policy goals were advanced and argued in private international law. Public policy goals certainly could be advanced, but they had to be argued as domestic public policy. Domestic public policy goals and interests indeed were accorded the highest priority under the traditional conflict of laws. This is sometimes overlooked because private international law is often concerned with private transactions.

Several characteristics of traditional private international law reveal this priority of domestic public policy. First, the courts deferred to any constitution, statute, or implemented international convention that changed the rules of the conflict of laws. Second, the courts refused to enforce any foreign law or judgment that was repugnant to domestic public policy. Third, the courts would not enforce foreign criminal, revenue, or regulatory laws. Courts held that criminal, revenue, and regulatory laws were the domain of the domestic legislature, and if there were to be such enforcement of
foreign laws, there should be specific direction from the domestic legislature.

This configuration of policy debate in private international law helps to explain the current pattern of policy argumentation over internationalist reform. One consequence of the historical features of private international law is that the municipal became identified as the appropriate source for most progressive public policy, such as regulation and redistribution. Furthermore, arguments for the application of foreign law and the consideration of foreign interests had to be linked to policies that could be defended on the grounds that they were in the long-term best interests of the forum. This latter requirement has meant that internationalist policy arguments in private international law have tended to focus on promoting seemingly uncontroversial international public policies—such as increasing international commerce, international cooperation, and comity—rather than objectives such as effective regulation or equity, which were left to be protected by individual states.

C. Regulatory Considerations and the Problem of Parochial Progressivism

Because traditional private international law theories only indirectly protected regulatory objectives—primarily through deference to municipal concerns—internationalist reform efforts understate as policy values effective regulation, creative conflict, and diversity of national laws. Contemporary policy argumentation seems unable to recognize this because the goals of commerce, cooperation and cosmopolitan fairness are justified as providing mutually beneficial, uncontroversial benefits to all jurisdictions in the system. In contrast, courts and legislators seem to view regulatory or distributive concerns as being more problematic because there is significant potential for disagreement among different jurisdictions. Moreover, the primary concern of internationalist reform has been to control for the threat that municipal actors will make parochial decisions that ignore foreign interests and that defeat international political and economic cooperation.

111. I elaborate on the appeal of ideas of consent and cooperation in Wai, supra note 58, at 228–39.

The progression of U.S. theories of the conflict of laws demonstrates some of the hazards of parochialism in defending regulatory interests. The traditional vested rights theory tended to be formalist in its focus on the vesting and enforcement of individual rights and its denial of the degree to which conflict of laws involved the substantive public policy goals of different jurisdictions. The critical fire of legal realism was directed against this subterfuge concerning the impact of private international law on domestic public policy. In doing so, however, the realists were also undermining the potentially more cosmopolitan effects of the rights-based conception of private international law developed by Dicey and Beale. This need not have been so if judicial and scholarly conceptions of national interest had been able to generate a conception of public interest that included the interests of those outside of the forum. However, this is not what occurred.

The manner in which the post-realist approach to conflict of laws in the United States turned against cosmopolitanism is most evident in the rise and development of the governmental interest analysis as a significant U.S. approach to choice of law. Judicial reasoning about choice of law, at least in theory, considered the relevant substantive interests of each jurisdiction in the resolution of a matter. In the case of "real conflicts" between jurisdictions, where each jurisdiction had an interest in application of its law, a forum was to apply its own law. Not surprisingly, it was easy to find a forum policy interest in virtually every kind of private law. Baxter's more refined approach, based on a "comparative impairment" assessment of the relative interests at stake in conflict of law

112. BEALE, supra note 105; RESTATEMENT OF CONFLICT OF LAWS (1934). In the First Restatement, examples of jurisdiction-selecting rules include choice of law rules for contract (e.g. § 332) that select the law of the place of the contract (§ 311) and choice of law rules for tort (e.g. § 378) that select the law of the place of the wrong (§ 377).


114. Governmental interest analysis is most commonly identified with the work of Brainerd Currie. See BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). For commentary see BRILMAYER, supra note 47, ch.2.

115. CURRIE, supra note 114, at 183.

116. See Singer, Real Conflicts, supra note 4, at 35-47, for an explanation of how conflicting state and individual interests should be analyzed.
problems, did not find much favor. Instead, and partly for reasons of separation of power concerns for legislative priorities, U.S. courts tended to find a forum interest and thus direct application of the forum law.

The progressive inheritors of this system have generally argued that internationalist reforms pose threats to regulatory objectives on the basis that national laws best protect regulatory concerns. For example, Louise Weinberg advocates that comity be abandoned and forum law be applied in virtually all circumstances. Her confidence partly comes from her pro-plaintiff orientation, which sees that in the play of interaction among different jurisdictions, the aggressive application of forum law will lead to the highest level of tort liability. Comity will undermine what she believes are the most important values:

[N]ationwide or even worldwide, of the safety and security of the shared environment, of the fairness of the national or world securities markets, of the safety of markets for crops and manufacturers, and of the safety of international or interstate transportation networks, and other services delivery systems.

The assumption that U.S. forum law remains the most progressive is reflected even in the best critical scholarship. For example, in a broad-ranging attack on the various uses of the comity doctrine in U.S. conflict of laws, Joel Paul criticizes comity for obscuring "the real political conflicts between sovereigns and [making] it difficult to address those tensions directly." He identifies a host of general problems, including regulatory competition, with comity. Paul also fears that the broad conception of comity with respect to foreign laws and foreign courts is deregulatory because it provides "an opportunity for a foreign or domestic party to opt out of U.S. regulation." Instead of comity, Paul advocates


118. For a discussion of the importance of separation of powers concerns to U.S. conflict of laws issues, see GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 22–24 (3d ed. 1996).


120. Paul, Comity, supra note 4, at 55.

121. Id. at 71, citing The M/S Bremen v. Zapata Off-Shore Co, 407 U.S. at 9; Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth Inc., 473 U.S. 614; In Re Union Carbide
international coordination of regulatory policies and the harmonization of conflict of law principles. In the absence of such coordination or harmonization, however, Paul supports the abolition of comity, the strong deference of domestic courts towards domestic legislation and public policy, and vigorous extraterritorial application of U.S. law.

2. The Dangers of Parochialism in Defending Regulatory Concerns

The analysis by progressive scholars like Paul and Weinberg displays a troubling parochialism. First, their analyses reflect an inability to imagine situations where application of a foreign law or procedure may be more amenable to progressive purposes, such as high standards of regulation, than the U.S. law or process. Consequently, Paul and Weinberg seem unable to give credit to those internationalist reforms, such as liberalized recognition and enforcement, which may actually improve the application of private laws with higher regulatory content.

Attacks on comity are troubling when they seem to presume that the source of the injustice would invariably be a foreign jurisdiction. There may be many sets of laws that, while not identical to U.S. laws, would nonetheless achieve substantial justice to the parties. Indeed, the foreign law may be more progressive from a regulatory view. For most foreigners, the presumption that the laws of the United States have struck either the best or the most progressive balance, especially in areas of social legislation, seems hasty.

The progressive critiques of comity by Paul and Weinberg demonstrate little concern that denial of comity would disrupt the policy balances in jurisdictions that set a different regulatory level or

Corporation Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986); aff'd, 809 F.2d 195 (2d Cir. 1987).

