

THE PUBLIC-PRIVATE DISTINCTION IN THE CONFLICT OF LAWS

WILLIAM S. DODGE*

INTRODUCTION

Morton Horwitz dates the full emergence of the public-private distinction in law to the nineteenth century. “One of the central goals of nineteenth century legal thought was to create a clear separation between constitutional, criminal, and regulatory law—public law—and the law of private transactions—torts, contracts, property, and commercial law.”¹ The purpose of the distinction was “to stake out distinctively private spheres free from the encroaching power of the state”² and to create “a neutral and apolitical system of legal doctrine and legal reasoning free from what was thought to be the dangerous and unstable redistributive tendencies of democratic politics.”³ In the early twentieth century, the public-private distinction came under attack, particularly from legal realists who argued that because private-law rights were enforced by the state they should be conceptualized as delegations of public power to private individuals.⁴ “By 1940, it was a sign of legal sophistication to understand the arbitrariness of the division of law into public and private realms.”⁵

* Professor of Law, University of California, Hastings College of the Law. My thanks to Hannah Buxbaum and Mary Kay Kane for comments on an earlier draft.

1. Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982).

2. *Id.* at 1423; see also Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Reputation*, 130 U. PA. L. REV. 1429, 1429 (1982) (“The distinction between public and private connects with a central tenet of liberal thought: the insistence that because individuals have rights, there are limits on the power of government vis-à-vis the individual.”).

3. Horwitz, *supra* note 1, at 1425.

4. See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 585-92 (1933); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12-14 (1927).

5. Horwitz, *supra* note 1, at 1426; see also Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982) (tracing the public/private distinction from its heyday to its demise).

The purpose of this paper is to explore whether a public-private distinction exists in the conflict of laws, as well as the nature of that distinction and whether it ought to be maintained. At first glance, a public-private distinction would certainly seem to exist in the conflict of laws. For example, a court's approach to determining the applicable law in a suit touching multiple jurisdictions differs dramatically depending on whether the claim is one of tort or antitrust. In a torts case, the court looks to the particular forum's choice-of-law rules to determine which jurisdiction's substantive law should apply. If the answer is foreign law, the court applies that law and decides the case on the merits.⁶ In an antitrust case, by contrast, the court does not look to the forum's choice-of-law rules to decide which antitrust law should govern. Instead, it construes its own antitrust law to decide whether that law reaches the case, and if it does not, the court simply dismisses the claim. Under no circumstances does the court decide the case by applying foreign antitrust law.⁷

One may identify at least two basic differences in the approaches taken by courts. First, in the private law context, the court answers the question of applicable law by resorting to rules that are *external* to the substantive law, specifically by applying the forum's choice-of-law rules. In the context of public law, the court's method is *internal*—it looks for the answer to the applicability question in the substantive law itself. Second, in the private law context, a court will apply foreign law to decide a case if it determines that foreign law governs. In the public law context, the court will not apply foreign law but will dismiss the case if it finds the forum's law inapplicable. In other words, in private law cases the court asks *which* substantive law applies, while in public law cases it asks *whether* the forum's substantive law applies.

A number of scholars have noted the similarity of the applicable-law question in the public-law and private-law realms and have urged that conflicts principles be used to define the extraterritorial reach of regulatory legislation.⁸ For the most part, however, these scholars ac-

6. See, e.g., *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999).

7. See, e.g., *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168-69 (2004).

8. See, e.g., Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975, 997-98 (1994); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992); Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11 (1987); Andreas F. Lowenfeld, *Public Law in*

cept the external-internal and which-whether distinctions described above. In his seminal article on the subject, Donald Trautman conceded that a court construing a regulatory statute must ultimately ground its decision upon legislative intent: "Strictly the job of the judge is to apply the statute within the limits laid down by Congress."⁹ Trautman further noted that "[a] court faced with the question whether to apply its regulatory statute does not have the alternative of applying some other statute as a substitute except where the foreign statute provides private remedies enforceable by the forum; the choice is simply whether or not to apply the statute of the forum."¹⁰ Trautman and others have argued that conflicts thinking should influence the interpretation of regulatory statutes, but not that the rules of conflicts should be applied directly to them.

In Part I of this paper, I point out that courts have long been doing precisely what Trautman and others have urged. Although choice-of-law rules have not been applied directly to regulatory statutes, they have long influenced the approaches courts have taken in interpreting the extraterritorial reach of such statutes. As choice-of-law rules have changed, so too have the ways in which courts construe the scope of regulatory statutes. Parts II and III examine the external-internal and which-whether distinctions in more detail. Part II shows that the core of the external-internal distinction is the courts' perceived need to ground decisions about the applicability of public law in legislative intent. The problem is that there is often no real evidence of legislative intent with respect to when a statute, the purpose of which would be served by applying it, should not be applied to serve other ends. It would be better for courts to assume responsibility for formulating rules to handle such cases, as they do with private law. Part III examines the reasons for the which-whether distinction, arguing that the reasons for refusing to apply foreign public law

the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction, 163 RECUEIL DES COURS 311 (1979-II); Donald T. Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 OHIO ST. L. J. 586 (1961). Others have been more skeptical. See, e.g., Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799 (1992); Friedrich K. Juenger, *Constitutional Control of Extraterritoriality?: A Comment on Professor Brilmayer's Appraisal*, 50 LAW & CONTEMP. PROBS. 39 (1987); Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982).

9. Trautman, *supra* note 8, at 587.

10. *Id.* at 617.

are generally unconvincing. Only the need to ensure reciprocity justifies such a distinction, but the distinction it supports is one between public and private plaintiffs, not public and private laws. The last section concludes.

I. THE INFLUENCE OF CONFLICTS ON EXTRATERRITORIALITY

Changing theories about the conflict of laws have long had an indirect influence on the interpretation of regulatory statutes.¹¹ Take the example of antitrust. Over the past century, U.S. courts have adopted three distinct approaches to the extraterritorial scope of the Sherman Act: (1) a territorial approach; (2) an effects approach; and (3) a balancing approach. Each has been heavily influenced by developments in the conflict of laws.

The Supreme Court first construed the scope of the Sherman Act in *American Banana Co. v. United Fruit Co.*¹² Justice Holmes held that the Act did not extend to the anticompetitive activities of a U.S. company in Central America.

