

# THE RETROGRESSIVE FLAW OF CHAPTER 15 OF THE BANKRUPTCY CODE: A LESSON FROM MARITIME LAW

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## INTRODUCTION

Chapter 15 of the U.S. Bankruptcy Code became law in October 2005. It governs transnational bankruptcies and is designed to propel bankruptcy law into the new age of global economic activity conducted by multinational companies. According to Chapter 15's supporters, modern day corporations do business throughout the world, and debtors and creditors need a structure that can provide greater certainty and predictability in the event of bankruptcy by a multinational debtor. At this time, the scope and contours of the new law are still untested and unknown. Its first few years will likely generate a struggle between those who have a more traditional view of bankruptcy law and those whose goal is to internationalize it, with the two sides seeking to narrow or expand the meaning and application of Chapter 15. This struggle will be a continuation of the debate between the two competing and polar models of transnational bankruptcy law—territorialism and universalism.

Chapter 15's proponents designed it with a view to promote universalism. Universalism involves one court in one country taking control of a multinational bankruptcy and applying its domestic bankruptcy law to all of the debtor's assets and creditors worldwide. Universalism takes the view that in the event of bankruptcy by a multinational debtor, the entire bankruptcy proceeding should be governed by the court and bankruptcy law of the country that is the "center of its [the debtor's] main interests" (its home country, in

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other words). To illustrate, suppose a company owns and operates factories in the United States and Germany, and has thousands of creditors and employees in both countries. Suppose further that the company was incorporated in Germany, has its headquarters in Munich, owns and operates factories in Bavaria, and has half of its employees and creditors in Germany. If this company filed for bankruptcy protection, it is almost certain that Germany would be deemed to be the center of its main interests. Consequently, application of the pure universalist ideal would result in the German court taking control of the case and applying German bankruptcy law to the disposition of all of the assets and claims. Thus, unpaid creditors in the United States would be required to seek repayment in the German court, and their rights would be determined by German bankruptcy law. This would be the situation even if the American creditors had engaged in transactions exclusively within the boundaries of the United States.

The beauty of this system, according to Chapter 15's supporters, is that all parties know in advance which law will apply in the event of bankruptcy. Creditors will be able to enter into transactions with a debtor and avoid the uncertainty of conflicting or inconsistent bankruptcy laws in various countries. The supporters assert that the new certainty will enhance global economic efficiencies and growth. With such goals in mind, Chapter 15's supporters applaud the movement away from a traditional concept of bankruptcy law based on territorial sovereignty, and urge the primacy of a global or universal approach. The new law is viewed as proof that bankruptcy law is finally catching up to the needs of modern business in an increasingly globalized world, and that bankruptcy law will not be left behind as international law gains prominence over national concerns.<sup>1</sup> The supporters of Chapter 15 and universalism view these developments as a tremendous advance in the area of international bankruptcy law.

This Article takes a different view. Namely, instead of representing an advanced and cutting-edge model of international law, universalism actually represents a tremendous step backward. Universalism embodies a retrogressive approach to international law that has been discredited by two centuries of U.S. Supreme Court

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1. In 1996, the Second Circuit observed: "The management of transnational insolvencies is concededly underdeveloped." *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996). The question remains, however, whether the approach championed by the universalists is the appropriate way to improve the situation.

opinions concerning international commerce. In short, this Article contends that universalism is based on a primitive state of international law that ignores a long history of evolution and refinement of international commercial law.

In order to consider, analyze, and understand this view, it is necessary to focus on the essential structure of universalism. Under universalism, a corporation takes the bankruptcy laws of its home country into every country in which it does business. The bankruptcy laws of its home country displace the bankruptcy laws of all other countries. It carries the metaphorical flag of its home country into every country it enters and the law of that flag governs the disposition of all claims in the event of bankruptcy.

The metaphor of the flag is useful because it implicates comparisons to what is perhaps the original and quintessential international law—maritime law. A fundamental principle of maritime law is that a seagoing vessel is deemed to be part of the territory of its home country, and displays its affiliation to its home country by flying its flag. Broadly speaking, the flag has legal significance because the law of that flag is the law of the vessel.

Throughout the history of the United States, foreign flag carriers have repeatedly argued in U.S. courts that the law of their country is the exclusive determinant of their rights and duties, even when they enter U.S. territory, and that they are, therefore, exempt from U.S. law. This view is basically the same as the view of the universalists—the bankruptcy law of a corporation’s home country should govern the treatment of all claims regardless of whether the corporation is operating in a different country. However, the Supreme Court has consistently rejected the arguments of foreign flag carriers, most recently in *Spector v. Norwegian Cruise Line Ltd.*, and applied a more textured analysis that takes into account the factual setting and related public policy concerns.

The outlook is uncertain, at best, as to whether Chapter 15 will actually deliver its promised benefits. What is certain, however, is that many domestic creditors will be materially harmed by the application of a foreign bankruptcy law to their claims. Thus, issues will arise as to whether such harmful results are unacceptable. In other words, will there be instances where the application of a foreign bankruptcy law violates a deeply-held public policy concern? Such a concern will trigger and require consideration under the public policy exception embedded in Chapter 15, which permits a court to refuse to take any action if such action would be contrary to public policy. This

statutory exception will play a crucial role in determining the shape of the new law. This Article suggests that one useful tool to assist and inform the analysis of these issues is the choice of law test developed in the Supreme Court's maritime cases, known as the *Lauritzen-Romero-Rhoditis* test. The Court employs this test to weigh choice of law issues with public policy concerns (as opposed to the one-dimensional and mechanical "law of the flag" test). The *Lauritzen-Romero-Rhoditis* test benefits from the fact that the courts have had decades of experience in applying this test, and it seems that such experience should serve as a guide to the development of Chapter 15. As bankruptcy judges are called upon to define the scope and contours of Chapter 15, it would seem advisable to look to the lessons of maritime law.

Part I of this Article provides an overview of Chapter 15. Part II then examines the theoretical roots of Chapter 15 through a comparison of territorialism and universalism. Part III takes a sharp turn away from the arguments in support of Chapter 15 by highlighting, in a general way, the problems with Chapter 15 and universalism. Part IV proceeds to draw the parallels between universalism and maritime law, and presents the analytical foundation to support comparisons between the two. Parts V and VI then examine the Supreme Court's line of relevant maritime cases and explain what lessons they hold for transnational bankruptcy law. The result is a proposed test, borrowed from *Lauritzen-Romero-Rhoditis*, to assist the public policy and choice of law analyses. The Conclusion compares the different processes through which Chapter 15 and the maritime cases developed, and argues for reliance on the lessons from maritime law.

## I. A BRIEF SUMMARY OF CHAPTER 15<sup>2</sup>

Chapter 15 was enacted as part of the Bankruptcy Abuse Protection and Consumer Protection Act of 2005<sup>3</sup> and became

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2. This Part highlights a few of the main features of the new law, especially the features that are necessary to understand in relation to the discussion of the maritime law issues. Parts I, II, and III are derived Parts II through V of John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty*, 27 NW. J. INT'L L. & BUS. 89, 92-110 (2006).

3. Bankruptcy Abuse Protection and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 801, 119 Stat. 23, 134-145 (2005) (codified as amended at 11 U.S.C.A. §§ 1501-1532) (West Supp. 2006) [hereinafter Act].

effective on October 17, 2005.<sup>4</sup> Chapter 15 is entitled “Ancillary and Other Cross-Border Cases.”<sup>5</sup> It applies to the bankruptcy of an American multinational corporation or a foreign multinational corporation with assets or operations in the United States.<sup>6</sup> It excludes from its application all natural persons who have debts within the limits that determine eligibility for Chapter 13 of the Bankruptcy Code (small debtors).<sup>7</sup>

Section 1501(a) enumerates five objectives: (1) cooperation between U.S. courts and foreign courts; (2) “greater legal certainty for trade and investment”; (3) “fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor”; (4) “protection and maximization of the value of the debtor’s assets”; and (5) “facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.”<sup>8</sup> Chapter 15 requires the American courts to “cooperate to the maximum extent possible with a foreign court or a foreign representative.”<sup>9</sup>

A Chapter 15 case is commenced by an application to the court by a foreign representative for “recognition” of a foreign proceeding.<sup>10</sup> Chapter 15 mostly focuses on what is referred to as a

4. *See id.* § 1501.

5. The term “ancillary” generally refers to a limited proceeding that is designed to assist a foreign proceeding. Evelyn H. Biery et al., *A Look at Transnational Insolvencies and Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 47 B.C. L. REV. 23, 31. “Once an ancillary proceeding is invoked, the domestic court’s primary responsibility is to aid the foreign court in administering the debtor’s assets.” *Id.* at 31-32. Parallel proceedings, on the other hand, are full proceedings “in each country where the debtor has assets.” *Id.* at 32; *see also* Jay L. Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 10-12 (2002). The use of the word “ancillary” in the title of Chapter 15 indicates that purpose of the legislation is to promote “a general rule that countries other than the home country of the debtor, where a main proceeding would be brought, should usually act through ancillary proceedings in aid of the main proceedings, in preference to a system of full bankruptcies in each state where assets are found.” H.R. REP. NO. 109-31, at 107-08 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 171.

6. Jay L. Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 715 (2005).

7. 11 U.S.C.A. § 1501(c)(2) (West Supp. 2006).

8. *Id.* § 1501(a).

9. *Id.* § 1525(a). “Perhaps the most innovative provision in the chapter is the authorization for the courts, as well as a trustee or DIP [debtor in possession], to communicate directly with the foreign court and trustee [pursuant to sections 1525 and 1526].” Westbrook, *Chapter 15 at Last*, *supra* note 6, at 723.

10. 11 U.S.C.A. §§ 1504, 1515(a). “Foreign proceeding” and “foreign representative” are defined in 11 U.S.C. §§ 101(23), (24) (2000).

“foreign main proceeding.”<sup>11</sup> A “foreign main proceeding” is “a foreign proceeding pending in the country where the debtor has the center of its main interests.”<sup>12</sup> It is contemplated that a debtor’s center of main interests will, in most instances, be its place of incorporation, unless contrary proof is provided.<sup>13</sup> The recognition of a foreign main proceeding is a key event in a Chapter 15 bankruptcy because it may conclusively decide the governing bankruptcy law. If the debtor obtains recognition of a foreign main proceeding, then the bankruptcy law of its home country will likely govern the entire case.<sup>14</sup> The effect would be that the bankruptcy law of the debtor’s flag would apply to all creditors and assets regardless of their location.

An order granting recognition of a foreign main proceeding also triggers a wide range of powerful provisions of the Bankruptcy Code, including the automatic stay under 11 U.S.C. § 362 and the foreign representative’s right to operate the American portion of the business under 11 U.S.C. § 363.<sup>15</sup> A court may dismiss or suspend a domestic bankruptcy case if a foreign proceeding has been granted recognition under Chapter 15 or the purposes of Chapter 15 “would be best served by such dismissal or suspension.”<sup>16</sup> In effect, the order granting recognition converts these powerful provisions into tools to enable the foreign representative to maintain and ensure the primacy of the foreign proceeding.

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11. Westbrook, *Chapter 15 at Last*, *supra* note 6, at 717. Chapter 15 also governs a “foreign nonmain proceeding,” see 11 U.S.C.A. § 1517(a)(1), which is defined as “a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment,” *id.* § 1502(5). As one would expect, the recognition of a foreign main proceeding triggers more provisions than that of a foreign non-main proceeding. *See id.* § 1520.

12. *Id.* § 1502(4). As discussed later in this section, the phrase “center of its main interests” is an example of the almost verbatim adoption of the language of the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law, because it is a phrase that is unfamiliar to American jurisprudence. *See infra* note 27.

13. Westbrook, *Multinational Enterprises in General Default*, *supra* note 5, at 14. Professor Westbrook has likened the “center of its main interests” test to the more familiar “principal place of business” test in the United States, and predicts that the Model Law language will be no more difficult to apply than the familiar American test. Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2316 (2000).

14. 11 U.S.C.A. §§ 1504, 1515(a), 1520; *see also* Jay L. Westbrook, *Universalism and Choice of Law*, 23 PENN. ST. INT’L L. REV. 625, 630 (2005) (describing Chapter 15 as being designed to apply the bankruptcy law of the center of the debtor’s main interests).

15. 11 U.S.C.A. § 1520.

16. 11 U.S.C. § 305(a)(1) (2000).

Chapter 15 applies unless its application would violate public policy.<sup>17</sup> When the foreign representative applies for recognition, he is not required to make a showing that public policy will not be violated.<sup>18</sup> It is up to an interested party or the court to raise the issue. Thus, bankruptcy judges are at the front line of protecting public policy interests, and may be the first line of defense for creditors who are too small or disorganized to raise public policy objections on their own.<sup>19</sup>

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

The Bankruptcy Code previously addressed international bankruptcies in a single section, § 304, which was repealed and replaced by Chapter 15.<sup>20</sup> Section 304 permitted the filing of ancillary cases in U.S. bankruptcy courts by foreign representatives “to protect the dignity of concurrently existing foreign proceedings.”<sup>21</sup> The

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17. 11 U.S.C.A. § 1506 (“Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.”).