122. There is also the danger that such approaches fail to carefully analyze the particular law and facts at issue but instead invite judicial actors to use problematic stereotypes of the "other" as the source of offensive values. Weinberg, for example, sets up as representative of the problems of comity the failure to enforce Title VII protection of a U.S. worker in Saudi Arabia, problematically invoking the specter of Arab anti-Semitism and sex discrimination. See Weinberg, supra note 119, at 74–75.

123. A similar concern about the substance of the applicable law regardless of its jurisdictional source animates Robert Leflar's "better law" critique of Currie's interest analysis. See Robert Leflar, Conflicts Law: More on Choice Influencing Considerations, 54 CAL. L. REV. 1584 (1966). For a commentary, see BRILMAYER, supra note 47, § 2.2.2.
which rely less on tort litigation as a regulatory tool. In this respect, a broader sense of comity by U.S. courts might assist regulatory purposes by permitting recognition of progressive public regulation statutes of foreign jurisdictions.\footnote{124}{Cf. Lowenfeld, supra note 73, at 17–22; Restatement (Third) of Foreign Relations Law of the United States § 403 (1987) (introducing criteria of reasonableness into the refusal to enforce the public regulations of other jurisdictions).} In addition, the absence of a law often does not indicate a lack of an underlying policy purpose, but rather a deliberate and considered policy decision to limit liability.\footnote{125}{Singer, Real Conflicts, supra note 4, at 39–42.}

Weinberg’s parochial presumption is especially a problem when it is translated into a rule that always enforces forum law. Given the number of jurisdictions where U.S. companies and persons operate, the idea that U.S. courts should simply apply U.S. forum rules seems a threatening form of extraterritoriality by the dominant state in the contemporary international system. The significance of U.S. regulators and courts in the international market, moreover, makes the state of U.S. conflict of law rules and their enforcement of particular importance to foreign jurisdictions. An aggressive extraterritorial application of U.S. laws in areas such as tort and antitrust, where the United States is already perceived abroad to be aggressive, will lead to a reputation as a judicial bully, and may lead foreign authorities to refuse to enforce judgments from that bully’s jurisdiction.\footnote{126}{Indicative is the reaction of the lower British Columbia court to aggressive Texas courts in Amchem Products Inc. v. British Columbia (Workers’ Compensation Board), [1993] 1 S.C.R. 897 (Can.).} Foreign legislative action may fight extraterritoriality through devices such as clawback and blocking statutes to combat the extraterritorial application of U.S. antitrust law. Like the English internationalists of the nineteenth century, Weinberg may be relying on the economic and military power of the U.S. to encourage acquiescence by foreign jurisdictions, especially since foreign private parties frequently pay a big price for being excluded from United States markets.\footnote{127}{See Weinberg, supra note 119, for confidence that laws favoring plaintiffs will become the norm of the land. Other jurisdictions may decline jurisdiction, but the aggressive will triumph because of the operation of liberal recognition and enforcement rules which lessen review of any judgments made by the aggressive state.} However, this approach is empirically uncertain and normatively repugnant to other jurisdictions; it will invite non-cooperation, ill-will, and even open antagonism. A reciprocal foreign move to shut down the use of comity or equivalent doctrines will also harm the potential force of progressive judgments from the United States in foreign jurisdictions.
Finally, progressive critiques that do not more carefully distinguish among different cases too readily ignore the separate value of respecting the social decisions and functioning of other societies. Singer has persuasively criticized the view that the forum should simply adopt conflict rules that further the goals of its substantive laws. Singer argues that a forum must have a "multistate" concern about appropriate tolerance and respect for the choices of other normative and political communities.

In sum, the most recent iteration of the comity debate in the United States seems an unfortunate replay of earlier manifestations of the internationalist-domestic debate. Critics of internationalist reform in private international law too often fall into the well-worn lines of protectionist logic from international trade or collective security debates. The disclosure of the critics' parochial alternatives and biases remains the strongest argument for equally problematic internationalist reform. The resulting challenge for addressing the regulatory function of contemporary private international law recalls a familiar difficulty from international trade law: navigating between free trade internationalism and progressive parochialism. Critiques of the international policy objective of free trade are weakened because valid concerns—such as protection of non-trade regulatory policies—are interspersed with questionable protectionist motives.

Consequently, it is difficult to argue for alternative rules and policies that reflect a cosmopolitan public policy viewpoint, wherein topics such as regulation can be advanced as proper goals for internationalists and cosmopolitans to support in the private international law regime. In the final part of this Article, I attempt to articulate the contours of such a view with respect to the regulatory function of private international law.


129. Singer, Real Conflicts, supra note 4, at 85–89.

130. This tension lies behind the central debates in interpretation of the General Agreement on Tariffs and Trade and other international trade agreements over how to address issues of de facto discrimination under provisions requiring National Treatment (article III) and Most-Favored-Nation Treatment (article I) of "like products," as well as how to deal with domestic regulatory policies that have a detrimental effect on trade liberalization. See generally JAGDISH BHAGWATI & ROBERT HUDEC, FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? (1996).
IV. ARTICULATING A COSMOPOLITAN PERSPECTIVE ON THE REGULATORY FUNCTION OF PRIVATE INTERNATIONAL LAW IN AN ERA OF GLOBALIZATION

This Part attempts to elaborate from a cosmopolitan public policy perspective some of the challenges for regulatory objectives posed by a liftoff of transnational business conduct and dispute-resolution and the demise of domestic private law regulation. The search for a cosmopolitan public policy viewpoint in private international law reform parallels efforts by scholars in a number of fields to articulate a cosmopolitan or transnational viewpoint that would acknowledge both the importance of local communities and the significance of many kinds of transnational connections.  

A. The Problems of Transnational Cooperation

There are a number of reasons to believe that there is suboptimal "under-regulation" at the transnational level. In particular, there are problems related to lack of cooperation due to the anarchic nature of the international system in which there is no overarching enforcement authority to coordinate and administer regulation. Of several obstacles to international regulatory coordination, the most fundamental in terms of the transnational liftoff of business networks relates to regulatory gaps. In addition, the fragmented nature of the international system increases the possibility of harmful regulatory competition among jurisdictions.

As the favored method of addressing transnational regulatory concerns, internationalists look to international-level solutions such as international treaties, institutions, or cooperation dedicated to the particular regulatory concern, such as environmental protection. The problems arise when there is no such first-best solution. Where there is no comprehensive multilateral agreement, problems of regulatory gaps and regulatory competition may mean that the next-best alternative is regulation by domestic regulatory regimes, including private laws.


1. Regulatory Gaps

A foundational problem for international law scholarship has been "regulatory gaps." Regulatory gaps arise in the structure of the contemporary international system where there are transnational problems, but few or inadequate international regulatory bodies. Environmental problems such as acid rain or the maintenance of fish stocks are commonly cited as examples of transnational problems that are under-regulated as a result of the decentralized or anarchic nature of the international system. Many of these issues involve problems of externalities—the ability of a private actor, such as a polluter, or a state whose interests are aligned with that actor, to act so as to impose some of the costs of their activities on others. The result is that not all of the social costs of an action are internalized into the cost-benefit assessment of the actor. A related problem is with the "positive externalities" of public goods. Such public goods involve the activities of one actor that have benefits for others, but for which the actor is unable to prevent "free-riding" by internalizing some of that benefit. The result is a collective action problem in which suboptimal production of public goods occurs, from the point of view of society as a whole. A liberal international trading order is arguably a public good of this kind.