[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater v. Mexican National R.R. Co.*, 194 U. S. 120, 126. . . . This principle was carried to an extreme in *Milliken v. Pratt*, 125 Massachusetts, 374. For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.¹³

As Larry Kramer has observed, Holmes's analysis was "pure conflict of laws."¹⁴ Each of the authorities on which he relied was either a conflicts case or a conflicts treatise. The first was his own opinion in *Slater*, a torts case and the leading judicial statement of the "vested rights" theory of conflicts that then prevailed. The vested rights theory was based on a territorial view of sovereign power. Although

11. For further discussion, see William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 110-43 (1998).

12. 213 U.S. 347 (1909).

13. *Id.* at 356 (citing *Phillips v. Eyre*, (1869) 4 L.R.Q.B. 225, 239 (U.K.), *aff'd*, (1870) 6 L.R.Q.B. 1, 28 (U.K.)); DICEY, *CONFLICT OF LAWS* 647 (2d ed. 1908).

14. Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 186.

foreign law was not “operative outside its own territory,” it could create an obligation within its own territory that other courts would enforce.¹⁵ Under this theory, “the only source of this obligation is the law of the place of the act.”¹⁶ But while Holmes looked to the conflict of laws for guidance in *American Banana*, he did not apply its rules directly to the Sherman Act. Instead he adopted a presumption about legislative intent based upon those rules. “The foregoing considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”¹⁷

The vested rights theory soon crumbled under attacks from legal realists during the 1920s and 30s and was ultimately supplanted by a series of approaches authorizing the forum to apply its own law. In *Guinness v. Miller*,¹⁸ Judge Learned Hand articulated what came to be known as the “local law” theory.¹⁹ Its basic premise was that “no court can enforce any law but that of its own sovereign,” although Hand noted that a court would “impose[] an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs.”²⁰ Though criticized by some as mere wordplay,²¹ the local law theory importantly emphasized the autonomy of the forum in deciding what law to apply. In the 1930s, a series of conflicts opinions by Justice Stone relaxed the territoriality of the vested rights theory as a matter of constitutional law and began to emphasize governmental interests as a basis for choosing the applicable law.²² In *Pacific Employers*, Stone held that the forum could apply its own law even

15. *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 126 (1904).

16. *Id.*

17. *American Banana*, 213 U.S. at 357.

18. 291 F. 769, 770 (S.D.N.Y. 1923).

19. See generally David F. Cavers, *The Two “Local Law” Theories*, 63 HARV. L. REV. 822 (1950).

20. *Guinness*, 291 F. at 770.

21. See, e.g., Gerhard Kegel, *Private International Law: Fundamental Approaches*, in III INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3, 10-11 (Kurt Lipstein ed., 1986) (“If this notion were to be transposed from the realm of law to that of languages, the conclusion would have to be: If an Englishman speaks French, he speaks English in reality, fashioned as nearly as possible in conformity with French.”).

22. See *Alaska Packers Assoc. v. Indus. Accidents Comm'n*, 294 U.S. 532 (1935); *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493 (1939).

though another state might apply its law “with respect to the same persons and events.”²³

The impact of these developments on the interpretation of the Sherman Act can be seen in Hand’s 1945 decision in *United States v. Aluminum Co. of America (Alcoa)*, which broke with *American Banana* and applied the Act extraterritorially on the basis of effects:

[W]e are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the ‘Conflict of Laws.’ We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.²⁴

Turning to those limitations, Hand observed, “it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.”²⁵ Thus, Hand construed the Sherman Act to reach anticompetitive agreements between foreign companies outside the United States “if they were intended to affect imports and did affect them.”²⁶

Hand’s line in *Alcoa* that “as a court of the United States, we cannot look beyond our own law” obviously echoes his statement in *Guinness* that “no court can enforce any law but that of its own sovereign.”²⁷ At the same time, the conflicts rule to which Hand looked to authorize the application of the forum’s law on the basis of effects reflects the influence of Justice Stone’s opinions loosening the restraints of territoriality. It is also worth noting that Hand, like Holmes, did

23. *Pac. Employers*, 306 U.S. at 502. Brainerd Currie would later develop Stone’s approach into what became known as “governmental interest analysis.” Currie wrote: “If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy . . .” BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 184 (1963).

24. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945).

25. *Id.*

26. *Id.* at 444.

27. *Guinness v. Miller*, 291 F. 769, 770 (S.D.N.Y. 1923).

not apply conflicts rules directly to the Sherman Act but rather read congressional intent against the background of those rules: “We should not impute to Congress *an intent* to punish all whom its courts can catch”²⁸

In time, some courts adopted a third approach to the Sherman Act that balanced U.S. interests against those of other nations. In *Timberlane Lumber Co. v. Bank of America*,²⁹ the court proposed to weigh a variety of factors to determine “whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.”³⁰ In developing this approach, *Timberlane* drew expressly on conflicts: “We believe that the field of conflict of laws presents the proper approach, as was suggested, if not specifically employed, in *Alcoa*.”³¹ Of course, *Alcoa* had employed a conflicts approach, but the rules of conflicts had evolved in the interim. Most significantly, the 1971 *Restatement (Second) of Conflicts* had adopted a “most significant relationship” test³² that asked courts to consider the contacts of each jurisdiction to the case and a series of factors set forth in Section 6. *Timberlane*’s balancing approach was quite similar, and indeed the court cited Section 6 of the *Restatement (Second)* in support.³³

Once again, the court did not apply choice-of-law rules directly to the statute, but seemed to think them relevant to an analysis of what Congress intended, as *Timberlane*’s reliance on *Alcoa* would indicate.³⁴ Other advocates of this balancing approach have more explicitly justified it in terms of congressional intent. Writing in dissent in *Hartford Fire Insurance v. California*,³⁵ Justice Scalia noted that decisions like *Timberlane* had “tempered the extraterritorial application

28. *Alcoa*, 148 F.2d at 443 (emphasis added); see also *id.* (“the only question open is whether Congress intended to impose the liability”).

29. *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976).

30. *Id.* at 613.

31. *Id.*

32. See, e.g., RESTATEMENT (SECOND) OF CONFLICTS § 145 (1971).

33. See *Timberlane*, 549 F.2d at 614 n.29 (1976).

34. See *id.* at 613 (quoting *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945)) (“[W]e are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the ‘Conflict of Laws.’”).

35. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

of the Sherman Act with considerations of ‘international comity.’”³⁶ He emphasized that this comity was “exercised by legislatures when they enact laws”³⁷ and that courts construing statutes in the light of comity were simply following the presumed intent of those legislatures.

In sum, courts have again and again looked to conflicts rules for guidance in construing the Sherman Act. Courts have not applied these conflicts rules directly, as they would to private law, but have instead viewed the rules as relevant to the question of legislative intent. As the conflicts rules have changed from vested rights, to the law of the forum, to interest balancing, so too has the courts’ construction of the Sherman Act’s extraterritorial reach.

II. THE EXTERNAL-INTERNAL DISTINCTION

Although developments in the conflict of laws have clearly influenced the ways in which courts construe the reach of public-law statutes like the Sherman Act, there still appear to be large methodological differences between multijurisdictional tort cases and multijurisdictional antitrust cases. One such difference is what we might call the external-internal distinction. In a torts case, the court looks to conflicts rules external to the substantive law to tell what law governs. In an antitrust case, the court does not apply external choice-of-law rules. Rather, it looks for legislative intent.

Choice-of-law rules are, by definition, external to the substantive law. Section 4 of the *Restatement (Second) of Conflicts* expressly distinguishes between a state’s “rules of Conflict of Laws” and its “local law.”³⁸ Choice-of-law rules “do not themselves determine the rights and liabilities of the parties, but rather guide decisions as to which local law rule will be applied to determine these rights and duties.”³⁹ In

36. *Id.* at 817 (Scalia, J., dissenting).

37. *Id.* (Scalia, J., dissenting).

38. RESTATEMENT (SECOND) OF CONFLICTS § 4(1) (1971). Conflict of laws rules include not only the choice-of-law rules that are the focus of this paper, but also rules on judicial jurisdiction and the enforcement of foreign judgments. *See id.* § 2, cmt. a.

39. *Id.* § 2, cmt. a. In the United States, choice-of-law rules are typically rules of judge-made common law. About half the states follow the approach of the *Restatement (Second) of Conflicts*, but a number continue to follow the traditional approach of the first *Restatement*, while others have adopted distinct approaches. For a listing of methodologies, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 AM. J. COMP. L. 697, 713 (2006).

Spinozzi v. ITT Sheraton Corp.,⁴⁰ to take a recent example, Judge Posner looked to Illinois's choice-of-law rules to decide whether Illinois's rule of comparative negligence or Mexico's rule of contributory negligence should apply to a tort claim by an Illinois resident arising from an injury in Mexico. Illinois had adopted the approach of the *Restatement (Second)*, so because Mexico had the most significant relationship to the issue, Posner applied Mexico's substantive law and granted summary judgment for the defendant.

When the plaintiff's claim is based on public law, a court's approach is different. As we saw in Part I, courts do not apply choice-of-law rules directly to decide whether a regulatory statute like the Sherman Act reaches a particular case, even though their approaches have been strongly influenced by those rules. Instead, courts have sought their answers within the substantive law itself, grounding their decisions about extraterritorial scope in the intent of the legislature.

Sometimes Congress speaks directly to the extraterritorial scope of its regulatory laws. After the Supreme Court construed Title VII to not apply extraterritorially,⁴¹ Congress amended it to provide that, "[w]ith respect to employment in a foreign country, ['employee'] includes an individual who is a citizen of the United States."⁴² It further specified that Title VII would not apply to foreign companies abroad unless they were controlled by American employers⁴³ and would not apply in cases where the discrimination abroad was compelled by foreign law.⁴⁴ To take another example, Congress provided in the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) that the Sherman Act does not apply to anticompetitive conduct that affects only foreign markets.⁴⁵

Frequently, though, Congress does not specify the extraterritorial reach of its regulatory laws. In these cases, courts employ a series

40. *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999).

41. *See* *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 258 (1991).

42. 42 U.S.C. § 2000e(f).

43. *Id.* § 2000e-1(c).

44. *Id.* § 2000e-1(b). The Age Discrimination in Employment Act (ADEA) contains similar provisions specifying its extraterritorial scope. *See* 29 U.S.C. §§ 623(f)(1), 623(h), 630(f).

45. More specifically, the Sherman Act does not apply to conduct involving commerce with foreign nations other than import commerce unless such conduct has "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce and such conduct gives rise to "a claim" under the Sherman Act. 15 U.S.C. § 6a.

of presumptions about legislative intent.⁴⁶ One of these is the presumption against extraterritoriality: “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”⁴⁷ Applying this presumption in *Aramco*, the Supreme Court held that Title VII (prior to its amendment in 1991) did not apply to employment discrimination by an American employer against an American citizen in Saudi Arabia. The Court framed the question as one of legislative intent: “It is our task to determine whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States.”⁴⁸ The Court then turned to the presumption against extraterritoriality as “a valid approach whereby unexpressed congressional intent may be ascertained.”⁴⁹ The presumption assumes that Congress wants to avoid “unintended clashes between our laws and those of other nations which could result in international discord,”⁵⁰ and that Congress “is primarily concerned with domestic conditions.”⁵¹

A second presumption to which courts sometimes turn is the so-called *Charming Betsy* presumption that “an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.”⁵² Like the presumption against extraterritoriality, the *Charming Betsy* presumption is frequently justified as a reflection of congressional intent. “It is generally assumed that Congress does not intend to repudiate an international obligation of the United States,” explains the *Restatement (Third) of Foreign Relations Law*.⁵³ Dissenting in *Hartford Fire Insurance Co. v. California*,⁵⁴ Jus-

46. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993) (Scalia, J., dissenting) (discussing the presumption against extraterritoriality and the *Charming Betsy* presumption).

47. *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). For further discussion of the presumption against extraterritoriality, see William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 *BERKELEY J. INT'L L.* 85 (1998).

48. *Aramco*, 499 U.S. at 248.