18. See 11 U.S.C.A. §§ 1515-1518.

19. In most large bankruptcy cases, there will be a multitude of unsecured creditors whose individual claims are so small that it is not economically feasible to fully participate in the proceedings. The unsecured creditors committee may advance such interests, but the committee is comprised of large unsecured creditors, see 11 U.S.C. § 1102(b)(1), whose interests may or may not perfectly coincide with smaller creditors.

20. 11 U.S.C. § 304, *repealed by* § 802(d)(3), 119 Stat. 146; Westbrook, *Chapter 15 at Last*, *supra* note 6, at 714. In contrast to that single section, Chapter 15 contains five subchapters and 32 sections. 11 U.S.C.A. §§ 1501-1532.

21. Biery et al., *supra* note 5, at 33.

purpose of the section was to prevent the “piecemeal distribution of assets” in the United States by local creditors.<sup>22</sup> While § 304 and Chapter 15 may have similar goals, the language of § 304 was primarily discretionary, as opposed to the mandatory language of many of the provisions of Chapter 15.<sup>23</sup> Section 304 did not require the courts to grant any particular relief; it merely stated the court “may” grant the relief enumerated in the section.<sup>24</sup> This discretionary language resulted in a wide variety of decisions under the old law—some maintaining territoriality, and some embracing universalism.<sup>25</sup> According to Professor Westbrook, § 304’s language and prior case law “apply only where they enable the court to go beyond Chapter 15 in cooperating with the foreign court,” but “[p]rior law does not apply where it limits relief under Chapter 15.”<sup>26</sup>

As with the old § 304, the new Chapter 15 will likely generate debate regarding the extent to which it promotes or achieves the

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22. *Id.*

23. *See, e.g.*, 11 U.S.C.A. §§ 1508, 517(a)-(c), 1525(a).

24. 11 U.S.C. § 304(a), *repealed by* § 802(d)(3), 119 Stat. 146. This is in contrast to the language of Chapter 15 which states that “an order recognizing a foreign proceeding shall be entered” and a “foreign proceeding shall be recognized” if certain conditions are met. 11 U.S.C.A. § 1517(a)-(b).

25. *See generally* Biery et al., *supra* note 5, at 41-48 (and cases discussed therein). There is some debate as to whether § 304 embodied universalism.

Unable to win adoption of a universalist law or convention, the universalists asserted that [§] 304 of the U.S. Bankruptcy Code, which had been adopted in 1978, was such a law. Section 304 authorized the bankruptcy courts of the United States to turn over control of U.S. assets to foreign bankruptcy courts. But the statute added: “(C) In determining whether to grant [such] relief . . . the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by [U.S. bankruptcy law].”

Read literally, [§] 304 clearly limits authority to surrender U.S. assets to situations in which the foreign court will distribute them in substantially the same way a U.S. court would. But the universalists, many of whom were themselves bankruptcy judges, chose not to read [§] 304 as written. Instead, they claimed that [section] 304 authorized turnover of assets to foreign courts that would distribute the assets substantially differently, as long as the foreign country had a bankruptcy law “of the same sort generally as [the United States].” Universalist judges, including Judge Burton R. Lifland, began surrendering U.S. assets for distribution by foreign bankruptcy courts, and universalist commentators, including Professor Jay L. Westbrook, cheered them on. The effect was to sporadically implement universalism in the United States, at the expense of the particular U.S. creditors whose assets were surrendered.

Lynn M. Lopucki, *Global and Out of Control*, 79 AM. BANKR. L.J. 79, 84-85 (2005) (internal citations omitted). Professor Westbrook has characterized Section 304 as “modified universalism.” *See* Jay L. Westbrook, *The Lessons of Maxwell Communication*, 64 FORDHAM L. REV. 2531, 2533 (1996). The Second Circuit viewed § 304 as “a step toward the universality approach.” *In re Treco*, 240 F.3d 148, 154 (2d Cir. 2001).

26. Westbrook, *Chapter 15 at Last*, *supra* note 6, at 720.



goals of universalism.<sup>27</sup> The battleground for this debate will likely be § 1506, the public policy exception. Because many of the operative provisions of Chapter 15 are mandatory, the primary means to avoid their application will be to raise and prevail on the threshold issue of whether the requested rulings violate public policy.<sup>28</sup> The proponents of universalism will argue that the public policy exception is designed to be an extremely narrow exception to be applied in rare cases. They need to advance this position because a broad application of § 1506 would frustrate the basic purpose of universalism. Those with an opposing view will argue for a wide and liberal application of the exception, to the point where it literally becomes the exception that swallows the rule.<sup>29</sup> The potential importance of § 1506 makes the comparisons to maritime law more compelling because the maritime decisions have been driven by considerations of deep public policy concerns.<sup>30</sup>

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27. Its proponents will argue that the origins of the law make clear that universalism is the goal. Chapter 15 explicitly incorporates the Model Law on Cross-Border Insolvency (the “Model Law”), which was promulgated by the United Nations Commission on International Trade Law (UNCITRAL) based in Vienna. See 11 U.S.C.A. § 1501(a); H.R. REP. NO. 109-31(I) (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 105; Westbrook, *Chapter 15 at Last*, *supra* note 6, at 719. The formal development of the Model Law began in the 1990s when the issue of cooperation in international bankruptcies became the subject of a “working group” formed by UNCITRAL. See Westbrook, *Chapter 15 at Last*, *supra* note 6, at 719. The efforts of this group led to the promulgation of the Model Law at UNCITRAL’s Thirtieth Session on May 30, 1997. Biery et al., *supra* note 5, at 49; Westbrook, *Multinational Enterprises in General Default*, *supra* note 5, at 3. In December of that year, the U.N. General Assembly approved the Model Law through a resolution. Biery et al., *supra* note 5, at 49. The goal of the Model Law’s supporters was clear: “The Model Law makes universalism the foundation of the United States’ international bankruptcy policy.” Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 143 (2005). The lead American participant stated: “The number one reason for adopting it was to demonstrate the United States commitment to the Model Law and to cooperation and universalism generally, in the hope that our example would encourage other countries to follow.” Westbrook, *Chapter 15 at Last*, *supra* note 6, at 726.

28. For this reason, § 1506 serves a vital systemic function. The need for discretionary flexibility is present in any legal system, and students of legal theory would recognize the applicability of Professor Hart’s observations to Chapter 15: “In every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents.” H.L.A. HART, *THE CONCEPT OF LAW* 136 (2d ed. 1994).

29. It should be noted, however, that the legislative history of § 1506 discourages a broad interpretation of the statute. It cautions that the public policy exception has been narrowly interpreted on a consistent basis in courts around the world, and that the word “manifestly” in international usage restricts the exception to the most fundamental policies of the United States. H.R. REP. NO. 109-31(I), *reprinted in* 2005 U.S.C.C.A.N. 88, 109.

30. See *infra* Parts V.A-C.

## II. THE THEORETICAL ROOTS OF CHAPTER 15

### A. Territorialism and Universalism

In order to understand both the context out of which Chapter 15 arose and its potential consequences, it is necessary to understand the two competing and opposite models of international bankruptcy jurisdiction that define the debate: territorialism and universalism. The debate over the two models gained increasing momentum during the 1990s as international economic activity gained pace.

Territorialism is simply the traditional practice of nations exercising exclusive jurisdiction over assets and parties within their borders<sup>31</sup>: “It is the default rule in every substantive area of law, including . . . bankruptcy.”<sup>32</sup> It rests upon traditional notions of national sovereignty, which means that the law of the sovereign is imposed on all people and property within its territorial reach.<sup>33</sup> In a transnational bankruptcy conducted under the principles of territorialism, each country decides under its own laws how the debtor’s assets within its territory will be treated in the face of creditor claims, without deferring to any foreign proceeding involving the same debtor.<sup>34</sup>

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31. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2218 (2000); Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT’L L. REV. 555, 561 (2001).

32. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, *supra* note 31, at 2218. Territoriality is so embedded in the common understanding of law that its daily manifestations probably escape attention. For example, no citizen of the United States who stays within its borders has concerns whether a law passed by the British Parliament will affect his or her rights. To be concerned would be silly because the laws of Great Britain have no application in the United States. That is because, as a general matter, the power of British laws is confined to the territory of the United Kingdom and British subjects. A shift in sovereign power is most apparent to those whose daily lives involve the crossing of international borders. For example, the many “frontaliers” who live in “France *voisine*” and work in the Swiss cantons of Geneva and Vaud understand that the laws governing their activities change as they cross the border. However, universalism would subject people to the laws of another country even if they never venture outside their own borders.

33. Westbrook, *Multinational Enterprises in General Default*, *supra* note 5, at 5. To its detractors, territorialism is referred to perjoratively as the “grab rule” because each nation’s courts grab the assets within their jurisdiction for distribution under its own laws. Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2179 (2000); See John A.E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT’L L. 935, 944-45 (2005).

34. See LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, *supra* note 31, at 2218; Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT’L L. 31, 10 (2001).

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

Universalism, on the other hand, is based on the concept of “one law, one court.”<sup>35</sup> It envisions a single bankruptcy proceeding in the debtor's “home country,” where a single court applies the bankruptcy law of its country and makes “a unified worldwide distribution to creditors through liquidation or reorganization.”<sup>36</sup> That court would have global jurisdiction over all of the debtor's assets and creditors, wherever located, and displace all the courts and laws of other countries.<sup>37</sup> Universalism requires a country to defer to a foreign legal proceeding, even with respect to property within its own territory and legal relationships formed and wholly conducted within its own borders.<sup>38</sup>

By administering the case in one jurisdiction, universalism avoids duplicative proceedings (and therefore duplicative administrative costs). Its underlying theory posits that the overall value of the bankrupt estate will be maximized because one forum will be able to

35. Tung, *Is International Bankruptcy Possible?*, *supra* note 34, at 40. One scholar describes universalism in this way:

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

Pottow, *Procedural Incrementalism*, *supra* note 33, at 948 (internal citations omitted).

36. Westbrook, *Universalism and Choice of Law*, *supra* note 14, at 625-26; Guzman, *supra* note 33, at 2179.

37. Tung, *Fear of Commitment in International Bankruptcy*, *supra* note 31, at 569.

38. *Id.*

realize the sum of the parts or the going concern value, as opposed to a piecemeal liquidation or treatment.<sup>39</sup> Plus, lenders' costs will theoretically be reduced because lenders will know in advance which law will both govern repayment and apply to their collateral.<sup>40</sup> Thus, they are relieved of the burden of risk assessment in the face of conflicting legal systems. Universalism's benefits can be summed up to include: (1) a more efficient allocation of capital; (2) a reduction in confusion over competing domestic priority rules; (3) a reduction in the lender's cost of monitoring foreign assets; (4) a reduction in administrative costs due to a reduction in the number of proceedings; (5) an avoidance of forum shopping and the race to file; (6) facilitated reorganizations; (7) an increased reorganization or liquidation value; and (8) increased overall clarity and certainty to all parties.<sup>41</sup> The theory concludes that such reductions in costs and increases in efficiency will lead to a reduction in the cost of lending and a corresponding reduction in the cost of capital for borrowers.<sup>42</sup>

The ultimate benefits are described in the language of economics and administration. What is missing, however, is the language that describes the effects in human terms. The only identifiable people who will allegedly benefit seem to be bankers and senior officers of multinational borrowers. The problem is that Chapter 15 applies to everyone in the United States, and it is (at best) uncertain how others (such as small unsecured creditors, involuntary creditors, and employees) would fare under the universalist approach.

Universalism is also supported by the need for "market symmetry" (according to its proponents), which is "the requirement

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39. Westbrook, *A Global Solution to Multinational Default*, *supra* note 13, at 2285. For example, suppose a bankrupt company owns an American factory that produces widgets with unique specifications for sale in the United States. It also owns a facility in Mexico that makes slight modifications to the American widgets to comply with Mexican requirements. Suppose further that the Mexican facility can only modify widgets with the particular specifications of its sister American company. The universalists would correctly point out that the two facilities should be sold or reorganized together because the Mexican facility's value lies in its ability to modify the American widgets. If sold separately, its value might be limited to the value of its real estate and scrap value (with no value assigned to its modification process). Under universalism, the two facilities would be administered together by a single court. Under a strict territorial approach, the two might be administered completely separately by the two different courts. The territorialists will point out, however, that territorialism allows for cooperation between the courts to realize the highest value for the assets.