Much state intervention, including through public and private law, is intended to remedy problems of externalities and public goods. In the international context, however, there is no equivalent overarching authority that can enforce a policy to remedy externalities and to ensure cooperative production of public goods. International cooperation, even in the absence of such an overarching authority, can itself be viewed as a type of public good. The problem is that it is difficult to generate a common international standard of regulation that is optimal because of free-riding by states that see the advantage

133. See Kennedy, New World Order, supra note 64, at 371–73. Joel Trachtman has recently referred to the regulatory gap through the idea of "underlaps" in regulatory coverage that "make possible regulatory arbitrage, avoidance or evasion." See Joel Trachtman, Externalities and Extraterritoriality: The law and economics of prescriptive jurisdiction, in ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES 642, 643 (Jagdeep S. Bhandari & Alan D. Sykes eds. 1997).

134. This is the basic insight behind the neoclassical welfare economics for public intervention. The classic exposition of the idea of externalities and public goods in neoclassical economics is PIGOU, supra note 68. For a brief commentary, see ROGER BACKHOUSE, A HISTORY OF MODERN ECONOMIC ANALYSIS 165–66, 315–17 (1985). For one strand of contemporary critique of Pigouvian ideas of social cost and a reconception on the basis of transactions costs, see Coase, supra note 68; RONALD H. COASE, THE FIRM, THE MARKET AND THE LAW (1988) [hereinafter COASE, THE FIRM].

135. See, e.g., BRILMAYER, supra note 47, at 169–218.
of cheating when other states respect an international standard. Moreover, national regulators are usually more concerned with protecting interests in their own jurisdiction than with protecting interests abroad, and so domestic laws and regulatory standards may not reflect harms to foreign interests. Finally, states often genuinely disagree with each other about standards and obligations, as well as mechanisms for the effective enforcement of international rules. International business actors are often adept at operating in, and indeed taking advantage of, decentralized international markets where there are gaps and conflicts among national regulatory regimes. Even in areas of economic regulation such as antitrust or banking, national regulators have not been able to coordinate their regulation of international and transnational business conduct.  

Regulatory overlap is also a possibility in a decentralized system of regulatory jurisdiction. In particular, the willingness of state legislatures and state courts to expand extraterritorial jurisdiction could mean that an “excessive” layer of regulation would occur. Two or more national jurisdictions might be willing and able to regulate, with the result that business actors might be subject to an excessive level of regulatory oversight or may be subject to conflicting regulatory demands. There are, however, a number of reasons to believe that regulatory gaps are more common than regulatory overlaps in the current international system. There may be a collective action problem in which the interests harmed by lack of regulatory protection are too dispersed to motivate any particular national legislature to take action. In contrast, the costs of over-regulation are visited on specific actors who have the incentive to act and lobby for changes. In the antitrust context, William S. Dodge argues that the lack of coordinated regulatory authority and the lack of representation in national legislatures of all the parties impacted by anticompetitive business conduct will lead to “systematic under-regulation.” National legislatures will systematically fail to provide adequate regulatory coverage because they lack sufficient political incentives to regulate international business activity that have harmful effects on foreigners. Moreover, they may permit domestic


137. See Trachtman, supra note 133, at 43.

138. Collective action problems are generally considered to be more severe as the numbers of participants to be coordinated increases. See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS, ch. 2 (1965).

businesses to engage in activities that "benefit domestic interests at the expense of foreign interests."\footnote{Id. at 153.}

The basic role of private international law in addressing transnational regulatory gaps is to coordinate the process of regulation by national authorities and national laws. In particular, private international law rules help to determine when parties injured by the transnational activity of actors can make complaints under national legal regimes. This is perhaps best demonstrated by the rules of jurisdiction and choice of law concerning tort law.

Tort law is the major form of private law that attempts to address regulatory gaps by permitting affected individuals to sue actors that seek to externalize costs onto others.\footnote{Tort law can also become a tool for the protection of advantages, legitimate or illegitimate; for example, defamation suits or the threat of such suits by business actors against their critics.} The problem in the transnational context is that the affected individuals are often not all within the same jurisdiction. Moreover, transaction costs and other coordination problems are more severe across borders. The result is that many actions are never commenced and, when they are, national courts have difficulty determining in which forum interests are to be protected. If injured parties are able to claim a legal remedy, for example through class actions in a U.S. court, then the problem of regulatory gaps is partly addressed. This does not occur if a foreign court declines jurisdiction. Similarly, the choice by a forum court to apply foreign law will lower regulatory oversight if the domestic law provides more expansive regulatory protection. This might often be the case, given that a more favorable forum law is often a reason for the plaintiff's choice of a forum. Overall, however, it seems likely that courts have tended to underestimate the role of national courts and national tort laws in addressing regulatory concerns for foreign interests.

Because private international law rules are important to determining whether state-based regulation will occur (whether that be sufficient regulation or over-regulation), the internationalist reform of such rules may very much effect the overall level of regulation. Liberalized recognition and enforcement or more expansive assumption of jurisdiction by state courts may assist in the regulatory oversight of transnational activity by national laws. In contrast, greater use of doctrines of forum non conveniens to grant stays of proceedings may reduce overall regulatory standards. Similarly, arbitration clauses, forum-selection clauses, and choice of law clauses
may result in under-regulation if there is insufficient consideration of the limits on the power and knowledge of contracting parties such as consumers.

In addition, while deference to foreign laws would not seem to have a determinate deregulatory tendency, some critics claim that there is a bias in the types of laws to which courts defer. One claimed bias is that the extraterritorial application of national laws is limited to business and economic laws, while national regulatory laws remain imprisoned within national boundaries. Internationalist critics note that the long-established rule against enforcement of foreign penal, revenue, or other public laws remains, even in an era where the laws on the enforcement of foreign judgments in civil and commercial matters has been much eased. From a more critical perspective, for example, there seems to be a bias in the extraterritorial application of U.S. laws by U.S. courts towards application of commercial laws but against an application of social laws such as employment discrimination statutes. Paul, for example, argues that by emphasizing the policy of protecting bargained-for expectations, the courts privilege the interests of those who trade and invest against the interests of consumers and small investors. Whatever the cause, the common concern is that internationalist reform in private international law has only advanced comity and deference in contexts that promote commercial interests.

2. Regulatory Competition

A second challenge for those concerned with effective regulation is regulatory competition in an international system where private actors are able to move from jurisdiction to jurisdiction in order to find the most favorable regulatory climate. In this situation, not only will private actors slip through the "gaps" of a fragmented regulatory regime, but through actual movement abroad, or threats of such movement, economic producers may also generate pressure on individual jurisdictions to lower domestic regulatory standards below what they would otherwise have been. This can be viewed as an externalities problem, but it is distinctive and significant enough to merit separate analysis.