49. *Id.* (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

50. *Id.*

51. *Id.* (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

52. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

53. *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 115, cmt. a (1987). For discussion of alternative justifications, see Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretative Role of International Law*, 86 *GEO. L.J.* 479 (1998).

tice Scalia employed the presumption in just this way. Section 403 of the *Restatement (Third) of Foreign Relations Law* says that customary international law prohibits the exercise of prescriptive jurisdiction when it would be unreasonable based on an evaluation of factors like those set forth in *Timberlane*.⁵⁵ After weighing those factors, Justice Scalia concluded that application of the Sherman Act would be unreasonable and that “therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.”⁵⁶ Justice Scalia termed the resulting deference to the interests of other nations “prescriptive comity,”⁵⁷ and he took care to describe it as a matter of legislative intent rather than judicial fiat. Prescriptive comity, he wrote, “is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere.”⁵⁸ Instead it “is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted.”⁵⁹

“Prescriptive comity” moved from dissent to majority in the *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* case.⁶⁰ At issue was whether anticompetitive conduct that both occurred abroad and affected the plaintiffs there was exempted from the reach of the Sherman Act by the FTAIA. Although Justice Breyer looked to the language of the FTAIA⁶¹ and to its legislative history,⁶² he relied heavily upon a “rule of construction” interpreting ambiguous statutes so as

54. 509 U.S. 764 (1993).

55. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403. Whether § 403 in fact reflects customary international law is a matter of some controversy. See David B. Massey, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 YALE J. INT’L L. 419 (1997).

56. *Hartford*, 509 U.S. at 819 (Scalia, J., dissenting). For a critique of Justice Scalia’s analysis, see Dodge, *supra* note 11, at 138-43. The majority read § 403 as limited to situations where a party subject to regulation by two states cannot comply with the laws of both. *Hartford*, 509 U.S. at 798-99. Although the FTAIA addresses the extraterritorial application of the Sherman Act in some circumstances, see *supra* note 45 and accompanying text, the majority thought it was unclear whether the FTAIA would apply and concluded that the anticompetitive conduct alleged in *Hartford* would satisfy its standard in any event. *Id.* at 796 n.23. Justice Scalia apparently did not think the FTAIA applicable, for he did not mention it.

57. *Hartford*, 509 U.S. at 817 (Scalia, J., dissenting).

58. *Id.* (Scalia, J., dissenting).

59. *Id.* (Scalia, J., dissenting).

60. 542 U.S. 155, 169 (2004).

61. *Id.* at 161-62, 173-74.

62. *Id.* at 169-73.

“to avoid unreasonable interference with the sovereign authority of other nations.”⁶³ As with the other presumptions we have seen, Breyer’s presumption against unreasonable interference was premised upon congressional intent. “This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.”⁶⁴

Is the external-internal distinction I have sketched more apparent than real? After all, external choice-of-law rules often direct courts to look internally at the purpose of a law in a way that resembles a search for legislative intent. At the same time, the presumptions about legislative intent to which courts often resort when construing regulatory statutes might be characterized as external choice-of-law rules in disguise. We shall examine each of these challenges in turn.

Modern choice-of-law rules tend to give great weight to governmental interests. The *Restatement (Second) of Conflicts* says that “the state whose interests are most deeply affected should have its local law applied.”⁶⁵ In evaluating those interests, courts typically examine the purpose of each jurisdiction’s substantive law to see if that purpose would be served by applying it to the case at hand. In *Babcock v. Jackson*, for example, the New York Court of Appeals observed that,

[t]he object of Ontario’s guest statute . . . is ‘to prevent the fraudulent assertion of claims by passengers, in collusion with

63. *Id.* at 164. Whether such a rule of construction exists is an important question. The authorities Breyer cited do not state such a rule but rely instead on the quite different rule that “an act of congress ought never to be construed to violate *the law of nations* if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (emphasis added). Justice Breyer’s citation of *Restatement (Third) § 403* suggests that he was relying upon it for the proposition that customary international law forbids unreasonable exercises of prescriptive jurisdiction, but as noted above the accuracy of § 403 as a statement of customary international law is contested. *See supra* note 55. In any event, Justice Breyer did not endorse the case-by-case weighing of factors envisioned in § 403, commenting that “this approach is too complex to prove workable.” *Empagran*, 542 U.S. at 168.

64. *Empagran*, 542 U.S. at 164.

65. RESTATEMENT (SECOND) OF CONFLICTS § 6, cmt. f (1971); *see, e.g.*, *Reich v. Purcell*, 432 P.2d 727, 729 (Cal. 1967) (“The forum must search to find the proper law to apply based upon the interests of the litigants and the involved states.”); *Babcock v. Jackson*, 191 N.E.2d 279, 283 (N.Y. 1963) (“Justice . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation.”).

the drivers, against insurance companies' . . . and quite obviously, the fraudulent claims intended to be prevented by the statute are those asserted against Ontario defendants and their insurance carriers.⁶⁶

Because *Babcock* involved a New York defendant, Ontario's purpose would not be served by applying its law. "Whether New York defendants are imposed upon or their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario simply because the accident occurred there."⁶⁷

The distinction between interest analysis and legislative intent becomes apparent, however, in the case of "true conflicts": when the purpose of each state's law would be served by applying it. In *Offshore Rental Co. v. Continental Oil Co.*,⁶⁸ the California Supreme Court faced a conflict between two state statutes. California's statute would have permitted the plaintiff corporation to recover for the loss of an injured employee's services, while Louisiana's statute would have protected the defendant corporation against liability. The purpose of each statute would have been served by applying it to the case,⁶⁹ so the court had to choose. It chose Louisiana's statute, not on the basis of legislative intent but by applying an external choice-of-law rule, specifically the court's "comparative impairment" approach.⁷⁰ The court candidly admitted that "the resolution of true conflict cases may be described as 'essentially a process of allocating respective spheres of lawmaking influence.'"⁷¹ The important point is that those spheres were allocated not by a legislature but by the court, through its adoption of a particular choice-of-law rule. The Court never asked if the California legislature would have intended its statute to give way in the face of a stronger foreign interest.

One may also challenge the external-internal distinction by asking whether the presumptions about legislative intent that courts fre-

66. *Babcock*, 191 N.E.2d at 284 (quoting *Survey of Canadian Legislation*, 1 U. TORONTO L.J. 358, 366 (1936)).

67. *Id.*; see also *Reich*, 432 P.2d at 730-31 (examining purpose of Missouri's wrongful death statute).

68. 583 P.2d 721 (Cal. 1978).

69. *Id.* at 725.