40. Westbrook, *The Lessons of Maxwell Communication*, *supra* note 25, at 2541.

41. Guzman, *supra* note 33, at 2179; Pottow, *Procedural Incrementalism*, *supra* note 33, at 947.

42. Guzman, *supra* note 33, at 2181.

that some systems in a legal regime must be symmetrical with the market, covering all or nearly all transactions and stakeholders in that market with respect to the legal rights and duties embraced by those systems.”<sup>43</sup> In order for bankruptcy law to be effective, it must cover the entire market, and this need for market coverage explains why bankruptcy law in the United States is federal (in other words, each state does not have its own bankruptcy law) and specifically provided for in the Constitution.<sup>44</sup> Thus, the universalists extrapolate from this national example to conclude that in a globalized marketplace, bankruptcy law needs to be global.<sup>45</sup>

According to one of universalism’s supporters, “the majority view, at least among academic circles, is that universalism is normatively superior as an efficient and fair model to resolve cross-border defaults, notwithstanding the ongoing preference for territorialism among many country’s [*sic*] policymakers.”<sup>46</sup> With such lofty notions to support their position, the supporters of universalism belittle its detractors by arguing that the detractors are concerned with what the supporters characterize as small and inconsequential interests.<sup>47</sup> One view seems to assert that universalists just know better than others: “Despite the near-unanimous support of the academic community, policymakers have chosen not to adopt universalism. Although a number of other arguments have been advanced for territorialism, its support leans heavily on a sense among judges, legislators, and some academics that territorialism can help small, local creditors.”<sup>48</sup>

Territorialism and universalism are at opposite ends of the spectrum.<sup>49</sup> In the course of debate, the pure ideals of the two competing models have been softened at the edges to widen their appeal and to acknowledge actual practice (to some degree).<sup>50</sup> The modified versions are known as cooperative territorialism and

43. Westbrook, *A Global Solution*, *supra* note 13, at 2283.

44. *See id.* at 2286.

45. The theoretical support for the assertion that a bankruptcy law should have global reach is questionable. *See* Chung, *supra* note 2, at 112-14.

46. Pottow, *Procedural Incrementalism*, *supra* note 33, at 951.

47. *See* Guzman, *supra* note 33, at 2193.

48. *Id.*, at 2184. Small and inconsequential are in the eyes of the beholder, however.

49. There is also another model known as contractualism. It contemplates that a debtor would contractually choose which country’s law to apply with each creditor. Biery et al., *supra* note 5, at 30-31.

50. Westbrook, *Chapter 15 at Last*, *supra* note 6, at 716; Pottow, *Procedural Incrementalism*, *supra* note 33, at 952-57.

modified universalism, which are closer together on the continuum.<sup>51</sup> Cooperative territorialism permits a departure from strict territorial sovereignty by encouraging cooperation on an as-needed basis, and contemplates the use of international conventions to govern matters such as the return of improperly removed assets on the eve of bankruptcy.<sup>52</sup> The typical scenario would involve each country in which the debtor holds assets conducting parallel bankruptcy proceedings and cooperating “through the interaction of agents appointed by each state to represent the bankruptcy estate located there.”<sup>53</sup> Modified universalism departs from the pure universalist ideal by accepting the right of a country to refuse (under certain circumstances) deference to another country’s court.<sup>54</sup> Chapter 15 in its present form probably represents modified universalism.

## B. Chapter 15 and the Promotion of Universalism

Pure universalism is the ultimate goal of many of those who created the Model Law and promoted Chapter 15. However, there were limits to how much they could accomplish. Given such limits, even its supporters would probably concede that Chapter 15 does not impose a pure universalist framework (at least not at this time). It does not commit the United States to a global, substantive bankruptcy law because there appears to be sufficient safety valves to protect domestic interests.<sup>55</sup> In some ways, it looks rather benign, with its emphasis on cooperation and communication.<sup>56</sup> Nevertheless,

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51. Westbrook, *Chapter 15 at Last*, *supra* note 6, at 716; Pottow, *Procedural Incrementalism*, *supra* note 33, at 952-57.

52. Pottow, *Procedural Incrementalism*, *supra* note 33, at 954-55.

53. Tung, *Fear of Commitment in International Bankruptcy*, *supra* note 31, at 562.

54. Pottow, *Procedural Incrementalism*, *supra* note 33, at 952. Professor Pottow observes: “Taken to its extreme, then, the discretionary safety valve of modified universalism has the potential simply to ‘modify’ universalism back into territorialism, because a state may refuse to defer to the controlling state when its laws are different, i.e., when there is a true conflict of laws.” *Id.* at 954.

55. *See, e.g.*, 11 U.S.C.A. §§ 1506, 1521(b), 1522(a) (West Supp. 2006) (requiring the courts to satisfy themselves that interests of creditors are protected before certain actions are taken).

56. *See, e.g.*, 11 U.S.C.A. §§ 1501(a), 1525, 1526, 1527. To the extent that Chapter 15 concerns itself with cooperation and communication, there is little reason to object to it. There is agreement that cooperation is desirable. *See generally* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999). With respect to Chapter 15 in particular, there is merit to formalizing the ability of courts to communicate with each other across borders, and to conferring official recognition on the person who has authority over an insolvent estate. By having a formal structure in place, courts are assured that they are acting within their authority by communicating with a foreign court

Chapter 15 represents a significant step toward the ultimate goal of universalism. This interpretation finds support in the scholarship of universalism's proponents. The proponents openly acknowledge that it was too much of a challenge to move the United States and other nations to full universalism.<sup>57</sup> The delegates who agreed upon the Model Law knew they had to operate within practical constraints.<sup>58</sup> For example, the reason why a model law was generated (rather than a treaty, for example) was because it would have been too difficult to win acceptance of anything more substantial than a model law.<sup>59</sup> This also explains why the Model Law does not attempt to substantively unify the different bankruptcy laws around the world; there never would have been agreement.<sup>60</sup>

Appreciating the historical resistance to universalism, its proponents set more modest goals for the Model Law. Thus, the purpose of the Model Law is to advance universalism incrementally.<sup>61</sup> It advances universalism by gradually introducing the acceptance of outcome differences in transnational insolvencies. As discussed by Professor Pottow, outcome difference means the possibility that a local creditor may end up worse off under the application of a foreign bankruptcy law than under her domestic law.<sup>62</sup> In other words, the goal is to get creditors accustomed to the idea that the bankruptcy law of another country may apply to them, and that they may end up worse off under the foreign law. Professor Pottow thus describes the Model Law as a device to acclimate creditors to the effects of universalism:<sup>63</sup> “In summary, while not overtly trumpeting its universalist proclivities—and wisely so, given the consensus-dooming touchiness of the ongoing debate—the Model Law actually contains several provisions, albeit at the margin, which begin to ‘nudge’ states

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and that they are dealing with authorized representatives. Plus, an established statutory framework relieves the courts of the need to re-invent the wheel for each new case.

57. Pottow, *Procedural Incrementalism*, *supra* note 33, at 957-63.

58. *Id.*

59. See Jay L. Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 570 (1996); Pottow, *Procedural Incrementalism*, *supra* note 33, at 958-9, 986.

60. Biery et al., *supra* note 5, at 50.

61. Pottow, *Procedural Incrementalism*, *supra* note 33, at 970; Westbrook, *Creating International Insolvency Law*, *supra* note 59, at 571.

62. John A.E. Pottow, *Greed and Pride in International Bankruptcy: The Problems and Proposed Solutions to “Local Interests,”* 104 MICH. L. REV. 1899, 1906 (2006).

63. Pottow, *Procedural Incrementalism*, *supra* note 33, at 988-90. The need for acclimation, however, seems to be powerful proof that there is something to be wary of in the first place.

along the way to ceding some sovereignty.”<sup>64</sup> Thus, states come to accept some erosion of regulatory sovereignty.<sup>65</sup> Universalism remains, however, the “ultimate ideal.”<sup>66</sup> On this same theme of acclimation, Professor Pottow continued:

[T]here may be some states that let their guards down because of the non-threatening nature of the universalist provisions in the [Model] Law—states that may well be surprised to find themselves moved slightly more along the universalist continuum and, upon realizing that they are where they are, unlikely to move back.<sup>67</sup>

One goal, then, is to ease the unsettling effects of transition. Such a goal makes sense in that universalism seeks to alter centuries of custom and expectations.

If there was any question as to whether adoption of the Model Law was designed to commit the United States to a universalist position, it was clarified by the promulgation of the Principles of Cooperation in Transnational Insolvency Cases (the “Principles”) among the Members of the North American Free Trade Association (NAFTA), adopted by the American Law Institute in 2002 (the “ALI Principles”).<sup>68</sup> Although the ALI Principles were developed for NAFTA, they were also drafted with Chapter 15 in mind, and the drafters were of the view that they should be applied generally to all transnational bankruptcies (not just those involving NAFTA countries).<sup>69</sup> Professor Westbrook, a principal drafter of the principles, described General Principle V of the Principles as urging “that the courts of the NAFTA countries determine distributions from a universalist perspective to the maximum extent permitted by their respective laws.”<sup>70</sup>

Despite the clear aim of the Model Law, it apparently was presented to Congress as a benign model of cooperation that was not

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64. *Id.* at 983.

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

66. Jay L. Westbrook, *Fearful Future Far Off*, 33 BANKR. CT. DECISIONS, Mar. 30, 1999, at 5 (“The Model Law did not make the terrible changes that [LoPucki] suggests. He would be closer to right if the Model Law really did embody ‘universalism,’ which I regard as our ultimate ideal.”).

67. Pottow, *Procedural Incrementalism*, *supra* note 33, at 991.

68. LoPucki, *Global and Out of Control*, *supra* note 25, at 87.

69. Westbrook, *Chapter 15 at Last*, *supra* note 6, at 714.

70. Westbrook, *Multinational Enterprises in General Default*, *supra* note 5, at 35.



universalist.<sup>71</sup> Only its supporters were permitted to testify before Congress.<sup>72</sup> The entire process was an exercise in universalism “through the back door.”<sup>73</sup> Thus, there are two messages concerning Chapter 15, and the content of each message depended on the audience. For Congress, the message was: Chapter 15 is about cooperation; there is no universalism in the legislation. For internationalists, on the other hand, the message was: Chapter 15 is a significant step toward eventual and inevitable universalism.<sup>74</sup>

### C. The Fundamental Social Policies and Choices Embodied by Bankruptcy Law

A reasonable question at this point is whether any harm (or unacceptable harm) results from replacing one country’s bankruptcy law with another country’s bankruptcy law through the operation of Chapter 15 or the Model Law. To be sure, some creditors (and mostly small ones at that) may become subject to a different payment or priority structure, but such a result is negligible compared to the global administrative or economic gains (according to the universalists). If the harm is confined to small creditors, and limited to whether a creditor receives a distribution of \$5,000 or \$7,500 (to pick two arbitrary amounts), perhaps the tinkering with the bankruptcy laws of various countries really does not matter when compared to the benefits. Contrary to what may be popular belief, however, bankruptcy law is not just about whether a creditor receives fifty or seventy-five cents on the dollar owed.

Bankruptcy law embodies and reflects each society’s particular choices concerning its attitudes toward money, debt, the relationship between those with property and those without, employers and labor,

71. LoPucki, *Universalism Unravels*, *supra* note 27, at 166, n.102 (2005) (citing Westbrook, *Fearful Future Far Off*, *supra* note 66, at 5).

72. *Id.*

73. *Id.*

74. It is also possible that universalism’s supporters will argue that Chapter 15 achieves the goal of “one court, one law.” Now that Chapter 15 is law, they may argue that it fully embodies universalism and will likely urge the courts to apply Chapter 15 as broadly as possible (to the point, for example, where the public policy exception is rarely applied). This development would be like a repeat of the universalists’ arguments after the enactment of § 304. *See supra* note 24 (describing the arguments to have § 304 interpreted as universalism). This likely scenario underscores the point that the enactment of Chapter 15 does not end the debate, but rather gives it more urgency because substantive outcomes will depend on how much of the universalist ideal will be read into it.

and so on.<sup>75</sup> In other words, bankruptcy law reflects and embodies deep social issues that define the structure and aspirations of a society. It does matter if one set of bankruptcy laws is replaced by another. Each nation's bankruptcy laws embody and reflect that particular nation's social and political choices.<sup>76</sup> Bankruptcy laws are the product of each country's unique legal, historical, political, and cultural context.<sup>77</sup> "Given the vast cultural differences around the world, and the history of each country's economy and attitudes about money and debt, there is no one-kind-fits-all bankruptcy system for either enterprises or individuals."<sup>78</sup>

In other words, bankruptcy laws reflect fundamentally different views about each society's aspirations. Thus, there are significant consequences to substituting one nation's bankruptcy law for another. Whatever it may be, it is certainly not a like-for-like substitution. As Professor Tung stated, "Bankruptcy law's wholesale purview means that recognition of a foreign proceeding effects the wholesale import of another state's regime for deciding sensitive policy issues. Political judgments about local asset disposition and allocation of local losses from the foreign firm's demise are left in the hands of a foreign court."<sup>79</sup>

Even a strong supporter of Chapter 15 like Professor Pottow recognized this problem, and his observation is equally valid: "When one state cedes jurisdiction to another state to facilitate a market-wide resolution of the default, it must fully subjugate its broad-

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75. Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 B.C. INT'L & COMP. L. REV. 1, 5 (2005).

76. Tung, *Is International Bankruptcy Possible?*, *supra* note 34, at 48. Bankruptcy laws reflect a nation's substantive policy decision and are distributive, "deciding which creditors warrant special treatment in distribution" and which transfers of assets to specific creditors should be set aside to further the greater good of all creditors. Pottow, *Procedural Incrementalism*, *supra* note 33, at 941-42.

77. Martin, *supra* note 75, at 4 (presenting a wide-ranging survey and discussion of historical and cultural influences in the development of bankruptcy laws in the United States and various countries in Europe and Asia).

78. *Id.* at 5. On the subject of debt forgiveness, for example, which reflects fundamental views of commercial and social obligations, "people are less forgiving about debt forgiveness than they are in the U.S. In some parts of the world, not paying debts is the ultimate disgrace. In other parts of the world, there simply is no personal bankruptcy system, and little in the way of business reorganization either." *Id.* at 35.