142. See, e.g., LOWENFELD, supra note 73, at 119–22.
143. See Note, Constructing the State Extraterritorially, supra note 131.
144. Paul, Comity, supra note 4, at 63–66.
The analysis of regulatory competition focuses on the challenges posed by the increasing mobility of economic actors in a global economy for the maintenance of domestic regulatory standards. The basic concern is that states will face pressure to lower their regulatory standards in order to attract or retain investment and employment within their borders. Examples include lowering of tax rates, labor standards, and environmental standards. This problem has been a common topic in discussions of regulation of economic activity in federal states such as the United States. More recently, it has become a key subject in European integration and in the NAFTA context. Regulatory competition concerns are increasingly of concern for policy makers in an international system in which the material barriers, such as geography, and the policy barriers, such as trade restrictions, that separate distinct jurisdictions are fading.

There is a substantial academic debate as to whether international regulatory competition is always a “race to the bottom”. For many in the law and economics tradition, for example, the existence of such competition among jurisdictions provides a potentially useful restraint on inefficient forms of state regulation, and rules that facilitate contractual choice of law should be encouraged. In general, contemporary discussions of regulatory competition recognize that there may be a deregulatory tendency, but that conclusions regarding the benefits or detriments of such trends


require a more specific examination of the nature of the regulations, the subject of regulation and the surrounding circumstances. 150

Several aspects of internationalist reforms in private international law raise substantial concerns about the negative impact of regulatory competition in the area of transnational dispute resolution. For example, regulatory competition concerns are raised concerning the enhanced respect for dispute-resolution autonomy of international business parties to choose choice of forum, choice of law and arbitration clauses. Party choice in this respect proceeds based on the preferences of the two parties and not based on larger social concerns. The result is that the choices of substantive regimes may avoid the greater social concerns embodied in national laws that arguably have more to do with the transaction. Parties are better able to avoid laws that are more socially protective but which increase the costs to transacting parties.

The critique of the deregulatory impact of party autonomy has been well-articulated in comments on the decisions of the U.S. Supreme Court affirming the ability of international commercial arbitrations to arbitrate disputes which include claims under U.S. antitrust or securities laws. In three key decisions, the United States Supreme Court expanded the domain of arbitration over disputes, including antitrust or securities claims, as a necessary concession to the needs of contemporary international commerce. 151 The criticisms were immediate, and indeed were largely reflected in the dissents in Mitsubishi. "Quixotic internationalism" had so blinded the court, wrote one critic, that legitimate American regulatory concerns were sacrificed to internationalist objectives. 152 Respect for the foreign court or international arbitral tribunal may provide "an opportunity for a foreign or domestic party to opt out of U.S. regulation." 153 Paul observes that "where capital is free to flee, national and local jurisdictions seeking to protect domestic employment may be compelled to bargain away regulations in order to keep jobs at


152. Carbonneau, Mitsubishi, supra note 34.

home. In this sense, deregulatory competition will harm workers worldwide. Antitrust claims, it was argued, were beyond the capacity of the arbitration process, and were in a realm which called for expertise and outlooks which most business arbitrators lacked. The ability reserved for courts to have a "second look" at the recognition stage was imperfect at best, because any such review would be circumscribed to procedural matters and limited substantive public policy review.

The concern about the suboptimal protection of national regulatory interests is increased by recent studies of the construction of the international commercial arbitration regime. These studies evidence that some states’ motivation for supporting arbitration may have been to gain narrow pecuniary advantages associated with involvement in arbitration, rather than to consider the broader regulatory implications of the decision to promote arbitration. W. Michael Reisman has questioned the motives behind reforms that have limited the interference and control of national courts over international arbitrations. Reisman argues that a number of jurisdictions loosened such controls not because of a genuine belief that international commercial arbitration is the best system for dispute resolution, but rather in an effort to attract the "business" of international commercial arbitration to their state. The analysis is modeled on the process of regulatory competition in the U.S. incorporation example, in which the state puts aside genuine regulatory preferences in order to attract business for its lawyers, accountants, and other attendant services. Reisman identifies such competition for arbitration business as motivating, for example, reforms in Belgian and Swiss legislation. The role of such interests in influencing and frequently lobbying state authorities also figures at least partly in the study by Dezalay and Garth of the world of international commercial arbitrators.

154. Id. at 73.
155. Carbonneau, Mitsubishi, supra note 34, at 126–27.
156. Id.; New York Convention, supra note 27, art. 5; UNCITRAL Model Law, supra note 30, art. 36.
157. REISMAN, supra note 29.
158. Id. at 124.
159. These services are sometimes referred to as "producer services." See Harry W. Arthurs, The Hollowing Out of Corporate Canada?, in GLOBALIZING INSTITUTIONS: CASE STUDIES IN SOCIAL REGULATION AND INNOVATION 29 (Jane Jenson & Boaventura de Sousa Santos eds., 2000).
160. REISMAN, supra note 29, at 141.
161. DEZALAY & GARTH, supra note 2.
The challenges of regulatory competition for the regulatory function of private international law are significant. Regulatory competition may permit transnational business actors to play off differences between state actors in order to reduce their regulatory burden. If there is little ability to tie transnational actors to jurisdictions where their conduct has effects, a state may be pressured to reform private laws, such as tort laws, to ensure that it can keep or attract business production.

B. The Problem of “Liftoff” in Transnational Private Actor Values

In addition to, and in tandem with, regulatory gaps and regulatory competition, effective transnational regulation is made still more difficult by the enhanced autonomy of transnational networks of private actors. Most obviously, the growth in the scale and scope of such transnational networks increases the material power of private actors who are the subjects of national regulation.162

The inability of state systems to control the increasing material power of transnational networks is made more problematic by an increase in what Teubner, using Niklas Luhmann’s term, describes as their “autopoietic” character.163 As social systems such as these transnational networks achieve autonomy from state laws, the norms and rules of these networks become reflexive and self-reinforcing. The dominant norms are found within the system itself. The closed nature of the values of any system means, among other things, that the system can interact only imperfectly and indirectly with any other system after it becomes, for whatever reason, a separate system. Teubner suggests that transnational business networks which use arbitration and lex mercatoria take on a law-making and law-generating character and engage participants to look only to values from within that system as their binding laws.

The autopoietic character of transnational business systems may undermine hopes that the regulatory function might be contained within the new systems themselves. The adversarial structure of most international disputes between private parties is such that at least one

162. For example, see the discussion of the “process of circular causation” by which “the legal ground rules of economic struggle constitute the economic bargaining power of the combatants,” but then the legal rules “are themselves at least in part the product of the conflicts they condition” in Duncan Kennedy, The Stakes of Law, or Hale and Foucault?, 15 LEGAL STUD. F. 327, 335–36 (1991).

party will often find it worthwhile to advance and support the more “regulatory” of positions. This is at least partly the response of the majority decision in *Mitsubishi* to concerns about one-sided presentation of legal positions in arbitrated disputes over antitrust claims.\textsuperscript{164} For each internationalist argument advanced by a party to a private international dispute, another party will usually desire a result in another direction. If it considers the issues carefully, any particular business party should expect to be tactically and opportunistically arguing for or against a more internationalist application of a rule of private international law or of the underlying substantive law. In both arbitrations and court cases, it would be the rare case where both parties to a dispute would favor the same rule and application; this is, after all, the foundation of the adversarial system of dispute-resolution in common law systems.