70. "[T]he 'comparative impairment' approach . . . seeks to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *Id.* at 726.

71. *Id.* (quoting William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 11-12 (1963)).

quently apply to regulatory statutes are not in fact external choice-of-law rules. It should be obvious that these presumptions are at least not *the same* external choice-of-law rules that courts apply to private law. Although *Empagran*'s presumption against unreasonable interference with the sovereign authority of other nations bears some resemblance to the most-significant-relationship test of the *Restatement (Second) of Conflicts*, it also differs from that test by, for example, rejecting the notion of a case-by-case balancing test.⁷² *Aramco*'s presumption against extraterritoriality harkens back to the choice-of-law rules of an earlier era, which only a few courts continue to apply today.⁷³ The *Charming Betsy* presumption has no analogue in choice-of-law jurisprudence since it is designed to mediate not between the local laws of various jurisdictions but between local law and international law. It shapes the extraterritorial application of regulatory statutes only when joined with international law rules on prescriptive jurisdiction to create what Justice Scalia described as "prescriptive comity."⁷⁴

The real reason the presumptions applied to regulatory statutes cannot properly be characterized as external choice of law rules, however, is that they are all ultimately justified on the basis of legislative intent in a way that choice-of-law rules are not. "Prescriptive comity," Justice Scalia wrote in *Hartford*, is not exercised by courts but "by legislatures when they enact laws."⁷⁵ The presumption against unreasonable interference with the sovereign authority of other nations "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws."⁷⁶ The presumption against extraterritoriality is defended as "a valid approach whereby unexpressed congressional intent may be ascertained."⁷⁷ Even if the congressional intent these presumptions embody is imaginary, the court purports to be carrying out the will of the legislature when the issue is one of public law. In

72. See *supra* note 63.

73. See Kramer, *supra* note 14, at 184 (characterizing the presumption as an "anachronism").

74. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

75. *Id.* (Scalia, J., dissenting).

76. *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

77. *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

the context of private law, by contrast, legislative intent is relevant only insofar as the court's own choice-of-law rules have made it so.

One might hypothesize that this distinction reflects the presence of a statute in one case and not in the other. When a court must determine whether a statute applies, it seems natural to look for legislative intent. When a court is deciding the applicability of a common-law rule, it seems more justifiable to look to choice-of-law rules that are similarly judge-made. The problem is that the presence or absence of a statute does not in fact correspond with a court's willingness to apply external choice-of-law rules. A number of leading conflicts cases have applied the forum's external choice-of-law rules to private law statutes just as though the rules were ones of common law. Take *Babcock v. Jackson*, in which the New York Court of Appeals adopted a "center of gravity" approach for tort conflicts and then applied that approach to decide that Ontario's guest statute did not bar a suit between two New York residents arising out of an automobile accident in Ontario.⁷⁸ Or take *Offshore Rental Co. v. Continental Oil Co.*, in which the California Supreme Court applied its "comparative impairment" approach to choose a Louisiana statute barring a corporation from recovering for the loss of an injured employee's services as the governing law over a contrary statute of its own state.⁷⁹ Or consider *Schmidt v. Briscoll Hotel*, in which the Minnesota Supreme Court framed the issue of whether Minnesota's dram shop act applied to an accident in Wisconsin solely in terms of whether it should depart from the rules of the first *Restatement of Conflicts*.⁸⁰

Instead, whether the court applies external choice-of-law rules or searches internally for intent seems to turn on whether the court perceives the statute to create rules of private or of public law. But this distinction is vulnerable for two reasons. First, it ignores the legal realists' attack on the public-private distinction more generally, that because private-law rights are enforced by the state they should be con-

78. 191 N.E.2d 279, 283 (N.Y. 1963).

79. 583 P.2d 721, 726 (Cal. 1978).

80. 82 N.W.2d 365, 368 (Minn. 1957). There are counter examples, of course. In *Graham v. Gen. U.S. Grant Post No. 2665, V.F.W.*, 248 N.E.2d 657 (Ill. 1969), the Supreme Court of Illinois refused to apply its "center of gravity" rule to Illinois's dram shop act, *id.* at 659, observing that "the question of whether the Dram Shop Act should be given extraterritorial effect is a question of policy that is particularly within the province of the legislature." *Id.* at 660. *Graham*, however, seems to be unusual in treating a private-law statute this way.

ceptualized as delegations of public power to private individuals.⁸¹ It is widely recognized today that rules of contracts, torts, property, and the like do reflect considerations of public policy. Second, the distinction overlooks the private-law roots of many public-law statutes. “The congressmen who drafted and passed the Sherman Antitrust Law thought they were merely declaring illegal offenses that the common law had always prohibited.”⁸² The Supreme Court has noted that the Sherman Act “invokes the common law,”⁸³ and has treated it as “a common-law statute” authorizing judicial development in the tradition of the common law.⁸⁴ So too with statutory provisions on securities fraud, which the Court recently noted have “common-law roots.”⁸⁵ In the end, it is not at all clear that antitrust law is fundamentally different from unfair competition in torts, or securities fraud from common-law fraud.

Even if there is no particular reason to distinguish between public and private law and to give primacy to legislative intent with respect to the former, one might wonder if there is any particular harm in doing so, particularly when so much of the actual work is done by judicially created presumptions. It seems useful here to divide the intent inquiry into two separate questions: (1) would applying a regulatory statute advance its purposes; and (2) should its application nevertheless be limited to serve other ends? The first question is usually easy to answer for both public and private law.⁸⁶ The second is far more difficult. When the legislature speaks directly to the applicability question, of course the court must obey.⁸⁷ And sometimes legisla-

81. See *supra* note 4 and accompanying text.

82. William Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 355 (1954); see also Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 759 (1955); 21 CONG. REC. 2456 (statement of Sen. Sherman) (“It does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.”). That the Act went beyond the existing common law, see Letwin, *supra*, at 385; Dewey, *supra*, at 786, does not undercut the point that the subject matter was one traditionally treated by the common law.

83. *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 732 (1988).

84. *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2720 (2007).

85. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 344 (2005); see also LOUIS LOSS & JOEL SELIGMAN, *FUNDAMENTALS OF SECURITIES REGULATION* 846-55 (4th ed. 2001) (describing relationship between SEC fraud concepts and common law deceit).