79. Tung, *Is International Bankruptcy Possible?*, *supra* note 34, at 52.

reaching, deep-cutting, and policy-rich bankruptcy laws to those of the controlling state.”<sup>80</sup>

Moreover, there has been widespread recognition of the fact that thorny questions lurk in the thickets of universalism and Chapter 15. However, in their enthusiasm, the supporters have brushed aside attempts to answer such questions. Professor LoPucki identified several of the questions, which remain unanswered:

Under universalism, the court of the home country would have jurisdiction over the bankruptcy case. But what would be included in that jurisdiction? Could the court void an otherwise valid collective bargaining agreement? Relieve the debtor of the burdensome effects of environmental laws? Suspend the payment of pensions to retired workers? Risk the pension fund in a reorganization attempt?<sup>81</sup>

The problem, of course, is that when such questions are finally addressed, there will undoubtedly be a multitude of creditors who will be rudely shocked by the answers and by the fact that such unresolved questions were lurking in the first place.

Given the nature of bankruptcy law, the choice of law issue encroaches upon and interferes with the basic framework of social and legal values of a country. Thus, the concerns are not “just” about bankruptcy law; the concerns are about a country’s social and legal fabric. In light of these considerations, supporters of universalism need to address questions of the following sort: Why should a country’s deep social and legal values be subordinated to universalism’s claimed benefits of administrative ease or economic efficiency (assuming that such benefits exist in the first place)? How does one go about weighing such social and legal values against administrative ease or economic efficiency? Who does the weighing?<sup>82</sup>

Questions such as these and the nature of bankruptcy law reinforce the importance of Chapter 15’s public policy exception.<sup>83</sup> Issues involving labor rights, environmental protection, and retirement security are just a few of the issues that will call for a judge

80. Pottow, *Procedural Incrementalism*, *supra* note 33, at 951.

81. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, *supra* note 31, at 2237.

82. It seems fair to pose such questions to the universalists. After all, they are the ones who seek a dramatic reform of the traditional system of territorialism. As a general matter, those who seek to change the *status quo* should bear the burden of demonstrating that the proposed change will be better than the current state.

83. See 11 U.S.C.A. § 1506 (West Supp. 2006).

to decide whether American public policy would be violated. The presence of such issues is precisely the reason why the exception exists in the first place.

### III. THE PROBLEMS WITH CHAPTER 15 AND UNIVERSALISM

The flaws in the theories supporting Chapter 15 and universalism have been comprehensively discussed in the scholarship of Professors Lynn LoPucki and Fred Tung.<sup>84</sup> The problems include: (1) the adverse, prejudicial treatment of unsecured creditors, including unpaid employees and tort creditors; (2) the incentives for improper forum shopping and manipulation of venue; and (3) the general absence of support for the assertion that economic benefits will be realized.<sup>85</sup> The numerous issues are beyond the purpose of this Article, but one problematic scenario deserves further discussion because it serves to highlight one intended result of Chapter 15 and universalism, a result that the experience of maritime law has deliberately sought to avoid.

The following hypothetical is based on Professor LoPucki's discussion of the results of a hypothetical bankruptcy involving the automaker, Daimler-Chrysler.<sup>86</sup> The hypothetical has been modified to reflect a more current and possible development involving another automaker and recent news events from Europe—the possible bankruptcy of General Motors (GM) and labor unrest in France.<sup>87</sup> General Motors is headquartered in Detroit.<sup>88</sup> In Europe, it has eleven production and assembly facilities located in eight countries and employs around sixty thousand people.<sup>89</sup> In France, it employs around 1,798 people, including employees at a factory in Strasbourg.<sup>90</sup> Suppose all the countries in the world succumbed to the universalists' vision and adopted the Model Law. In the event of a bankruptcy

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84. See *supra* notes 24, 26, 30-31, 34, 56.

85. See also Chung, *supra* note 2, at 110-28.

86. LoPucki, *Global and Out of Control*, *supra* note 25, at 93-94.

87. See generally Tom Petrino & John O'Dell, *If GM Fails, Then What?*, L.A. TIMES, Apr. 23, 2006, at C1; *French Debate Resumes, As Do Protests*, INT'L HERALD TRIBUNE (Paris), Apr. 26, 2006, available at <http://www.iht.com/articles/2006/04/25/news/france.php>.

88. See General Motors, Company Profile, [http://www.gm.com/company/corp\\_info/profiles/](http://www.gm.com/company/corp_info/profiles/) (last visited Jan. 26, 2007).

89. See General Motors Europe, GM in Your Country, [http://www.gmeurope.com/country/gm\\_in\\_your\\_country.html](http://www.gmeurope.com/country/gm_in_your_country.html) (last visited Jan. 26, 2007).

90. General Motors Europe, GM in France, [http://www.gmeurope.com/country/gm\\_france.html](http://www.gmeurope.com/country/gm_france.html) (last visited Jan. 26, 2007).

filing by GM, a universalist would require administration of the case in the United States, the home of GM. The likely result would be the administration of the affairs of the French factory, including its relationship with its employees and suppliers, in the United States with the court applying American bankruptcy law to transactions principally and, often times, exclusively among French parties.<sup>91</sup> This result would represent a complete disregard of the expectations and practices of the French parties. Moreover, the parties would find themselves in a distant court, represented by distant counsel, and operating in a foreign language.

In this hypothetical bankruptcy, it is a near certainty that one of the goals of a bankrupt GM would be to restructure its relationships with and obligations to its employees.<sup>92</sup> Given the legal, social, and political climate in France when it comes to any issue that threatens job security, there is no doubt that the French street and the French government would oppose any efforts by GM to engage in Anglo-Saxon-style downsizing or restructuring.<sup>93</sup> The situation would undoubtedly create tension between the American and French governments, and Americans would rightly question whether America's interests were at stake in an issue involving French jobs.

Yet, this is precisely the situation envisaged and welcomed by the universalists. They would see value in purely French issues being decided in an American court, even where America's interest is minimal. They would argue that any political tension within France or between governments is a negligible price to pay in comparison to the benefits of legal predictability, economic efficiency, and the

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

92. This scenario is currently being played out in the bankruptcy case of Delphi Corporation, an automotive parts supplier that was once owned by General Motors. Delphi is seeking to reject the collective bargaining agreement with its employees. See Dina ElBoghdady, *Delphi to Present Case to Toss UAW Contract*, WASH. POST, May 9, 2006, at D1.

93. French sensitivity to attempts to weaken or relax labor rights was vividly demonstrated by the recent protests against a law designed to remove restrictions on terminating the employment of workers under the age of twenty-six. The purpose of the law was to create more flexibility in the youth labor market on the theory that employers would be more inclined to hire young workers because the employers would not be committed to a more permanent employment relationship. The law was opposed by more than one million street demonstrators, with some of the demonstrators engaging in violence. The French government responded to the protests by withdrawing the law. See *France to Scrap Youth Jobs Law*, CNN.COM, Apr. 10, 2006, <http://www.cnn.com/2006/WORLD/europe/04/10/france.labor.law/index.html>.

demonstrated commitment to internationalize legal systems. One court, one law—a model of simplicity and elegance, they would argue.

Fortunately for those with a more realistic and clear-eyed view of international commerce and relations, there is an alternative model of law that actually exists and has been time-tested—maritime law. The types of international issues that the UNCITRAL Working Group tried to address through abstract debate have been the subjects of centuries of maritime trade. Cases and controversies generated by the friction of actual practice and commerce have led to well-developed law governing and guiding parties who transact outside their borders. Instead of re-inventing the wheel at United Nations-sponsored discussions, actual solutions forged through centuries of experience may already exist in maritime law.

#### IV. PARALLELS BETWEEN CHAPTER 15 AND MARITIME LAW

A bedrock principle of universalism is the notion that a foreign corporation brings with it all of its domestic bankruptcy laws in the event of bankruptcy.<sup>94</sup> Thus, if a German company doing business in the United States seeks bankruptcy protection, universalists would argue that the bankruptcy laws of Germany should govern the treatment of all of its American creditors and assets. It is as if the German company flies the German flag wherever it goes, with German law therefore applying to all who do business with it. This concept behind universalism looks much like a primitive form of the law of the flag era in maritime law. It is unknown whether the UNCITRAL working group had in mind such maritime law principles as they developed the Model Law, or whether the working group members were aware of any possible parallels. Nonetheless, the concepts are remarkably similar, or at least similar enough to inquire whether maritime law can perhaps add to or guide the development and application of Chapter 15.<sup>95</sup>

Maritime law refers to “the entire body of law, rules, legal concepts and processes that relate to the use of marine resources,

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94. See *supra* Part I.

95. A connection between international bankruptcy theory and maritime law was tangentially alluded to in Westbrook, *A Global Solution*, *supra* note 13, at 2316, by a reference to flags of convenience in a discussion concerning forum shopping by debtors, and this connection was also touched upon in Chung, *supra* note 2, at 123 n.148.

ocean commerce, and navigation.”<sup>96</sup> Maritime law arose out of the practical needs of the first merchants who set sail from their shores to engage in commerce.<sup>97</sup> Given its origins and purpose, maritime law is inherently international in nature.<sup>98</sup> At their roots, maritime law and

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96. 1 THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* 2 (4th ed. 2004). Although commonly used as synonyms, admiralty law is distinct from maritime law in that admiralty law is about the law of ships and shipping. *Id.* at 1. This article refers to maritime law because of its wider scope.

97. *See id.* at 2. A nineteenth-century American scholar described maritime law’s relationship to commerce in the following manner:

Commerce naturally and necessarily followed upon navigation. To regulate the multiform transactions of the former, and to encourage the latter, soon required the attention of the early commercial States. Maritime laws were adopted, appropriate to the limited wants of an infant trade, but containing nevertheless the elements of the expanded system, that now comprehends the commerce of the world, and prescribes the rule of decision, in all contested cases arising out of it.

HENRY FLANDERS, *A TREATISE ON MARITIME LAW* 3 (1852). Professors Gilmore and Black wrote, “Maritime law was secreted in the interstices of business practice. It arose and exists to deal with problems that call for legal solution, arising out of the conduct of the sea transport industry.” GRANT GILMORE & CHARLES L. BLACK, *THE LAW OF ADMIRALTY* 11 (2d ed. 1975).

98. *See* SCHOENBAUM, *supra* note 96, at 2 (“Although its rules are a part of the internal legal order of each country and, consequently, important national differences persist, the essential concepts and institutions of maritime law are remarkably similar all over the world.”). Indeed, maritime law is one of the earliest forms of international law and may be the quintessential international law. Early forms of maritime law are found in the Code of Hammurabi from around 1800 B.C. *Id.* at 3 (provisions relating to marine collisions and ship leasing). The Phoenicians, and later the island of Rhodes, dominated maritime activity and law, and Rhodes is reputed to have developed the Rhodian Sea Code around 900 B.C. (although there is considerable dispute as to whether Rhodes did in fact develop such a code). *Id.* at 4; 1 BENEDICT ON *ADMIRALTY* 1-5 to -13 (7th ed. 2006). The imperial Romans adopted and further developed the maritime law of the ancient Greeks, and this law became part of the *Jus Gentium*, the law governing all within the Roman empire. SCHOENBAUM, *supra* note 96, at 4-7. Following the fall of the empire, the Italian city-states (starting around the year A.D. 1000) dominated maritime activity in the Mediterranean and further developed the Roman maritime law. *Id.* at 7; GILMORE & BLACK, *supra* note 97, at 4. In the latter part of the thirteenth century, trade between Aquitaine, England, and Flanders resulted in the Rolls of Oleron, the most important and influential of the medieval sea codes, which was derived from Roman and Italian sources. SCHOENBAUM, *supra* note 96, at 9. The Rolls became the basis of the common maritime law of the North Sea and Atlantic Ocean, and also served as the chief early authority for the English Admiralty. *Id.* at 9-10. The Maritime Court in Barcelona produced the *Libro del Consulat del Mar*, which was first printed in 1494, and the court provided the model for the Admiralty of England. *Id.* at 11; BENEDICT, *supra* at 1-27. After independence, America’s own maritime laws were influenced (but not restricted) by England’s experience, and America “received” the traditional body of maritime law (subject, of course, to its particular needs and circumstances). SCHOENBAUM, *supra* note 96, at 16-18; BENEDICT, *supra*, at 7-5 to -9; GUSTAVUS H. ROBINSON, *HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES* 7-13 (1939). This quick and truncated summary of the lineage of maritime law may interest those who enjoy history, but its main purpose is to demonstrate that maritime law has developed over a period of time measured in millennia and reflects the practices and legal conclusions of widely

the concepts underlying Chapter 15 are concerned with a common subject—the promotion and regulation of international commerce.