In an autopoietic system, however, the sense of shared interests and norms among parties may become so significant that it colors perceptions of interests and leads parties not to appeal to national legal systems even where it might be in their interests otherwise defined. This loss of concern for the nation-state system makes ignoring national laws and regulations all the more pervasive because the national laws lose much of their legitimacy and relevance. National laws may become less and less a part of the routine experience of those involved in international transactions, and these parties may fall out of the habit of thinking of these laws as being of relevance, and, more perniciously, worthy of respect. This is especially problematic when the arbitrators or adjudicators, chosen by the parties, also fall into the same system of thought.\textsuperscript{165}

Above all, it is a problem that the interests and values of non-participants are not part of the regulatory concerns of these new, autopoietic systems.\textsuperscript{166} While these systems arguably could regulate

\textsuperscript{164} Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth Inc., 473 U.S. at 636–37 (even in domestic courts, it is up to private litigants to pursue their statutory rights, and “so long as prospective litigant is able to vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”).

\textsuperscript{165} The U.S. Supreme Court perhaps inadequately deals with this concern in Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth Inc., 473 U.S. at 634, where it rejects “the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes.” The Court reasons, citing an \textit{amicus} brief of the International Chamber of Commerce, that arbitrators are drawn from the legal as well as business community, and parties will select arbitrators that are aware of the legal components of the dispute.

\textsuperscript{166} For example, Caruso, \textit{supra} note 74, at 23, notes that private parties “although interested in the abolition of regulatory barriers, have no particular stake in the harmonisation of private law.” This may be an example of where conflict exists among private actors, but cooperation occurs where all gain at the expense of third parties.
as well as facilitate international transactions, they tend to be less inclusive in their policies and interests than territorially-defined national regimes. Non-state systems may be less nationalistic and fairer between the participants directly involved, but there is a cost to those who are not included. Above all, the new systems suffer from exclusion because they are not normative communities which include the interests of all those affected by their activities. While territorally defined jurisdictions also exclude actors and interests, such states tend to be more inclusive because of the relatively well-understood and inclusive idea of territorially-defined normative communities.

C. Regulation and Adjudication through the Countervailing Networks of Transnational Civil Society

In spite of the obvious regulatory problems, Teubner does not take a pessimistic view of the emergence of systems that compete with the nation-state. Rather Teubner seems to believe that systems of advocates, interest groups, and values will emerge which will at least partly compensate for the decline of state-based regulation and law-making. The examples he cites include labor law, the multinational enterprise, professional self-regulation, human rights discourses, and the ecological movement. To many others, the growth of multiple transnational identities offers the potential for progressive governance and law. It remains to be seen, however, what the effects of this pluralistic mix of systems, including state systems, will be for policy concerns such as effective regulation.

An optimistic reading of the fragmentation of regulatory authority may be that any regulatory gap will be temporary. First, it may be that as international private actors become less regulated their consciousness will change, and lead them to incorporate concerns for wider interests into their decision-making. The owners of

167. For a similar point concerning “insiders” and “outsiders,” see Stone, supra note 50, at 1024–36.
168. Teubner writes hopefully in Breaking Frames, supra note 15, at 157: 
Lex mercatoria, the transnational law of economic transactions is not the only case of global law without a state. It is not only the economy, but various sectors of world society that are developing a global law of their own. And they do so, as Giddens has put it, in “relative insulation” from the state, from official international politics and international public law.
169. Id., See also GLOBAL LAW, supra note 2.
corporations might, either as individuals or through the corporation, voluntarily make social contributions such as charitable contributions, even if at present few seem to do so. More likely, "socially conscious" business may make good business sense when potential consumers, investors, and employees are attracted by progressive corporate behavior.\textsuperscript{171} The increase in voluntary corporate codes of conduct falls into this category.

Second, and more important, transnational business actors may be pressured to act more responsibly as interest groups and government catch up with the changing regulatory scene. The pursuit of interests in different venues—ranging from international lobbying at the World Bank to local consumer boycotts—has been embraced by many activists.\textsuperscript{172} The new networks of human rights activism have been identified by many scholars as good examples of transnational and global regulatory networks.\textsuperscript{173} The acceptance of voluntary codes of conduct by some multinational corporations concerned about reputational damage is sometimes viewed as an example of the influence of countervailing networks on corporate conduct.\textsuperscript{174}

The desire to find alternatives to international-level institutions modeled on state regulation is also attractive because state-based regulation is under attack for failing to effectively protect public interests. Progressive critics of national administrative structures have expressed concerns about bureaucratization and regulatory capture.\textsuperscript{175} From a different political perspective, the critiques by theorists of public choice have identified the degree to which regulatory regimes are economically costly and subject to interest group rent-seeking.\textsuperscript{176} In the wake of theoretical and political

\textsuperscript{171} As in the brands developed by businesses such as Starbucks and The Body Shop, see NAOMI KLEIN, NO LOGO (1999), ch. 1.

\textsuperscript{172} \textit{Id.;} see Kennedy, \textit{New World Order, supra} note 64, at 348–49.


\textsuperscript{174} KLEIN, \textit{supra} note 171, at 430–35.

\textsuperscript{175} \textit{See, e.g.,} CHARLES LINDBLOM, \textit{Politics and Markets}, 161–233 (1977). For an earlier statement, see Robert Hale, \textit{Coercion and Distribution in a Supposedly Noncoercive State, 38 Pol. Sci. Q.} 470, 493 (1923): The channels into which industry shall flow, then, as well as the apportionment of the community's wealth, depend upon coercive arrangements. These arrangements are put in force by various groups, some of whom derive their coercive power from control over governmental machinery, some from their own physical power to abstain from working.

\textsuperscript{176} \textit{See, e.g.,} COASE, \textit{The Firm, supra} note 134, ch. 1; George J. Stigler, \textit{The Theory of Economic Regulation, 2 Bell J. Econ. \\& Mgmt. Sci.} 3 (1971); W. Mark Crain \\& Robert
attack, many national regulatory regimes are being reduced or even dismantled. Moreover, non-state social activism may be especially effective because it is not limited by many of the constraints of state-based regulation. In particular, such social activism can employ a variety of strategies—including legal challenges, economic boycotts, and culture jamming—directly against non-state actors, such as large businesses.  

While regulation could be spread across a multitude of venues, including private venues, there are a number of concerns about such a dispersal of state-based regulation. First, there may be externalities to non-parties that arise simply from the privatization of the process itself. For example, private arbitrations are often confidential and, as such, limit production of records and testimony, which are often useful to regulators and activists. Sophisticated contemporary activists often use the very process of a trial itself, and reporting of the trial, for the communication of various viewpoints with respect to corporate conduct. The controversies over the privatization of legal processes is still more pronounced where arbitration processes are used with respect to areas of clear public-private overlap, as in private-party investor claims under the investment provisions of Chapter Eleven of the North American Free Trade Agreement.

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177. KLEIN, supra note 171.


[Reliance on such informal systems is particularly problematic because one loses the "public goods" associated with more formal litigation: development of a set of precedents; public revelation of information about such important policy matters as accident rates; and ... the use of judicial decision to propagate and reinforce social norms. Note that all of these are goods that the parties themselves—particularly powerful repeat transactors—would have no incentive to consider or, indeed, may see as costs to themselves, although they are benefits from the social point of view.