86. See *supra* notes 65-67 and accompanying text.

87. See RESTATEMENT (SECOND) OF CONFLICTS § 6(1) (2007) (“A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.”).

tures do provide explicit instruction, in both the areas of public law⁸⁸ and private law.⁸⁹ But usually there is only silence on the second question.⁹⁰ Indeed, sometimes the silence seems deliberate. As the courts' approach to the Sherman Act swung during the twentieth century from territoriality to effects to balancing, Congress declined to amend the statute to clarify its extraterritorial reach. When Congress passed the FTAIA in 1982, the House Report stated that the Act was "intended *neither to prevent nor to encourage* additional judicial recognition of the special international characteristics of transactions. If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane*."⁹¹ Under these circumstances, to say that any particular approach to the extraterritorial application of the Sherman Act reflects congressional intent is simply fanciful. It allows the courts to avoid responsibility for making the difficult policy choices involved, a responsibility they have willingly and ably assumed in the context of private law.

III. THE WHICH-WHETHER DISTINCTION

Another distinction between private and public law cases concerns the court's willingness to apply foreign law. In multijurisdictional tort suits, if the forum's choice-of-law rules point to foreign law, courts will routinely apply that law and decide the case on the merits.⁹² In multijurisdictional antitrust suits, courts dismiss the case if they find that the forum's law does not apply. They never apply foreign antitrust law. In *Empagran*, for example, foreign vitamin purchasers in Australia, Ecuador, Panama, and Ukraine brought suit

88. *See, e.g.*, 42 U.S.C. § 2000e-1 (specifying the extraterritorial scope of Title VII).

89. Section 1-105 of the original UCC provided that the Code should be applied "to transactions bearing an appropriate relation to this state." Revised Article 1 would have eliminated the bias in favor of forum law and referred courts to the choice-of-law rules of the forum, but each of the 29 states to have adopted Revised Article 1 as of this writing has retained the UCC's original provision on applicability. *See* Uniform Law Commission, Final Acts and Legislation by State, <http://www.nccusl.org/Update/> (last visited March 28, 2008).

90. This should not be surprising if, as the *Aramco* Court noted, Congress "is primarily concerned with domestic conditions." *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

91. H.R. REP. NO. 97-686, at 13 (1983), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2498 (emphasis added). The Supreme Court noted in *Hartford* that Congress had declined to take a position on *Timberlane*. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993).

92. *See, e.g., Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999) (applying Mexican tort law).

against defendants alleged to be involved in a price-fixing conspiracy. As we have seen, the Supreme Court held that the Sherman Act, as amended by the FTAIA, did not reach the foreign conduct.⁹³ The Court did not consider the possibility of applying foreign antitrust law to decide the claims, despite the fact that Australian law, for example, allows private damages actions for price fixing.⁹⁴ Both U.S. and foreign courts have expressed the view that the courts of one nation will not enforce the antitrust laws of another.⁹⁵ The same is true of securities fraud regulation.⁹⁶

The roots of this “public law taboo”⁹⁷ may be found in two rules that are historically distinct.⁹⁸ First, as Chief Justice Marshall wrote in *The Antelope*, “[t]he Courts of no country execute the penal laws of

93. *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158 (2004). Having decided the case on the assumption that the foreign harm caused by the anticompetitive conduct was independent of the domestic harm, the Supreme Court remanded for consideration of plaintiffs’ alternative argument that without higher prices in the U.S. the foreign harm would not have occurred. *Id.* at 175. On remand, the D.C. Circuit found that the U.S. harm did not cause the foreign harm and dismissed the case. *See Empagran S.A. v. F. Hoffmann-LaRoche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

94. *See Trade Practices Act, 1974, pt. VI, § 82 (Austl.)* (authorizing damages action for violations of, *inter alia*, § 45A’s prohibition of price-fixing). At the district court level, the plaintiffs did seek damages under foreign antitrust law, but the district court declined to exercise supplemental jurisdiction over those claims. *See Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360, at *7-8 (D.D.C. 2001). Other courts have similarly refused to exercise supplemental jurisdiction over foreign antitrust claims. *See, e.g., In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 702, 713 n.8 (D. Md. 2001); *Info. Res., Inc. v. The Dun & Bradstreet Corp.*, 127 F. Supp. 2d 411, 417-18 (S.D.N.Y. 2000).

95. *See, e.g., Capital Currency Exch., N.V. v. Nat’l Westminster Bank PLC*, 155 F.3d 603, 609 (2d Cir. 1998), *cert. denied*, 526 U.S. 1067 (1999) (“English courts will not enforce the Sherman Act.”); *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 891 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007 (1983) (“[W]e have little doubt that the Indonesian courts would quite properly refuse to entertain plaintiffs’ Sherman Act claim.”); *British Airways Bd. v. Laker Airways Ltd.*, (1985) 1 A.C. 58, 79 (H.L. 1984) (appeal taken from O.B.D.) (U.K.) (“The Clayton Act which creates the civil remedy with threefold damages for criminal offenses under the Sherman Act is, under English rules of conflict of laws, purely territorial in its application.”). One Canadian court has suggested that *judgments* under the Sherman Act might be enforceable in Canada, but not that Canadian courts might apply U.S. antitrust law to decide a case in the first instance. *See Old N. State Brewing Co. v. Newlands Servs. Inc.*, (1998) 58 B.C.L.R.3d 144 (B.C.C.A.).

96. *See, e.g., Schemmer v. Prop. Res. Ltd.*, (1975) 1 Ch. 273, 288 (1974) (U.K.) (“The [Securities Exchange] Act of 1934 is . . . a penal law of the United States of America and, as such, unenforceable in our courts.”).