Under American law, maritime law is “a body of uniform federal law drawing its authority from the Constitution and laws of the United States.”<sup>99</sup> Article III of the Constitution provides that the judicial power of the United States shall extend “to all cases of admiralty and maritime jurisdiction.”<sup>100</sup> 28 U.S.C. § 1333 provides that the district courts shall have original jurisdiction of any civil case of admiralty or maritime jurisdiction.<sup>101</sup> The federal nature of maritime law is an accepted part of admiralty jurisprudence.<sup>102</sup>

Some of the foundational issues in the development of maritime law were the questions of: (1) Which law applies to a seagoing vessel?; (2) Which law governs the rights of crew members (including matters of working conditions, health and safety)?; (3) Which law regulates the construction and structure of a vessel to ensure seaworthiness?; and (4) Which law applies to the commission of a tort or crime aboard a vessel?<sup>103</sup> Civilized nations agreed that vessels could not be laws unto themselves.<sup>104</sup> A law had to govern, but which

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disparate regions, cultures, and eras. Unlike Chapter 15, maritime law did not spring forth fully-formed from a working group, like Athena from the brow of Zeus. One historian observed:

If we trace [maritime] law to its source, we shall find that it is not the growth of a single generation, nor the product of a single mind, but the accumulated wisdom of progressive ages, and different nations. It is founded on the practices of merchants, the principles of Civil Law, approved compilations of maritime rights and usages, such as the Laws of Oleron and Wisbury, the writings of eminent juriconsults, and the adjudications of the Admiralty Courts of different countries.

FLANDERS, *supra* note 97, at 1. For this reason, it would seem helpful for any contemporary development involving international commercial law to seek at least some guidance from maritime principles.

99. *Romero v. Int'l Term. Co.*, 358 U.S. 354, 377 n.49 (1959) (citing *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875)).

100. U.S. CONST. art. III, § 2, cl. 1.

101. 28 U.S.C. § 1333 (2000).

102. *Romero*, 358 U.S. at 378. However, maritime law is not “a mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.” *The Western Maid*, 257 U.S. 419, 432 (1922).

103. See FLANDERS, *supra* note 97, at 38, n.1.

104. See SCHOENBAUM, *supra* note 96, at 49-50. Ships must have a nationality: “Ships without nationality may be boarded by any state, even on the high seas, and any state may assert jurisdiction over a stateless vessel.” *Id.* Moreover, the “flag state is obligated to prescribe and enforce laws to protect the passengers and crew aboard a ship flying its flag and to ensure that good order is maintained.” *Id.* Thus, the requirement that a ship sail under a particular flag is the legal framework that ensures that a ship will be governed by law, and not be a law unto itself.



one? The response to this question gave rise to the principle of the “law of the flag.”<sup>105</sup> In its simplest form, the law of the flag has been described as the notion that seagoing vessels are like floating bits of territory of the sovereign whose flag it flies, with the law of that sovereign governing the vessel and those on board.<sup>106</sup> The Supreme Court described the principle in the following way:

Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship’s papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.

This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it “is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty.”<sup>107</sup>

Although the concept may be oversimplified and general, the notion that a ship is governed by the law of its flag retains vitality and usefulness, and still serves as a starting point for modern cases involving conflicts between the laws of one nation and the laws of a ship’s flag nation.

One of the Supreme Court’s earliest rulings involving the law of the flag was issued in *The Schooner Exchange v. McFaddon*.<sup>108</sup> That case arose out of the disputed ownership of a vessel that was anchored in Philadelphia.<sup>109</sup> Two “libellants” filed their action against the vessel, which they referred to as the *Schooner Exchange*, and alleged that they were its sole owners.<sup>110</sup> According to their complaint, the vessel was on a voyage to Spain when it was forcibly taken by persons acting under the orders of Napoleon, and converted

105. See *Patterson v. Eudora*, 190 U.S. 169, 176 (1903) (“A ship which bears a nation’s flag is to be treated as a part of the territory of that nation. A ship is a kind of floating island.” (quoting *Queen v. Anderson*, 1 L.R.C.C. 161)).

106. See *id.*

107. *Lauritzen v. Larsen*, 345 U.S. 571, 584-85 (1953) (footnotes omitted).

108. 11 U.S. 116 (1812).

109. *Id.* at 117.

110. *Id.*

into a French vessel.<sup>111</sup> The vessel was later sailed into the port of Philadelphia by the new captain.<sup>112</sup> The French government denied that the vessel had ever belonged to the libellants.<sup>113</sup> Thus, the underlying facts of the history of ownership were disputed.

Nonetheless, it appears there were several undisputed facts that were important to the decision. A vessel called the *Balaou* sailed into Philadelphia flying the French flag.<sup>114</sup> It was a public, armed vessel of France (a warship, in other words) at the time it was in Philadelphia.<sup>115</sup> The *Balaou*'s presence in U.S. waters was lawful, and the United States did not object to its presence.<sup>116</sup>

Chief Justice Marshall framed the issue as whether “an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.”<sup>117</sup> The Court affirmed the trial court’s dismissal of the libel action, and held that the courts had no jurisdiction to decide a title dispute involving the warship of a foreign sovereign.<sup>118</sup> With the benefit of hindsight, *The Schooner Exchange* looks like an easy case. If any vessel is to be considered a floating piece of its country’s territory, it would certainly be a warship in service of its sovereign. Imagine America’s response if any other country claimed that its laws governed the aircraft carrier, the USS *John F. Kennedy*. Just mentioning the hypothetical exposes its absurdity.

*The Schooner Exchange* and the above-quoted language from *Lauritzen*<sup>119</sup> could, one imagines, support a colorable argument that the law of the flag is or should be the exclusive determinant of the law applicable to a vessel. However, a fair reading of the Supreme Court’s maritime cases suggests that *The Schooner Exchange* may have represented the high water mark for the sanctity of the law of the flag. Since 1812, the Court has repeatedly rejected attempts to argue that the flag of a foreign vessel exempts it from the application of U.S. law.<sup>120</sup>

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111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 118.

115. *Id.*

116. *Id.*

117. *Id.* at 135.

118. *Id.* at 147.

119. *Lauritzen v. Larsen*, 345 U.S. 571, 584-85 (1953).

120. *See infra* Part V.

Yet, the proponents of universalism and Chapter 15 seem to urge the primacy of the law of the flag for transnational bankruptcies, and it does appear that the law of the flag provides some support for the concept that one law (the law of the home country) should apply to the bankruptcy of a company. However, the Supreme Court's history demonstrates that the concept of the law of the flag is nowhere near as broad or generous as a reading limited to a few sources might suggest. Indeed, if one accepts the legitimacy of the parallels between international bankruptcy theory and maritime law, the maritime cases actually raise serious questions and expose serious flaws in the underlying foundations of universalism.

## V. LESSONS FROM MARITIME LAW

The metaphor of seagoing vessels as little pieces of their sovereign's territory, carrying the law of their sovereign on their voyages, is routinely acknowledged in court opinions, but the opinions also immediately distance themselves from that metaphor by describing it as a discredited or "mischievous fiction."<sup>121</sup> Indeed, the history of the law of the flag in America can be described as beginning with the simple notion that the law of the flag governs a vessel, with almost each subsequent case exposing the unworkable simplicity of that concept and then limiting its meaning and application. The following discussion will begin with a review of *Spector v. Norwegian Cruise Line Ltd.*,<sup>122</sup> the most recent, relevant Supreme Court case, and then it will jump back in time to the early

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121. The commonly accepted understanding of the "law of the flag" principle was described as follows:

In support of their contention the defendants refer to the statement sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor. The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty. It is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign.

*Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1923) (citations omitted). The Court's decisions have made clear, however, that there are limits to the principle's usefulness:

Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag-state, but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.

*Lauritzen*, 345 U.S. at 585 (footnote omitted).

122. 545 U.S. 119 (2005).

maritime cases and move forward chronologically to show the development of the Court's jurisprudence over the decades.

A. *Spector v. Norwegian Cruise Line Ltd.*

In *Spector v. Norwegian Cruise Line Ltd.*,<sup>123</sup> the Supreme Court addressed the issue whether Title III of the Americans with Disabilities Act (ADA)<sup>124</sup> applied to foreign-flag cruise ships in U.S. waters. The petitioners were disabled individuals and their companions who purchased tickets in 1998 or 1999 for round-trip cruises on two ships that departed from Houston.<sup>125</sup> The ships were operated by Norwegian Cruise Line Ltd., a Bermuda corporation with its principal place of business in the United States.<sup>126</sup> The ships at issue flew the flag of the Bahamas.<sup>127</sup>

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123. *Id.* at 125.

124. 42 U.S.C. §§ 12101-12213 (2000). In a nutshell, Title III of the ADA prohibits discrimination against the disabled in the full and equal enjoyment of public accommodations, § 12182(a), and public transportation services, §12184(a). The general prohibitions are supplemented by various, more specific requirements. Entities that provide public accommodations or public transportation: (1) may not impose "eligibility criteria that . . . tend to screen out" disabled individuals, §§ 12182(b)(2)(A)(i), 12184(b)(1); (2) must "make reasonable modifications in policies, practices, or procedures, when such modifications are necessary" to provide disabled individuals full and equal enjoyment, §§ 12182(b)(2)(A)(ii), 12184(b)(2)(A); (3) must provide "auxiliary aids and services" to disabled individuals, §§ 12182(b)(2)(A)(iii), 12184(b)(2)(B); and (4) must remove architectural and structural barriers, or if barrier removal is "not readily achievable," must ensure equal access for the disabled "through alternative methods," §§ 12182(b)(2)(A)(iv)-(v), 12184(b)(2)(C). These specific requirements, in turn, are subject to important exceptions and limitations. Eligibility criteria that screen out disabled individuals are permitted when "necessary for the provision" of the services or facilities being offered. §§ 12182(b)(2)(A)(i), 12184(b)(1). Policies, practices, and procedures need not be modified, and auxiliary aids need not be provided, if doing so would "fundamentally alter" the services or accommodations being offered. §§ 12182(b)(2)(A)(ii)-(iii). Auxiliary aids are also unnecessary when they would "result in an undue burden." § 12182(b)(2)(A)(iii). The barrier removal and alternative access requirements do not apply when these requirements are not "readily achievable." §§ 12182(b)(2)(A)(iv)-(v). Additionally, Title III does not impose nondiscrimination or accommodation requirements if, as a result, disabled individuals would pose "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." § 12182(b)(3).

125. *Spector*, 545 U.S. at 126.

126. *Id.*

127. *Id.* It is a common and widespread practice of owners of vessels to operate their vessels under the flags of countries to which the operators or vessels have little, if any, substantive connection. As early as 1953, the Supreme Court noted that "it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries." *Lauritzen*, 345 U.S. at 587. This practice enables shipowners to register their vessels in countries with favorable or lax regulations under so-called flags of convenience, in order to escape the burdens of their

The petitioners were plaintiffs in a class action filed in the U.S. District Court for the Southern District of Texas.<sup>128</sup> Their complaint allege[d that] the respondent charged disabled passengers higher fares and required disabled passengers to pay special surcharges; maintained evacuation programs and equipment in locations not accessible to disabled individuals; required disabled individuals, but not other passengers, to waive any potential medical liability and to travel with a companion; and reserved the right to remove from the ship any disabled individual whose presence endangered the “comfort” of other passengers.<sup>129</sup>

They also “allege[d] more generally that the respondent ‘failed to make reasonable modifications in policies, practices, and procedures’ necessary to ensure the petitioners’ full enjoyment of the services respondent offered.”<sup>130</sup> They further alleged that “most of the cabins on the respondent’s cruise ships, including the most attractive cabins in the most desirable locations, [were] not accessible to disabled passengers,” and “allege[d] that the ships’ coamings—the raised

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home countries. See generally Tony Alderton & Nik Winchester, *Regulation, Representation and the Flag Market*, J. FOR MAR. RES., Sept. 2002, available at <http://www.jmr.nmm.ac.uk/server/show/ConJmrArticle.53>. In the fifty-plus years since *Lauritzen*, the practice has grown more widespread, and is certainly not limited to American shipowners. The development of this practice was described by Professor Jonathan Gutoff in his *amicus* brief in support of the petitioners in *Spector*. Brief for Jonathan Gutoff as Amicus Curiae Supporting Petitioners, *Spector v. Norwegian Cruise Lines*, 545 U.S. 119 (2005) (No. 03-1388) [hereinafter Gutoff Brief]. Gutoff states:

Following the Second World War, United States vessel owners became aware of the great cost savings of Panamanian registry as it freed them from United States shipping regulations. Similarly, with encouragement from the State Department the Liberian registry was created by American oil companies for their tankers both as a means of avoiding United States regulations and a tool for foreign aid. . . .

In the 1980s a large number of other nations started opening up their registries to the owners of vessels from around the world. Since then the number of open registries and vessels flying those registries flags has continued to grow. The nations providing open registries gain income from the registration fees and any taxes they may impose. The vessel owners gain freedom from regulation and, very often, taxes from the countries in which they are located or where they base their operations. Vessel owners shop around for registries that will provide them with the best possible conditions in terms of fees, regulation and access to various markets, and registries compete with each other for the business of vessel owners. Indeed there is a commercial website on which subscribers can, with the click of a mouse, comparison shop among various ship registries to find the registry best suited, in terms of cost and regulatory environment, for a vessel owner.

*Id.* at 4-5 (citations omitted). Indeed, the practice is so widespread that by 1998, 51.3 percent of the world’s total gross tonnage was registered under flags of convenience. See Alderton & Winchester, *supra*, at 2.

128. *Spector*, 545 U.S. at 126.