Id. (notes omitted).

179. For a similar view about access to corporate information provided under SEC disclosure, see Cynthia A. Williams, The Securities and Exchange Commission and Corporate Social Transparency, 112 HARV. L. REV. 1197 (1999). Of course, many records in litigation are confidential. However, the concern remains because while sometimes not available, the record is frequently accessible.

180. See, e.g., JOHN VIDAL, MCLIBEL: BURGER CULTURE ON TRIAL (1997); KLEIN, supra note 171, at 387–93.

181. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296 and 32 I.L.M. 605 (1993), ch. 11. Under Chapter Eleven, foreign investors from NAFTA jurisdictions can sue the governments of NAFTA states for compensation for harm to investments caused by state measures; the arbitration processes under Part B of the Chapter provide that claims are heard by arbitration tribunals set up under the Chapter, either under
addition, to concerns about lack of transparency, the transfer of adjudication into private realms may also weaken the development of law that occurs through the national courts.\textsuperscript{182}

Second, there may be a difference in outcomes between state regulators or adjudicators and non-state arbitrators. State-based private law often includes protection of third parties and social interests among its substantive objectives, but there may be a tendency for private adjudicators to ignore arguments about the protection of individuals and groups not party to the actual decision in their interpretation of these laws.\textsuperscript{183} This may result from a form of "democracy deficit" in denationalized legal regimes. The nature of the denationalized regulatory regimes is such that they are subject to less pressure from different third-party constituencies than are national regulators, yet their decisions do have an impact on third parties. In the extreme case of Teubner's systems, the only constituencies to which many of these systems are open are often other private actors. While territorially-defined jurisdictions also exclude interested parties, in comparison they are more inclusive because of their broader scope of membership and their more widely-understood and relatively non-volitional concept of territorially defined membership.

Third, there is a potential public goods or collective action problem in regulation via countervailing networks. In particular, systems that promote human rights, environmental, or labor standards may not attract the commitment or resources of the individuals who benefit from such activity. There is no equivalent of mandatory national taxation, for example, to ensure that all that benefit from regulation contribute to its funding. In contrast, private actors receive direct economic benefits if they are able to externalize costs onto parties who are either too weak on their own or too diffusely spread to organize effective opposition.

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\textsuperscript{182} A similar concern is found in the more general debate over the public impact of alternative dispute resolution. See, e.g., Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073, 1085–86 (1984); Charny, supra note 178.

\textsuperscript{183} An example of this is the tendency of arbitrators to reinstitute problematic public-private distinctions in their interpretation of disputes involving contracts and property rights. See, e.g., Amr A. Shalakany, Arbitration and the Third World: A Plea for Reassessing Bias Under the Spectre of Neoliberalism, 41 HARV. INT'L L.J. 419, 453–55 (2000).
Fourth, in situations of international or other types of delegated authority, there is a greater risk of fragmentation and diffusion of responsibility. Among other concerns, one fear is that it will be those actors with the resources, scale, and expertise to monitor a complex regulatory terrain who will be the most able to advance their interests. The result will be a patchwork of regulation that varies substantially in its effectiveness.

In sum, there may be a substantial loss of regulatory power in the transition from state regulation to the idea of countervailing regulation by social and other networks. It therefore seems sensible to consider more carefully the role that state-based and interstate-based regulation, including private laws and state courts, can play.

V. PRIVATE INTERNATIONAL LAW AS A VENUE FOR TRANSNATIONAL REGULATORY CONCERNS

For transnational regulatory concerns, it seems important to gauge more carefully how significant the "liftoff" of transnational business is, and in particular, the role that state law and institutions can still play. Counter to some extreme interpretations, the liftoff still depends on the support of state institutions, including courts, as the earlier discussion of cases like *Mitsubishi* has already made clear. There are also other reasons, aside from simple enforcement of arbitration clauses, that transnational business actors must have recourse to state law and legal institutions. Because of these necessary ties, the liftoff of transnational business networks can be described not just as a matter of technical necessity, but also as a result of decisions or acquiescence by policy-makers such as legislatures and courts.

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184. This observation applies the hypothesis that "Repeat Players," such as large corporate actors and their lawyers, develop expertise in the courts and are often able as a consequence to limit progressive social change based in the courts. See Galanter, *supra* note 82.

185. E.g., *Klein, supra* note 171, at 435 (expressing such a concern about corporate codes of conduct).


Elites draw on liberal mythology concerning the superiority of private regulation to establish national and international private regulatory structures, which effectively delegate enforcement powers to the private sphere. The development of an international institutional context for arbitration, centered around the work of the United Nations Commission on International Trade Law and the many private international institutions, is critical to the strength of the arbitration norm. Liberal mythology has the sanction of states and is reproduced by cooperative governments and corporate elites in their rhetoric and in the law.
A. The Liftoff and Touchdown of Transnational Business Dispute-Resolution and the Dialectical Relationship of State and Non-State Systems

Domestic private laws and domestic courts have some potential to promote regulatory objectives because the contention that transnational business relations have achieved "liftoff" from nation-state legal systems can be contested as an empirical matter both (a) as a description of the understanding of the legal systems and (b) as a description of the ability of private networks, such as those of international commercial arbitration and lex mercatoria, to free themselves from national legal regimes.

Although transnational business and financial actors have become much more mobile (and clearly more mobile than labor), most businesses must still, to some degree, "put down roots." National courts are still one of the locations at which international transactions and the international economy must "touch down" to achieve certain benefits. For example, national private law regimes are important for parties to international transactions because of the need for effective enforcement of contractual agreements and protection of property rights, as those interested in protecting intellectual property or electronic commerce have discovered.

Merchant autonomy in the medieval period operated largely due to the absence of the state. Today, merchant autonomy exists with the endorsement and support of state elites. Furthermore, states participate in the construction of the myths by according private actors wide scope in both structuring and enforcing their international commercial agreements.


188. Saskia Sassen demonstrates well how, for example, contemporary international finance is still territorially grounded, although now concentrated in several key "global cities," such as New York, Tokyo and London. Saskia Sassen, Global Cities (1988).

189. See North, supra note 8; Douglass C. North, Institutions, Transaction Costs and Economic Growth, 25 Econ. Inquiry 419 (1987). Legal scholars have debated similar developments, although with greater sensitivity to the complex nature of "property" and "contract." For example, Thomas C. Grey, The Disintegration of Property, in Property (NOMOS XXII) 69, 75–76 (J. Roland Pennock & John W. Chapman eds., 1980), discusses the importance to increased capitalist exploitation of division of labor and function and the economies of scale. Grey notes that:

The transformation of a preindustrial economy of private proprietors into an industrial economy by the process suggested here presupposes that the entrepreneurs, financiers, and lawyers who carry the process through have the imagination to liberate themselves from the imprisoning concept of property as the simple ownership of a thing by an individual person. They must be able to design new forms of finance and control for enterprise, which can take maximum advantage of the efficiencies of scale and division of function, forms
Without at least some form of national private law of property and contractual enforcement, many international transactions would not occur. As those interested in protecting intellectual property or electronic commerce have found, it is difficult for private actors to operate profitably without an effective legal system which will facilitate transactions by protecting property and contractual enforcement. A commonly-cited example is the lack of legal protection of property rights in the “piracy” in China and elsewhere of computer and other software without compensation to the original creators. Internet commerce, or e-commerce, is also thought to be hampered by the difficulty of ensuring the protection of property rights. While some technological methods, such as encryption technology, are available, most commentators realize that there is no substitute for the security provided by state-based regulation and laws. Predictably, the same parties which advocate an active governmental role in defending strong property rights and contractual enforcement in new areas of intellectual property and e-commerce across borders are often equally concerned to argue that governments not “interfere” with the development and freedom of these realms through laws that regulate with respect to matters such as taxation, content (including pornographic and racist material), viewership, or the like.