97. Lowenfeld, *supra* note 8, at 322-26.

98. *See generally* William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L L.J. 161, 165-93 (2002).

another.”⁹⁹ Second, as Lord Mansfield wrote in *Holman v. Johnson*, “no country ever takes notice of the revenue laws of another.”¹⁰⁰ For our purposes, it is interesting to note that each of these rules was originally applied to prevent public-law statutes from interfering with private rights—the same rationale as the public-private distinction more generally.¹⁰¹ The revenue rule developed to allow the enforcement of private contracts that violated the customs laws of other countries. Lord Hardwicke explained in an early English case that “if it should be laid down, that because goods are prohibited to be exported by the laws of any foreign country from whence they are brought, therefore the parties should have no remedy or action here, it would cut off all benefit of such trade from this kingdom.”¹⁰² The penal-laws rule was initially applied to prevent foreign confiscation statutes from barring the enforcement of debts.¹⁰³ Later, in *The Antelope*, Chief Justice Marshall invoked the rule to protect rights in property—specifically slaves—against the interference of foreign declarations against the slave trade.¹⁰⁴

In the twentieth century, the function of these rules in guarding private rights from public encroachment was abandoned. Courts stopped enforcing contracts that violated foreign customs laws and export restrictions.¹⁰⁵ “[W]e should take notice of the laws of a friendly country, even if they are revenue laws or penal laws or political laws,” Lord Denning wrote, “at least, to this extent, that if two people knowingly agree together to break the laws of a friendly country . . . then they cannot ask this court to give its aid to the enforcement of their agreement.”¹⁰⁶ With respect to confiscatory statutes, the United States Supreme Court went even further, ordering their enforcement in U.S. courts under the act of state doctrine even if the

99. 23 U.S. (1 Wheat.) 66, 123 (1825).

100. (1775) 98 Eng. Rep. 1120, 1121 (K.B.).

101. See *supra* notes 1-3 and accompanying text.

102. *Boucher v. Lawson*, (1734) 95 Eng. Rep. 53, 55-56 (K.B.).

103. See *Folliott v. Ogden*, (1789) 126 Eng. Rep. 75 (Ct. Com. Pl. 1789), *aff'd*, *Ogden v. Folliott*, (1790) 100 Eng. Rep. 825 (Ch.); *Wolff v. Oxholm*, (1817) 105 Eng. Rep. 1177 (K.B.).

104. See 23 U.S. (1 Wheat.) at 123.

105. See, e.g., *Regazzoni v. K.C. Sethia (1944) Ltd.*, (1956) 2 Q.B. 490 (U.K.) (denying enforcement of contract to export jute bags from India to South Africa in violation of Indian export restrictions); *Foster v. Driscoll*, (1929) 1 K.B. 470, 510 (denying enforcement of a contract to smuggle whiskey to the United States in violation of prohibition laws).

106. *Regazzoni*, (1956) 2 Q.B. at 515-16.

statutes at issue allegedly violated international law.¹⁰⁷ Instead, the rules were applied to bar foreign governments from enforcing judgments for taxes,¹⁰⁸ and to justify a refusal to enforce U.S. antitrust and securities law.¹⁰⁹

As the application of the revenue rule and the penal-laws prohibition changed during the twentieth century, new rationales were found to justify them. One was the supposed difficulty of applying foreign law. Lord Somervell emphasized this in *Government of India v. Taylor*: “If one considers the initial stages of the process, which may . . . be intricate and prolonged, it would be remarkable comity if State B allowed the time of its courts to be expended in assisting in this regard the tax gatherers of State A.”¹¹⁰ A second rationale, which Judge Learned Hand thought applied both to penal liabilities and to taxes, was to avoid giving offense to other nations.¹¹¹ In deciding whether to enforce the private laws or judgments of a foreign country, a court considers whether doing so would violate its own public policy. “This is not a troublesome or delicate inquiry when the question arises between private persons,” Hand said, but “[t]o pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court. . . . It may commit the domestic state to a position which would seriously embarrass its neighbor.”¹¹² A third rationale has been that enforcing foreign public law “would have the effect of furthering the governmental interests of a foreign country, something which our courts customarily refuse to do.”¹¹³

107. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

108. See, e.g., *British Columbia v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979) (denying enforcement of Canadian tax judgment); *United States v. Harden*, (1963) 41 D.L.R.2d 721, 721-22, 725 (Can.) (denying enforcement of U.S. tax judgment); *India v. Taylor*, [1955] A.C. 491, 503-15 (H.L.) (appeal taken from Eng.) (U.K.) (denying enforcement of Indian tax judgment).

109. See, e.g., *British Airways Bd. v. Laker Airways Ltd.*, (1985) 1 A.C. 58, 79 (H.L. 1984) (appeal taken from Q.B.) (U.K.) (stating the English courts would not enforce the Sherman Act); *Schemmer v. Prop. Res. Ltd.*, (1975) 1 Ch. 273, 288 (1974) (U.K.) (refusing to appoint receiver for assets of defendant in U.S. securities fraud suit on the ground that the Securities Exchange Act was “a penal law”).

110. *Taylor*, [1955] A.C. at 514. Ironically, *Taylor* did not involve the “initial stages” of determining the tax owed but simply the enforcement of a tax judgment. But Lord Somervell was unswayed: “The principle remains. The claim is one for a tax.” *Id.*

111. *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (L. Hand, J., concurring).

112. *Id.* at 604 (L. Hand, J., concurring).

113. *Gilbertson*, 597 F.2d at 1165 (citing *Banco Nacional de Cuba v. Sabatino*, 376 U.S. 398, 448 (1964) (White, J., dissenting)).

Most of these rationales do not withstand scrutiny.¹¹⁴ Foreign public law is inherently no more difficult to apply than foreign private law. As a South African court noted, “[t]here may be difficulty in interpreting foreign revenue laws but such difficulties are met with in relation to other foreign laws with which the Courts have on occasion to grapple.”¹¹⁵ Having to declare a foreign public law contrary to the forum’s public policy might, on occasion, give offense to another nation, but this “would seldom be more offensive than a flat refusal to permit any action at all.”¹¹⁶ Most foreign public laws are unlikely to violate public policy. “After all, every State collects taxes, every State has a criminal law, and nearly every State regulates commerce in one way or another.”¹¹⁷ “We are *not* concerned . . . about tyrannical exactions of Tsarist moguls, and it makes no sense to pretend that we are.”¹¹⁸

The argument that one nation should refuse to enforce another’s public law because doing so would further the other’s governmental interests ignores the substantial benefits that may be had from cooperation.¹¹⁹ If U.S. courts refuse to enforce Canadian tax judgments,¹²⁰ and Canadian courts refuse to enforce U.S. ones,¹²¹ each country’s treasury will be reduced—to the harm of both the country and those of its respective taxpayers who are unable similarly to evade paying their taxes. The same is true of antitrust law. A cartel member or monopolist may not be amenable to personal jurisdiction in the country whose laws it has violated.¹²² If U.S. courts refuse to enforce Canadian antitrust laws, and Canadian courts refuse to enforce U.S. ones, some cartel members and monopolists will escape liability and, as a result, enrich themselves at the expense of consumers. Of course,

114. See Dodge, *supra* note 98, at 208-19.

115. *Comm’r of Taxes v. McFarland* 1965 (1) SA 470 (Witwatersrand Local Div.) at 473 (S. Afr.); see also *Pasquantino v. United States*, 544 U.S. 349, 370 (2005) (rejecting argument that “courts lack the competence to examine the validity of unfamiliar foreign tax schemes”).