129. *Id.* at 133-34 (opinion of Kennedy, J.) (citations omitted).

130. *Id.* at 134.

edges around their doors [made] many areas of the ships inaccessible to mobility-impaired passengers who use wheelchairs or scooters.”<sup>131</sup>

In response to a motion to dismiss the claims, the district court ruled that Title III generally applied to the cruise ships and allowed the claims to proceed, except for the claim based on the physical barriers, which was dismissed.<sup>132</sup> The Fifth Circuit affirmed in part and reversed in part. It held that “general statutes do not apply to foreign-flag vessels in United States territory absent a clear statement of congressional intent.”<sup>133</sup> Because “Title III does not contain a specific provision mandating its application to foreign-flag vessels, the Court of Appeals sustained the [d]istrict [c]ourt’s dismissal of the petitioners’ barrier-removal claims . . . and reversed [the rulings] on the remaining Title III claims.” In other words, the cruise line won at this appellate level.<sup>134</sup>

The Supreme Court reversed the Fifth Circuit.<sup>135</sup> The Court’s decision was noteworthy, in one respect, because of the splintered nature of its ruling. Justice Kennedy announced the judgment of the Court, but his opinion is the opinion of the Court only with respect to Parts I, II.A.1 and II.B.2, which were joined by four other Justices.<sup>136</sup> The other parts of his opinion were not supported by a majority.<sup>137</sup> The line-up of the votes might seem to suggest wide disagreement, and perhaps confusion, over the applicability of the ADA to foreign flag carriers. Remarkably, however, the Court was quite clear on the fundamental, first principle. Six Justices explicitly and flatly rejected the argument that foreign flag carriers are beyond the reach of the ADA.<sup>138</sup>

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131. *Id.*

132. *Id.* at 127 (majority opinion).

133. *Id.*

134. *Id.* at 127-28.

135. *See id.* at 125.

136. *Id.*

137. *Id.*

138. *Id.* Justice Scalia dissented from the holding, which was joined by two other Justices. *Id.* at 149 (Scalia, J., dissenting). Justice Thomas joined in part of the dissent. *Id.* However, he did not join in Justice Scalia’s broad view that the ADA does not apply. In his own, separate opinion, Justice Thomas wrote: “Title III applies to foreign ships only to the extent to which it does not bear on their internal affairs. I therefore would remand for consideration of those Title III claims that do not pertain to the structure of the ship.” *Id.* at 149 (Thomas, J., dissenting). Justice Thomas thus shared the views of Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer that the ADA does apply (at least to some extent) to foreign flag carriers. *See id.*

Justice Kennedy's opinion noted the strong policies underlying the ADA, and explored the conflict between its policies and the asserted protection of the law of the foreign flag carrier:

Cruise ships flying foreign flags of convenience offer public accommodations and transportation services to over 7 million United States residents annually, departing from and returning to ports located in the United States. Large numbers of disabled individuals, many of whom have mobility impairments that make other kinds of vacation travel difficult, take advantage of these cruises or would like to do so. To hold there is no Title III protection for disabled persons who seek to use the amenities of foreign cruise ships would be a harsh and unexpected interpretation of a statute designed to provide broad protection for the disabled. §12101. The clear statement rule adopted by the Court of Appeals for the Fifth Circuit, moreover, would imply that other general federal statutes—including, for example, Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. §2000a *et seq.*—would not apply aboard foreign cruise ships in United States waters. A clear statement rule with this sweeping application is unlikely to reflect congressional intent.<sup>139</sup>

There may be a variety of interpretations supported by the Court's various opinions. However, one point is clear: There are limits to the "law of the flag." Any force that the doctrine may have must give way to more compelling policy considerations. Given the important policies and aims of the ADA, it is not surprising that the Court rejected the notion that a foreign flag is a shield against the ADA's requirements. It is also clear that a majority of the Court was not prepared to permit entire sectors and swathes of the U.S. population to be removed from the protection of U.S. laws by a choice of flag.

Imagine if the Court had accepted the Fifth Circuit's view of the law. A disabled U.S. citizen watches a commercial for a fun-filled cruise on her local Houston television channel. She sees an ad for the same cruise in her local newspaper. Inspired by the promises of the cruise ship operator, she purchases a ticket at her local travel agent. She boards the ship in Houston, and the ship returns her to Houston. The vast majority of the other passengers are also Americans. Instead of the vacation of a lifetime, however, the cruise turns out to be an ordeal in which her experience is qualitatively inferior and deficient due to the restrictions placed on disabled passengers. It turns out that many of the promises contained in the advertising do not apply to disabled passengers. She complains to the cruise ship

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139. *Id.* at 132 (opinion of Kennedy, J.).

operator, but the operator points out that he or she has no legal obligation to address or remedy the passenger's complaints because the ship is registered under the flag of Mongolia, which has no law comparable to the ADA. The unhappy passenger files suit in federal court, where the district judge dismisses the case and apologetically explains that Mongolian law controlled all of her rights and remedies when she boarded that ship.<sup>140</sup>

Given the alternative scenario to the holding in *Spector*, it is difficult to imagine that the case could have turned out any other way.<sup>141</sup> Moreover, the holding in *Spector* is consistent with the

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140. Land-locked Mongolia does, in fact, have a ship registry, with a growing number of registrations. Gutoff Brief, *supra* note 127, at 5. This hypothetical assumes, but does not represent, that Mongolia lacks an equivalent of the ADA.

141. Notwithstanding the seeming inevitability of the ruling, the cruise line had weighty and substantive arguments in its favor. It pointed out that ships sail from country to country, and that it would be impractical, indeed impossible, for a ship to comply with conflicting standards and regulatory schemes. To illustrate, one country might require fixed handrails to be one hundred centimeters above the floor of the deck, while another might require a height of 120 centimeters. One country might require coamings to be on a certain deck or section of the ship, while another might not. Different regulatory schemes might mandate different requirements for the height of a coaming above the floor of the deck. A ship obviously cannot be structurally or architecturally altered from port to port. This reality probably explains why the *Spector* opinions were as splintered as they were. The Justices took different views as to just how much the ADA requires in terms of affecting the operation of a vessel. See, e.g., *Spector*, 545 U.S. at 158 (Scalia, J., dissenting). There was disagreement over what modifications were "readily achievable," and they noted that some modifications might pose "a significant risk to the health or safety of others," a significant concern when regulating seagoing vessels. See *id.* at 158. There was also concern that the ADA's requirements would require a ship owner to violate the International Convention for the Safety of Life at Sea (SOLAS), Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2, which is a treaty concerning the safety standards governing the design and maintenance of oceangoing ships. For example, the ADA Accessibility Guidelines (ADAAG) Review Advisory Committee—the government body charged with formulating the Title III barrier-removal guidelines—promulgated rules requiring at least one accessible means of egress to be an elevator, whereas SOLAS, which requires at least two means of escape, does not allow elevators to be one of them. In theory, a vessel could comply with both sets of requirements by having an elevator as well as two other means of egress. However, this problem of overlapping requirements was the burden that the cruise line sought to avoid, in addition to the greater potential problem that different regulatory requirements would be conflicting as well as overlapping. These issues exposed what was probably the fundamental source of disagreement among the Justices. As framed by Justice Scalia in his dissent, "The plurality correctly recognizes that Congress must clearly express its intent to apply its laws to foreign-flag ships when those laws interfere with the ship's internal order." *Spector*, 545 U.S. at 149 (Scalia, J., dissenting). In other words, the divisive issue was the extent to which the ADA intruded upon a vessel's "internal order." Justice Kennedy expressly acknowledged and addressed the issue by stating:

Our cases hold that a clear statement of congressional intent is necessary before a general statutory requirement can interfere with matters that concern a foreign-flag vessel's internal affairs and operations, as contrasted with statutory requirements that concern the security and well-being of United States citizens or territory. While the



Supreme Court's long line of maritime cases decided over the past two centuries. If the Court had reached the opposite holding, it would have represented a drastic departure from the Court's maritime jurisprudence.

## B. Nineteenth-Century Cases

*Brown v. Duchesne*<sup>142</sup> was an early case, which at first glance seemed to be about the primacy of the law of the flag. However, like *The Schooner Exchange*, the case speaks more to the limits of that concept. The petitioner, Brown, was the owner of the U.S. patent for a certain type of improvement in the construction of the gaff for sailing vessels.<sup>143</sup> Brown brought a patent infringement action against the defendant because the improvement was used in the construction of the defendant's vessel (which was harbored in Boston) without Brown's permission.<sup>144</sup> The defendant was a citizen of France, who was the master of a French schooner.<sup>145</sup> The vessel had been built in France and was owned by French citizens.<sup>146</sup> The improvement at issue was placed on the vessel in France, and the defendant argued that the improvement had been in common use in French merchant vessels "long before the plaintiff obtained his patent."<sup>147</sup> The Court framed the issue in the following manner:

[W]hether any improvement in the construction or equipment of a foreign vessel, for which a patent has been obtained in the United States, can be used by such vessel within the jurisdiction of the United States, while she is temporarily there for the purposes of commerce, without the consent of the patentee?<sup>148</sup>

The Court ruled in favor of the defendant, stating:

[T]he rights of property and exclusive use granted to a patentee does not extend to a foreign vessel lawfully entering one of our

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clear statement rule could limit Title III's application to foreign-flag cruise ships in some instances, when it requires removal of physical barriers, it would appear the rule is inapplicable to many other duties Title III might impose.

*Id.* at 125 (majority opinion). Despite the difficulties raised by these issues, the important point remains that a majority of the Court rejected the argument that the law of the flag is the starting and ending point of the analysis. *See id.* at 132 (opinion of Kennedy, J.).

142. 60 U.S. 183 (1856).

143. *Id.* at 193. A "gaff" is a "spar used in ships to extend the heads of fore-and-aft sails which are not set on stays." VI THE OXFORD ENGLISH DICTIONARY 307 (2d ed. 1989).

144. *Brown*, 60 U.S. at 193.

145. *Id.*

146. *Id.*

147. *Id.* at 193-94.

148. *Id.* at 194.

ports; and . . . that the use of such improvement, in the construction, fitting out, or equipment of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of an American patentee, provided it was placed upon her in a foreign port, and authorized by the laws of the country to which she belongs.<sup>149</sup>

In reaching this holding, the Court noted that the grant of a patent is domestic in character and confined within the limits of the United States.<sup>150</sup> It also observed that the “only advantage which the defendant derived from the use of this improvement was on the high seas, and in other places out of the jurisdiction of the United States.”<sup>151</sup> Further, the Court noted:

But, so far as the mere use is concerned, the vessel could hardly be said to use it while she was at anchor in the port, or lay at the wharf. It was certainly of no value to her while she was in the harbor; and the only use made of it, which can be supposed to interfere with the rights of the plaintiff, was in navigating the vessel into and out of the harbor, when she arrived or was about to depart, and while she was within the jurisdiction of the United States.<sup>152</sup>

By one interpretation, this case can be read to uphold the law of the flag. However, the case is actually more about the territorial limits of patent law. More importantly, the Court’s decision was based on the fact there was little harm in refusing to apply U.S. patent protection to the French vessel because there was no material commercial impact on or involvement with the United States.<sup>153</sup> It seems fair to conclude that the patent holder would have prevailed if he had been able to show a material commercial impact in the United States. Thus, *Brown* actually argues against the universalists’ assertion that foreign law should govern the bankruptcy of a foreign multinational business. Such a bankruptcy would certainly have a material commercial effect on the local market.

The limits of the law of the flag doctrine were more explicitly addressed in a later case, *Mali v. Keeper of the Common Jail of Hudson County*, commonly known as *Wildenhus’s Case*.<sup>154</sup> In October 1886, a Belgian steamship was moored at the dock in Jersey City,

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149. *Id.* at 198-99.

150. *Id.* at 195.

151. *Id.* at 196.

152. *Id.*

153. *Id.*

154. 120 U.S. 1 (1887).

New Jersey.<sup>155</sup> Joseph Wildenhus, a Belgian citizen and member of the crew, stabbed and killed another crew member who was also a Belgian citizen.<sup>156</sup> The murder occurred below the deck of the steamship, out of the sight and awareness of anyone on land.<sup>157</sup> There were several eyewitnesses of the crime, all of whom were also crewmembers.<sup>158</sup> The Jersey City police arrested Wildenhus, charged him with a crime under New Jersey law, and held him in the Hudson County jail.<sup>159</sup> The Belgian consul applied for a writ of *habeas corpus*, seeking the release of Wildenhus so that he could be subjected to Belgian law.<sup>160</sup>

In deciding the case, the Court considered the meaning of a treaty between the United States and Belgium under which each nation “granted to the other such local jurisdiction within its own dominion as may be necessary to maintain order on board a merchant vessel, but has reserved to itself the right to interfere if the disorder on board is of a nature to disturb the public tranquillity.”<sup>161</sup> Thus, the issue before the Court turned on whether the homicide was a disturbance of the public peace or “public repose” of the people of New Jersey.<sup>162</sup> The Court observed that certain kinds of conduct on board a vessel would not rise to the level of a disturbance of the public peace because the local residents would not be affected by it.<sup>163</sup> It then went on to describe the kind of conduct that would impact the local community:

Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction. . . . The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of

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155. *Id.* at 2.