These “touchdown” points are potential locations to regulate conduct of transnational actors. It is particularly important to use “touchdown” points as locations to protect the interests of third parties who are affected by the goods, production, or other conduct of transnational actors. National private law regimes such as regimes of tort law in common law jurisdictions and delict in civil law jurisdictions provide a significant tool for parties who are not necessarily parties to contract to seek effective control and redress for the harmful impact of international activity.

Grey further notes that there is a tradeoff, even in terms of aggregate economic production, as to the best balance between specialization through disaggregation of property rights and the need for facilitating market transactions through reducing the complexity of property rights.

190. NORTH, supra note 8, at 57–58. For a critique of this view of the value of strict enforcement of property and contract laws and credible commitment, see Kennedy & Michelman, supra note 61, at 726–29, 745–47.

191. For a more sophisticated view of the nature of copyright violation in China, see WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENCE (1995).

More specifically with respect to arbitration, international commercial arbitration still relies very much on the support of national legal systems. The ultimate authority for arbitration procedures is that they are recognized and supported by national legislative and judicial processes. Without the power of state legal systems behind them, a party who expects to do poorly in the arbitration will have no incentive to comply and may seek recourse to national legal systems. Consequently, international commercial arbitration operates very much "in the shadow of the law," and national laws continue to impose important limits. For example, *lex mercatoria* is a controversial basis for an applicable law, especially in common law jurisdictions. There are also limits on the willingness to compel arbitration, for example, in situations of coercion or illegality.

The relationship between transnational private dispute-resolution and national laws is better understood at the present time as a dialectical one, where the rules of private international law are an important part of the dialectical relationship in which neither has a clearly dominant status. The international business communities and networks may therefore be best viewed as "semi-autonomous social fields" as has been argued in accounts of legal pluralism. Clearly, Teubner and others are correct in observing that state laws no longer have, and probably never had, a normative monopoly on transnational conduct and that non-state based norm systems may have become the more significant force in the global economy. However, it seems equally clear that there is some ability for national authorities not just to abandon state laws in the face of these other normative systems,

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but rather to use the remaining leverage of private law as a site for international regulation.

The present situation with respect to international business networks somewhat resembles the situation with respect to the use of contract by private parties to provide private orderings within a national law context. Such private ordering in the domestic context is not thought to automatically break the frame of state law, either in the self-understanding of the law or as a matter of effective control. The concept of semi-autonomous social fields highlights that the balance in effective influence and power of different norm-generating sources can vary. The balance partly changes over time depending on the accumulation of decisions made in each social field. This point was long ago expressed in the domestic context by observers of private ordering. Extending this analysis to the international realm provides good reasons for national courts and legislators to consider more carefully the role that private law can play in containing the regulatory and democratic challenges that would result if the internationalist reforms that encourage party autonomy did reach the point of full private actor "liftoff."

B. Private International Law and the Constitution of a Pluralist System of Transnational Regulation

Internationalist reform in private international law has largely bracketed the role of private international law in addressing cosmopolitan regulatory concerns. The objectives of facilitating international commerce, increasing international cooperation, and ensuring cosmopolitan fairness have not been read broadly enough to include a consideration of the role of private international law in transnational regulation. Most internationalist reform fails to consider directly the objective of expanding the domain for national law and transnational non-corporate actors to act as countervailing regulatory forces.

This need not be so. Decisions of courts and legislators can enable regulation of transnational business networks by instituting different kinds of legal liability and facilitating other forms of direct action by non-state actors. Neither must this model of governance be based exclusively on state-based processes of dispute resolution. But

there needs to be an express sense of the role of state institutions in influencing the contours of the plural ways—including by state institutions as well as non-state actors—in which “governing” transnational business behavior can occur.

A major concern about regulation through state private laws is the fear of parochialism. While there is a possibility of “over-regulation” that may act as a disincentive for beneficial international economic activities, the lack of coordinated regulatory authority and the lack of representation in national legislatures of all the parties impacted by legislation or the absence of legislation is more likely to lead to “systematic under-regulation of international business.”\(^{199}\) In this situation, the best solution to these dangers is an international agreement that sets out the mutually-acceptable rules for assumption of jurisdiction, as the Brussels and Lugano Conventions do for Europe. However, in the absence of international agreement and given the continuing fragmented nature of regulatory authority in the international system, the continuing use of national laws applied extraterritorially seems like a necessary practice. Dodge, for example, argues that in the absence of international agreement, the second-best policy from a regulatory perspective is judicial unilateralism, a policy of aggressive assumption of extraterritorial or long-arm jurisdiction by national courts over business conduct. He argues that not only will this protect against under-regulation, but is “more likely to lead to international agreement in the long run.”\(^{200}\) Instead, the challenge becomes to describe what the appropriate understanding and boundaries of the practice should be. Most of all, this requires attention to the specific transnational regulatory challenge claimed to be at stake, the degree of international cooperation possible, and a sense of how to control for parochial motives for the unilateralism in the particular rule under discussion.

\(^{199}\) Dodge, supra note 139, at 153.

\(^{200}\) Id. at 158. For discussion of the game theory analysis behind this belief, see id. at 158–68. Dodge argues that unilateralism is appropriate for courts because they are unable to directly negotiate cooperative agreements. Unilateralism, he argues, “may create friction in the short run, [but] it is more likely to lead to international cooperation in the end.” Id. at 164. He argues that conflict has often spurred political negotiations and furthermore that the over-regulation that results from extraterritoriality in antitrust disfavors multinational enterprises, actors who are “generally in a better position than consumers to push for changes in the status quo.” Id. at 167.
1. Differentiating Among Components of the Internationalist Reform Agenda

As an initial guiding principle, promoting transnational regulation through national private laws requires that legal decision-makers more carefully distinguish between different parts of the doctrinal package of internationalist reforms. The liberalization of rules on recognition and enforcement would seem to assist in transnational regulation, by easing the ability of plaintiffs to enforce liability judgments gained in national courts. An example of an internationalist reform that would further assist transnational regulation would be to ease the rule in common law jurisdictions that courts will not enforce the penal, revenue, or other public laws of foreign jurisdictions.\(^{201}\) Internationalist reform in private international law has not generally changed the traditional refusal to enforce such laws.\(^{202}\) The refusal to enforce such laws abroad means that substantial limits exist on the use of national regulatory regimes to compensate for regulatory gaps. For example, some national regulatory regimes, such as environmental law regimes, often include court judgments for damages awarded against defendants. Reform of private international law in the direction of more generous enforcement of some public laws of other jurisdictions would help to ease this tension.\(^{203}\)

In contrast, the regulatory function is potentially challenged by internationalist reforms by state courts to restrain their jurisdiction in the interests of comity.\(^{204}\) Greater reluctance to assume jurisdiction and increased grants of stays of actions on the basis of \textit{forum non conveniens} make it more difficult for plaintiffs seeking to regulate the international conduct of defendants through private law actions. With the objective of reducing short-term conflict among

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201. DICEY & MORRIS, supra note 3, at 97–108, rule 3.