116. Robert A. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 217 (1932).

117. Lowenfeld, *supra* note 8, at 323.

118. *Id.* at 421.

119. See Dodge, *supra* note 98, at 224-26.

120. See, e.g., *British Columbia v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979).

121. See, e.g., *United States v. Harden*, (1963) 41 D.L.R.2d 721, 721-22, 725 (Can.).

122. Many countries, including the United States, penalize anticompetitive conduct only when it harms domestic markets. See, e.g., Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2000).

each country will benefit from cooperating only if the other reciprocates. If U.S. judges enforce Canadian antitrust laws, they cannot be sure that Canadian judges will enforce U.S. antitrust laws. Each court is caught in a “prisoner’s dilemma.”¹²³ The way out of this dilemma is for each nation to agree to enforce the other’s regulatory laws, but this is something only the political branches can do. As Russell Weintraub has observed in a related context, “[i]f in fact a significant sacrifice of United States interests results from [judicial] attempts to serve comity, international accommodation may . . . be retarded rather than advanced. Our bargaining chips will have been given away before the political branches could use them.”¹²⁴

If the non-enforcement of foreign public law may be justified because of the need to ensure reciprocity, does this argument not equally extend to foreign private law? Refusing to enforce Mexican tort law in U.S. courts would create an incentive to negotiate a treaty with Mexico that would ensure the reciprocal enforcement of American tort law in Mexican courts.¹²⁵ Fairness to private litigants, however, counsels against this. In the analogous context of judgments, Willis Reese has noted that “the creditor is not to blame for the fact that the state of rendition does not accord conclusive effect to American judgments, and it might well be thought unfair to rob him on this account of the essential advantages of his judgment.”¹²⁶ A defendant to whom Mexican tort law properly applies would similarly not be to blame for the fact that Mexico might not enforce American tort law. The defendant cannot negotiate a bargain for reciprocal enforcement with the United States in the same way that the Mexican government could, and it therefore seems unfair to punish that defendant by deny-

123. See Dodge, *supra* note 98, at 220-26.

124. Weintraub, *supra* note 8, at 1817.

125. Choice-of-law treaties do exist. In the European Union, the 1980 Rome Convention sets choice-of-law rules for contracts. See Convention on the Law Applicable to Contractual Obligations (Consolidated Version), 1998 O.J. (C 27) 34. The EU recently adopted choice-of-law rules for torts by regulation. See Commission Regulation 864/2007, The Law Applicable to Non-contractual Obligations (Rome II), 2007 O.J. (L 199) 40. It is worth noting that these rules apply not just to ordinary torts but also to antitrust violations. See *id.* art. 6, 2007 O.J. (L 199) at 44 (stating rule for unfair competition and acts restricting free competition); see also *id.* recital (22), 2007 O.J. (L 199) at 41 (“The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both national and Community competition law.”).

126. Willis L.M. Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 793 (1950).

ing it the defenses available under Mexican tort law, like contributory negligence.¹²⁷

If fairness justifies a distinction between public and private law, however, it is not a distinction between public and private law but rather between public and private plaintiffs. A private party bringing an antitrust claim has been harmed no less, and has no more ability to negotiate for reciprocal enforcement, than a private party bringing a tort claim. It is only when a foreign government brings suit in its regulatory capacity that a lack of reciprocity should bar enforcement of public law. This is the way the penal-laws prohibition was traditionally understood. Whether a foreign law should be considered “penal” “so that it cannot be enforced in the courts of another state,” the Supreme Court held in *Huntington v. Attrill*, “depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.”¹²⁸ The Privy Council took the same position in a case arising from the same facts. Enforcement of a foreign law attaching penalties would not be barred “except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer.”¹²⁹

Applying these principles to a private antitrust or securities suit for damages should lead a court to apply foreign law to the merits if it determines that foreign law applies. The court in a case like *Empagran* could proceed to apply foreign antitrust law once it determined that the Sherman Act did not govern, and the plaintiffs would not have to refile their claims in the Australian, Ecuadorean, Panamanian, or Ukrainian courts.

CONCLUSION

There is no good reason to maintain the public-private distinction in the conflict of laws. The external-internal distinction is premised on the false notion that it is possible to determine, in cases where a public-law statute is silent, when the legislature intends to restrict its application to serve other ends. It would be better for courts to as-

127. See *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999).

128. *Huntington v. Attrill*, 146 U.S. 657, 673-74 (1892).

129. *Huntington v. Attrill*, [1893] A.C. 150, 157-58 (P.C. 1892) (appeal taken from Ont.) (U.K.).

sume this responsibility themselves, as they have for private law. That is not to say that courts should necessarily apply the approach of the *Restatement (Second)*,¹³⁰ just that the approach should not differ depending on whether the claim is one of public or private law.

The which-whether distinction also lacks a convincing justification. As a general matter, courts should treat foreign public law just as they do foreign private law, applying it to the merits of cases when they find that it properly governs. To do so does not seem particularly burdensome, nor likely to cause offense to other nations. To the extent that the need to ensure reciprocity justifies a refusal to apply foreign public law, it is limited to situations in which a state brings suit to vindicate governmental interests. It should not bar antitrust victims from enforcing their rights under foreign law any more than it should bar tort victims from enforcing theirs.

In sum, it is time for courts faced with issues of public law to go beyond simply drawing inspiration from conflicts-of-law thinking. It is time for them to treat public law—like private law—as a proper subject of the conflict of laws.

130. In the context of antitrust law, I have argued for a forum-law approach quite different from the *Restatement (Second)*'s "most significant relationship" test. See Dodge, *supra* note 11, at 144-68.