156. *Id.*

157. *Id.*

158. *Id.* at 3.

159. *Id.*

160. *Id.* at 2.

161. *Id.* at 17.

162. *Id.*

163. *Id.*

disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction; and that, if the proper authorities are proceeding with the case in a regular way, the consul has no right to interfere to prevent it. That, according to the petition for the *habeas corpus*, is this case.<sup>164</sup>

Thus, the Court affirmed the Circuit Court's refusal to deliver Wildenhuis to the Belgian consul. This was the decision despite the fact that the crime was between Belgians on a Belgian flag carrier.<sup>165</sup> The Court rejected the notion that all acts on board the ship were under the exclusive jurisdiction of Belgium and that the ship constituted Belgian territory for purposes of criminal jurisdiction.<sup>166</sup>

This case, like *Brown*, reinforces the principle that the effect on the local setting must be taken into account when considering any deference to the law of the foreign flag.<sup>167</sup> Indeed, these cases suggest that impact on the local setting is the dispositive factor in the analysis. In other words, the law of the flag retains vitality up to a point. However, the law of a foreign flag must yield to local law when the impact on local concerns reaches a certain point.

### C. Twentieth-Century Cases

In the first years of the twentieth century, the Court considered the case of *Patterson v. Eudora*,<sup>168</sup> which involved the application of a statute that prohibited the payment of wages in advance to sailors.<sup>169</sup> By its terms, the statute expressly applied to foreign vessels, in addition to American vessels.<sup>170</sup> The petitioners were sailors on board

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164. *Id.* at 17-18.

165. *See id.* at 19.

166. *See id.*

167. *See Brown v. Duchesne*, 60 U.S. 183 (1856).

168. 190 U.S. 169 (1903).

169. The statute was called, "An act to amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce." *Id.* The statute was designed to prevent certain unscrupulous practices used to staff ship crews:

The story of the wrongs done to sailors in the larger ports, not merely of this nation, but of the world, is an oft-told tale, and many have been the efforts to protect them against such wrongs. One of the most common means of doing these wrongs is the advancement of wages. Bad men lure them into haunts of vice, advance a little money to continue their dissipation, and, having thus acquired a partial control and by liquor dulled their faculties, place them on board the vessel just ready to sail and most ready to return the advances. When once on shipboard and the ship at sea the sailor is powerless and no relief is availing. It was in order to stop this evil, to protect the sailor, and not to restrict him of his liberty, that this statute was passed.

*Id.* at 175.

170. *Id.* at 171.

the *Eudora*, who filed a libel for wages in district court.<sup>171</sup> The sailors boarded the *Eudora* in January 1900 in Portland, Maine for a voyage to Brazil with a return to the United States or Canada.<sup>172</sup> Wages were arranged as follows: “At the time of shipment twenty dollars was paid on account of each of them and with their consent to the shipping agent through whom they were employed.”<sup>173</sup> After completion of their voyage, the sailors demanded wages for the full term of their service notwithstanding the advance payments to the shipping agent.<sup>174</sup> The defendant understandably objected to payment, and argued that the American statute at issue did not apply to the *Eudora*, a foreign vessel.<sup>175</sup> The defendant argued that the contract with the sailors was a contract to be performed on a British vessel, which was British territory, and that British law should apply to the sailors’ claims.<sup>176</sup> In other words, the defendant argued that the law of the flag should apply. The Court ruled against the defendant and in favor of the sailors, stating, “no one within the jurisdiction of the United States can escape liability for a violation of those provisions on the plea that he is a foreign citizen or an officer of a foreign merchant vessel.”<sup>177</sup>

The nation’s attempt at prohibition generated another important case regarding the law of the flag. *Cunard S.S. Co. v. Mellon* involved several steamship companies seeking an injunction against application of the National Prohibition Act, which went into effect in December 1919.<sup>178</sup> In October 1922, the Attorney General issued an opinion “to the effect that the National Prohibition Act, construed in connection with the Eighteenth Amendment to the Constitution, made it unlawful (a) for any ship, whether domestic or foreign, to bring into territorial waters of the United States, or to carry while within such waters, intoxicating liquors intended for beverage purposes, whether as sea stores or cargo, and (b) for any domestic ship even when without those waters to carry such liquors for such purposes either as cargo or sea stores.”<sup>179</sup> After being advised that the

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171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *See id.*

176. *Id.* at 173-74.

177. *Id.* at 178.

178. 262 U.S. 100, 119 (1923).

179. *Id.* at 120.

government would seize their liquor, the plaintiffs sought their injunctions.<sup>180</sup> Several of the steamship companies were foreign companies and operated their vessels under foreign flags.<sup>181</sup>

The foreign flag carriers predictably raised the argument that the prohibition laws did not apply to them because of the law of the flag, and the government argued against that position.<sup>182</sup> The Court said, “Of course, if it were true that a ship is a part of the territory of the country whose flag she carries, the [government’s] contention would fail. But, as that is a fiction, we think the [government’s] contention is right.”<sup>183</sup> Thus, *Cunard* represented another decision by the Supreme Court limiting the scope of the law of the flag, and upholding the application of domestic law to foreign flag carriers (especially domestic law advancing strong policy interests).<sup>184</sup> Viewed in this way, *Cunard* foreshadowed the Court’s ruling in *Spector*, and both can be read as rejections of attempts to circumvent or undermine domestic policy by seeking application of a contrary foreign law.

The Jones Act later generated an additional set of law of the flag cases. *Uravic v. F. Jarka Co.* arose out of the death of an employee stevedoring in New York harbor.<sup>185</sup> Anton Uravic, an American citizen, was employed to stevedore by the F. Jarka Co., a Delaware

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180. *Id.* at 120-21.

181. *Id.* at 119.

182. *Id.* at 123-24.

183. *Id.* at 124.

184. Although it was famously abandoned, Prohibition embodied strong public policy concerns and goals when it was enacted:

The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. True this discouraged production here, but that was forbidden already, and the provision applied to liquors already lawfully made. It is obvious that those whose wishes and opinions were embodied in the amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay. When, therefore, the amendment forbids, not only importation into and exportation from the United States, but transportation within it, the natural meaning of the words expresses an altogether probable intent. The Prohibition Act only fortifies in this respect the interpretation of the amendment itself. The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without.

*Id.* at 130-31 (quoting *Grogan v. Hiram Walker & Sons*, 259 U.S. 80, 89 (1922)) (citation omitted). Whether or not Prohibition was ill-advised is immaterial to this analysis. The crucial point is that the Court refused to allow strong public policy goals to be undermined by the application of a law of a foreign flag.

185. 282 U.S. 234, 237-38 (1931). “Stevedore” means “[t]o load or unload cargo of (a ship).” XVI THE OXFORD ENGLISH DICTIONARY 661 (2d ed. 1989).

corporation.<sup>186</sup> In July 1926, Mr. Uravic was on a vessel flying the German flag, helping to unload it.<sup>187</sup> He suffered an injury while on board, and died as a result.<sup>188</sup> The issue before the Court was whether the Jones Act applied to his death.<sup>189</sup> The issue was important because application of the Jones Act barred certain defenses of the employer regarding its liability for the death.<sup>190</sup>

The defendant urged the Court to view Mr. Uravic in the same manner as a hypothetical German seaman who might have suffered fatal injuries on board the German ship.<sup>191</sup> Under such circumstances, the Jones Act would not apply, and the defendant argued the same result should govern the suit arising out of Mr. Uravic's death.<sup>192</sup> In short, the defendant argued that the Jones Act should not apply to an American employed to stevedore who suffered fatal injuries while on board a German ship, and that the law of the flag (German law) should apply instead.<sup>193</sup>

The Court rejected the argument that an American employed to stevedore should lose the protection of American law because of the happenstance that he was injured while on board a German vessel.<sup>194</sup> In the decision, Justice Holmes flatly dismissed the possibility that German law might control,<sup>195</sup> and stated, "There is strong reason for giving the same protection to the person of those who work in our harbors when they are working upon a German ship that they would

186. *Uravic*, 282 U.S. at 237-38.

187. *Id.* at 238.

188. *Id.*

189. *Id.* at 237. The Jones Act governs (among other things) the liability of vessel operators and marine employers for the work-related injury or death of an employee seaman. 46 U.S.C. § 688(a) (2000) provides:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

§ 688(a).

190. *Uravic*, 282 U.S. at 238.

191. *See id.* at 240.

192. *See id.*

193. *See id.*

194. *See id.* at 239.

195. *Id.* at 240.

receive when working upon an American ship in the next dock . . . .”<sup>196</sup> He went on to say:

It always is the law of the United States that governs within the jurisdiction of the United States, even when for some special occasion this country adopts a foreign law as its own. There hardly seems to be a reason why it should adopt a different rule for people subject to its authority because they are upon a private vessel registered abroad.<sup>197</sup>

Another important case in this area was *Hellenic Lines Ltd. v. Rhoditis*, which also involved the application of the Jones Act.<sup>198</sup> The respondent, Rhoditis, was a Greek seaman on board the *Hellenic Hero*, a vessel registered under the Greek flag and operated by the petitioner, a Greek corporation.<sup>199</sup> Rhoditis’s employment contract provided that Greek law governed, and required all claims arising out of the contract to be adjudicated in a Greek court.<sup>200</sup> Rhoditis was injured while the *Hellenic Hero* was docked in New Orleans, and sought compensation under the Jones Act in U.S. district court.<sup>201</sup> The district court found in his favor, and the decision was affirmed by the circuit court.<sup>202</sup> The petitioner appealed, arguing that the Jones Act did not apply to a situation that was so dominated by its connection to Greece and Greek law.<sup>203</sup>

While acknowledging the strong connections to Greece,<sup>204</sup> the Court noted the following connections to the United States. Although the petitioner was a Greek company, its largest office was in New York and it also had an office in New Orleans.<sup>205</sup> More than ninety-five percent of its stock was owned by a Greek citizen who lived in Connecticut, and had lived in the United States since 1945.<sup>206</sup> Additionally, the *Hellenic Hero* was “engaged in regularly scheduled runs between various ports of the United States and the Middle East,

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196. *Id.* at 238.

197. *Id.* at 240 (citations omitted).

198. 398 U.S. 306, 307 (1970).

199. *Id.* at 307-08.

200. *Id.* at 308.

201. *Id.* at 307.

202. *Id.*

203. *Id.* at 308.

204. *Id.*

205. *Id.* at 307.

206. *Id.* at 307-08.



Pakistan, and India,” and “its entire income [was] from cargo either originating or terminating in the United States.”<sup>207</sup>

After weighing the various connections to Greece and the United States, the Court held that U.S. law applied to Rhoditis’s claim, stating:

We see no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act “employer.” The flag, the nationality of the seaman, the fact that his employment contract was Greek, and that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with this country. If, as stated in *Bartholomew v. Universe Tankships Inc.*, 263 F.2d 437, the liberal purposes of the Jones Act are to be effectuated, the facade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States. By that test the Court of Appeals was clearly right in holding that petitioner Hellenic Lines was an “employer” under the Jones Act.<sup>208</sup>

If nothing else, *Rhoditis* demonstrates that the Court refuses to engage in mechanical or bright-line tests based on such simple measures as the law of the flag in determining the applicability of American law to foreign flag carriers. The Court could have limited its analysis to asking which flag flew over the *Hellenic Hero*. Instead, the Court chose to engage in a more textured, and difficult, analysis to resolve the issue.

#### D. Summary

This line of cases shows that the Supreme Court has consistently and repeatedly rejected the argument that the law of a foreign flag controls and determines all activities and issues relating to a vessel.<sup>209</sup> Moreover, the present Court shows no inclination to restore strength to the law of the flag principle.<sup>210</sup> *Spector* presented an opportunity for the Court to protect a foreign flag carrier, but a clear majority of the Court refused to permit a foreign flag to serve as a shield against

207. *Id.* at 308.

208. *Id.* at 310.

209. *See supra* Parts V.A-C.

210. *See generally* *Spector v. Norwegian Cruise Line, Ltd.*, 545 U.S. 119 (2005).

the application of American law.<sup>211</sup> *Schooner Exchange* recognized the basic concept of the law of the flag, but the subsequent cases have narrowed and limited that general principle to the point where the “mischievous fiction” of the law of the flag has been drained of almost all force when used in attempts to avoid American requirements.<sup>212</sup> The attempt by the universalists to assert the law of a foreign flag over bankruptcies in this country (or any other) runs counter to the clear and long-established line of cases rejecting the notion that a foreign flag controls all issues and disputes.

In order for universalism to work, the law must disregard local concerns. After all, the fundamental premise of universalism is that local concerns and local laws must yield to a universally applied law (the law of the debtor’s home country). If one supports the universalist position, then one must necessarily argue that the Supreme Court has been wrong for over 150 years because the Court has consistently and repeatedly rejected the argument that the law of the flag trumps local concerns and local laws. The universalists may argue that we live in a new era in which everything is different and the old rules do not apply (history will determine whether that is true or not). If it is the case that this is a new era, however, it seems reasonable to require the universalists to demonstrate compelling reasons why this long line of decisions should be neglected.