203. See, for example, United States v. Ivey, (1995) 139 D.L.R. 674, 689 (Ont. Gen. Div.), aff'd (1996) 139 D.L.R. 570 (Ont. C.A.) (Can.), where an Ontario court gave summary judgment to enforce civil judgments obtained pursuant to U.S. environmental clean-up legislation, the Comprehensive Environmental Response, Compensation and Liability Act 1980, 42 U.S.C., § 9607(a). In its discussion of the rule concerning penal, revenue, or other public laws, the lower court carefully examined the U.S. judgment, characterizing it as primarily a cost recovery measure, and the degree to which the "public law" prohibition applied to hybrid regulatory regimes that included civil liability. See id. at 684–89.

204. See Paul, Comity, supra note 4.
jurisdictions and showing proper respect for foreign courts and laws, internationalist-minded courts are potentially sacrificing cosmopolitan regulatory interests that are inadequately protected by international regulatory agreements. The controversial use of *forum non conveniens* analysis to decline jurisdiction over foreign tort claims, as in the Bhopal chemical disaster, demonstrates some of the deregulatory dangers.205

Perhaps most clearly, the regulatory function is jeopardized by internationalist reforms that increase party autonomy and choice over dispute resolution. There are significant risks to parties when there is inadequate judicial oversight for problems such as limited information and unequal bargaining power in many contexts where arbitration, forum-selection and choice of law clauses are "agreed" to. Restrictions on choice of forum clauses with respect to consumer and individual employment contracts are examples of such oversight.206 Most significantly, the ability of private parties to resolve disputes "among themselves" ignores the broader context of the current international system where there are inadequate transnational public laws or institutions to protect third-party interests. Regulatory gaps, regulatory competition, autopoietic norms, and weaknesses of countervailing regulatory networks mean that the continued regulatory function of state private laws may remain one of the few "levers" of influence for third parties.

2. Constituting a Pluralist System of Regulatory Governance

In addition to attending to the role of domestic laws in governing transnational conduct, it is also important for private international law policy-makers to understand the way in which transnational networks, interests, and identities are part of the

205. In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984, 809 F.2d 195 (2d Cir. 1987). The Second Circuit ruled that a suit against Union Carbide by Indian victims and the Indian government of the Bhopal chemical disaster was *forum non conveniens* in the New York courts, and should be heard in the courts of India. This conclusion was reached in spite of the submissions of the Indian government who agreed that the suit was better heard in the American court. The Court did affirm certain conditions for the dismissal, including that Union Carbide consent to the Indian Court's jurisdiction and waive the statute of limitations as a defense. Union Carbide was also required to consent to submit to the broad discovery under the U.S. Federal Rules of Civil Procedure. For critical commentary, see INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE (Upendra Baxi ed., 1986) and Paul, Comity, *supra* note 4, at 61-62.

206. This is partly recognized in the Preliminary Draft Convention, *supra* note 25. See text accompanying notes 88-92, *supra*. 
contemporary global system. Private law is probably not the best tool for effective regulation in domestic contexts. But private international law and domestic private laws clearly have a role to play in the development of an effective pluralistic conception of regulatory governance that mixes international governmental treaties and institutions, state public laws, transnational non-governmental organizations (NGOs), and local private actors.

An awareness of the growth of plural and complex identities and interests across borders, for example, would suggest that national courts begin to define jurisdictional interests more broadly to include a consideration of the interests of actors other than members of the jurisdiction. Complex forms of group interests as well as shared transnational interests are traditionally weakly protected by state courts in many common law jurisdictions. This seems problematic in a transnational system where there are significant cross-border flows of people, goods, and ideas and where national identities are mixed with hybrid and dynamic social identities.

In addition, domestic private law systems have a role in facilitating the efforts of countervailing transnational and sub-national networks of human rights activists, labor groups, and environmental NGOs to act in a regulatory oversight role. These groups frequently use national courts and private law claims as part of their strategies. National courts should not allow their concern about facilitating international transactions to overwhelm the value of providing fora for members of transnational civil society to play their oversight role. For example, courts might self-consciously distinguish public interest litigation for special consideration in determining their jurisdiction related to activities that cross national borders, in cases such as tort claims for environmental damage caused by multinational enterprises that are brought in the courts of the home country of the enterprise.

207. TOWARD A GLOBAL CIVIL SOCIETY (Michael Walzer ed., 1995).
208. See, e.g., TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott ed., 2001) [hereinafter TORTURE AS TORT]; Joerges, supra note 49.
209. See Wai, supra note 58, at 238–39.
210. See Note, Constructing the State Extraterritorially, supra note 131, at 1304–05.
211. BEITZ, supra note 42; COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION (Peng Cheah & Bruce Robbins eds., 1998).
The lack of effective remedies for human rights claims in foreign jurisdictions should be considered by local courts in deciding whether to hear claims against foreign state or non-state actors for human rights abuses, such as torture. Similarly, courts should be vigilant in resisting efforts of business or foreign state actors to use defamation suits to limit the communications of non-state activists who attempt to shed critical light on, for example, human rights abuses or environmental degradation by corporate or state actors.

VI. CONCLUSION

Transnational business networks pose regulatory challenges for legal regimes grounded in sovereign states. This Article argues that one way to understand this challenge is to critically examine the private law reforms that have increased the autonomy of transnational business actors without an equivalent increase in transnational regulation. It is argued that well-intentioned policy argumentation for internationalist legal reform in private law based on liberal international goals—such as facilitation of international trade, enhancement of interstate cooperation, and promotion of cosmopolitan fairness—has obscured the role that private law and private international law play in regulating transnational conduct.

The challenges of regulation in a changing globalized system require a revival of the role of private international law in creatively attending to the regulation of transnational business conduct, not an abandonment of this regulatory function in the face of concerns about inefficiency and parochialism. A concern about transnational regulatory purposes does not require that all internationalist reform be abandoned. Internationalist policy arguments concerning the benefits of international trade, inter-state cooperation, and cosmopolitan non-discrimination are valuable counters against unilateralism and disregard for international law and institutions. However, internationalism needs to be defined more broadly to better protect other cosmopolitan policy objectives and ultimately to have greater legitimacy.

Private international law and domestic private laws can play a role in the development of an effective pluralistic conception of

213. See generally TORTURE AS TORT, supra note 208.

regulatory governance that mixes international governmental treaties and institutions, states, transnational NGOs, and local private actors.\textsuperscript{215} To achieve that role, however, a more sophisticated internationalism in private international law requires that non-state actors, courts, and legislators expressly recognize the regulatory function that private international law has played, and should continue to play, in decisions regarding particular doctrinal reforms. In the broader context of changes in the global system that challenge traditional state roles, it becomes even more crucial that the regulatory aspect of private laws—something that all legal scholars understand—is emphasized and creatively utilized.

\textsuperscript{215} See, e.g., Torture as Tort, supra note 208.