## VI. MARITIME LAW’S TREATMENT OF THE APPLICABLE LAW

The history of maritime law demonstrates that the Supreme Court has repeatedly refused to apply a mechanical, one-dimensional test based on the law of the flag to determine applicable law. In place of such a test, *Lauritzen v. Larsen* presented a multi-factor analysis to decide the issue.<sup>213</sup> The seven factors were: (1) place of the wrongful

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211. *Id.*

212. *See generally* *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

213. 345 U.S. 571, 583 (1953). *Lauritzen* involved a maritime tort (the facts of which are discussed below). However, its multi-factor analysis is not limited to such torts. In *Romero v. International Terminal Operating Co.*, the Court decided that all claims arising under the general maritime law should be subject to the *Lauritzen* analysis. 358 U.S. 354, 382 (1959). In other words, *Romero* makes clear that even though *Lauritzen* arose out of the Jones Act, its analysis applies to maritime law in general:

While *Lauritzen v. Larsen* involved claims asserted under the Jones Act, the principles on which it was decided did not derive from the terms of that statute. We pointed out that the Jones Act had been written “not on a clean slate, but as a postscript to a long series of enactments governing shipping. All were enacted with regard to a seasoned body of maritime law developed by the experience of American courts long

act; (2) law of the flag; (3) allegiance or domicile of the injured; (4) allegiance of the defendant ship owner; (5) place of contract; (6) inaccessibility of the foreign forum; and (7) the law of the forum.<sup>214</sup>

This analysis arose out of the following facts. Larsen was a Danish seaman who was temporarily in New York, where he:

joined the crew of the *Randa*, a ship of Danish flag and registry, owned by petitioner, a Danish citizen. Larsen signed ship's articles, written in Danish, providing that the rights of crew members would be governed by Danish law and by the employer's contract with the Danish Seamen's Union, of which Larsen was a member. He was . . . injured aboard the *Randa* in the course of employment, while it was in Havana harbor.<sup>215</sup>

Larsen filed an action in federal court in New York under the Jones Act, and recovered damages for his injury.<sup>216</sup> The defendant appealed, arguing that Danish law controlled and that Larsen was not entitled to his award under Danish law.<sup>217</sup> The Second Circuit affirmed the award of damages.<sup>218</sup>

The Supreme Court reversed.<sup>219</sup> It highlighted the basic facts, which pointed to Denmark as the country to provide the governing law, stating:

This review of the connecting factors which either maritime law or our municipal law of conflicts regards as significant in determining the law applicable to a claim of actionable wrong shows an overwhelming preponderance in favor of Danish law. The parties are both Danish subjects, the events took place on a Danish ship, not within our territorial waters. Against these considerations is only the fact that the defendant was served here with process and that the plaintiff signed on in New York, where the defendant was

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accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations." 345 U.S., at 577. Thus the Jones Act was applied "to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law." 345 U.S., at 581. The broad principles of choice of law and the applicable criteria of selection set forth in *Lauritzen* were intended to guide courts in the application of maritime law generally. Of course, due regard must be had for the differing interests advanced by varied aspects of maritime law. But the similarity in purpose and function of the Jones Act and the general maritime principles of compensation for personal injury, admit of no rational differentiation of treatment for choice of law purposes. Thus the reasoning of *Lauritzen v. Larsen* governs all claims here.

*Romero*, 358 U.S. at 382.

214. *Lauritzen*, 345 U.S. at 583-91.

215. *Id.* at 573.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 593.

engaged in our foreign commerce. The latter event is offset by provision of his contract that the law of Denmark should govern.<sup>220</sup>

The Court later added to this analysis in *Rhoditis*, in which the Court cautioned that the factors listed in *Lauritzen* were not meant to be applied mechanically and were not exclusive.<sup>221</sup> The Court also added a ship's base of operations as another factor to be considered.<sup>222</sup> "Accordingly, under the *Lauritzen-Romero-Rhoditis* trilogy there are at least eight factors to be considered in determining whether foreign or domestic law will apply in an action within the admiralty jurisdiction. The flag of the vessel involved is only one."<sup>223</sup> Thus, the proper application of the *Lauritzen-Romero-Rhoditis* factors depends on a case-by-case analysis, and exclusive reliance on a vessel's flag, without any consideration of the other factors, is contrary to the proper analysis the Court has established for maritime cases.<sup>224</sup>

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220. *Id.* at 592.

221. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-09 (1970).

222. *See id.* at 309.

223. Gutoff Brief, *supra* note 127, at 21. The *Lauritzen-Romero-Rhoditis* test is also compatible with the approach of § 403 of the *Restatement (Third), of the Foreign Relations Law of the United States*, which addresses the exercise of jurisdiction over foreign persons and activities. Under § 403(2), factors to consider before exercising jurisdiction include:

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987).

224. Gutoff Brief, *supra* note 127, at 21-22. At least one court has recognized the general applicability of *Lauritzen* and *Romero* to international bankruptcy. *See In re Maxwell Commc'ns Corp.*, 93 F.3d 1036 (2d Cir. 1996). *In re Maxwell* arose out of the collapse of a media empire called Maxwell Communication, which spawned bankruptcy proceedings in the United States and England. One issue in the case was which law and which court would govern and decide an issue concerning the avoidance of certain pre-petition transfers. The court ultimately decided to defer to the laws and courts of England. In doing so, the Second Circuit cited several choice of law cases, including *Lauritzen* and *Romero*. *Id.* at 1047-48. This article

### A. A Suggested Application of a *Lauritzen-Romero-Rhoditis* Type of Test to Chapter 15

If one accepts the view that the maritime analysis is analogous enough to Chapter 15, questions naturally arise as to how and when such an analysis could be applied to a Chapter 15 case. Does the statutory framework of Chapter 15 even allow for the use of a *Lauritzen-Romero-Rhoditis* type of test? If the answer is yes, under what circumstances would such a test apply to a Chapter 15 case?

A natural opening for application of such a test is found in § 1506, the public policy exception.<sup>225</sup> Section 1506 answers those who assert that Congress spoke on the choice of law issue by enacting Chapter 15. Some might argue that the choice of law issue has been resolved because §§ 1501(a) and 1525(a), along with the mandatory language of the other sections and the legislative history, express the view of Congress that the law of a debtor's center of main interests shall control. This argument would go on to assert that the choice of law is not a matter that has been left open for the courts. If this argument is correct, then any comparisons to maritime law or any other law would be pointless because the analysis of any choice of law issue would be strictly confined to the statutory language.

However, choice of law is not a closed issue governed by dispositive statutory language because § 1506 is a safety valve that was deliberately inserted by Congress into Chapter 15 to prevent mechanical applications of foreign law. Despite the repeated expressions of support for global cooperation and harmony, Congress was concerned about how the application of foreign law might affect domestic parties and interests, and wanted to ensure that there would be a mechanism to prevent unacceptable harm. Thus, § 1506 leaves wide open the issue of the choice of law when public policy concerns are at stake, and nothing in the statute prevents the courts from looking to other relevant sources for guidance in deciding a choice of law issue. A *Lauritzen-Romero-Rhoditis* type of test could provide a useful guide by which to weigh a public policy challenge. This point can be illustrated by the use of a hypothetical involving a Chinese oil company with operations in the United States:<sup>226</sup>

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takes the court's discussion a step further by placing the comparison in the context of the "law of the flag" analysis.

225. See 11 U.S.C.A. § 1506 (West Supp. 2006).

226. This hypothetical was presented in Chung, *supra* note 2, at 116, in order to demonstrate the prejudicial effect of Chapter 15 on tort claimants. It was based on an actual failed attempt by a Chinese oil company to acquire Unocal, an American oil company.

Suppose a Chinese company owns a refinery and several producing oil wells in the United States. Due to an incident at the refinery, thousands of residents in the surrounding area are seriously injured. Their claims threaten to overwhelm the company, and its lenders and suppliers become nervous about doing business with it. However, the producing oil wells generate sufficient revenue to cover most of the claims. Under the historical, territorialist system, the company would commence a bankruptcy action in the United States, and a resolution would likely be reached where the claims would be satisfied out of the present and future revenues of the producing wells.

Under universalism and Chapter 15, on the other hand, the company could file bankruptcy in China (which would be the foreign main proceeding). An order granting recognition in the U.S. would automatically stay the victims' claims in the United States. Furthermore, the tort victims would not be eligible to file an involuntary petition in the United States . . . .<sup>227</sup>

Under Chapter 15, it is possible that the tort victims would be forced to go to China and "seek justice in a Chinese court applying Chinese law."<sup>228</sup>

Most would probably agree that this would never happen in real life because no American judge would allow that result and would certainly invoke § 1506, the public policy exception. Yet what would justify the invocation of § 1506, other than a visceral reaction? What is the analytical framework that would lead to the conclusion that forcing the tort victims into the Chinese legal system would violate U.S. public policy? This would seem like an appropriate situation for a *Lauritzen-Romero-Rhoditis* type of test.

Under such a test, the following factors would point to the United States as the proper forum: (1) place of the wrongful act; (2) allegiance or domicile of the injured; (3) inaccessibility of the foreign forum;<sup>229</sup> and (4) base of relevant commercial operations. The factors

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227. *Id.* See also 11 U.S.C.A. § 303(b) (West 2006). Under this statute, an involuntary case may only be filed by a holder of a claim "that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount." *Id.* This language excludes the tort claimants in the hypothetical.

228. Chung, *supra* note 2, at 116.

229. A separate or related factor could ask whether the foreign forum is governed by the rule of law, affords adequate due process, and is free of corruption. Most would probably agree that public policy would be violated if these considerations were absent in a foreign forum. However, there are more difficult issues. Does the foreign forum provide procedural vehicles that are available in the United States? For example, could the tort victims assert their claims as part of a group or class, or would they be forced to bring individual proceedings? If they are forced to bring individual claims, does this violate American public policy? What if the foreign forum does not recognize theories of recovery or remedies available in the United States?

pointing to China as the proper forum would include law of the flag (home country) and allegiance of the defendant. It seems fair to conclude that most observers would agree that the factors overwhelmingly point to the United States as the proper forum.

For contractual relationships, the “place of contract” factor could perhaps be refined to add additional factors such as the place where the contract was made, the place where the contract was to be performed, the extent to which the debtor or creditor made offers or solicited acceptances in a country (for example, Norwegian Cruise Line advertising in the United States), and the extent to which the debtor or creditor sought or derived commercial benefits in the foreign forum. Two hypotheticals illustrate how these factors might operate.

Hypothetical 1: Suppose there is a Chinese manufacturer of widgets. A large American bank seeks to gain entry into the commercial lending market in China. It contacts the Chief Financial Officer of the company and offers extremely attractive terms that are designed to establish the bank’s presence in China. The company accepts the terms of the loan, and a line of credit is established, with the borrowed amounts secured by assets in China and the United States. The bank sends senior officers and its outside lawyers to close the loan in China.<sup>230</sup> The Chinese company runs into financial difficulties, and commences a bankruptcy case in China. The bank exercises its rights and moves against the collateral in the United States. The Chinese company responds by filing an application under Chapter 15 in U.S. Bankruptcy Court for recognition of the foreign main proceeding in China. The bank argues that it would violate American public policy if it were forced to pursue its claim in a Chinese court due to the inaccessibility of the forum, and the primitive and unreliable state of the Chinese judicial system.

Hypothetical 2: The Chinese manufacturer seeks to expand into the United States, and wants to open a distribution center in California. It identifies a parcel of land and a warehouse in Long Beach, and contacts a local bank to arrange mortgage financing to purchase the property. The loan is negotiated and closed in

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Hypothetically, what if creditors were not permitted to look beyond the corporate form in the presence of insider abuse and seek recovery from insider assets? Would this violate public policy?

230. This illustration is purely hypothetical in that this article does not purport to describe or demonstrate knowledge of actual lending practices in China and the restrictions, if any, faced by U.S. lenders in that market.

California. The Chinese company runs into financial difficulties, and commences a bankruptcy case in China. The bank exercises its rights and commences foreclosure proceedings against the property. The Chinese company responds by filing an application under Chapter 15 in U.S. Bankruptcy Court for recognition of the foreign main proceeding in China. The bank argues that it would violate American public policy if it were forced to pursue its claim in a Chinese court due to the inaccessibility of the forum, and the primitive and unreliable state of the Chinese judicial system.

The bank has a strong argument in Hypothetical 2 because the public policy argument of the lender in Hypothetical 1 is much weaker. There would probably be little sympathy if this lender were forced to seek repayment in China. Again, the application of a multi-factor test would assist the analysis for both hypotheticals. In either event, it seems unfair to apply a one-dimensional test to both lenders based on the manufacturer's center of main interest. Any test that would mechanically force both lenders into a Chinese court should be questioned.<sup>231</sup>

In sum, a *Lauritzen-Romero-Rhoditis* type of test provides a framework to guide a public policy analysis. If the test points to the

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231. It should be noted that the usefulness of the *Lauritzen-Romero-Rhoditis* test may depend on the presence of a genuine and well-founded public policy objection. To illustrate, suppose Hypothetical 2 were redrawn as follows: A Canadian manufacturer based in Toronto seeks to expand into the United States, and wants to open a distribution center in Buffalo, New York (a distance of about one hundred miles). It identifies a parcel of land and a warehouse in Buffalo, and contacts a local bank to arrange mortgage financing to purchase the property. The loan is negotiated and closed in Buffalo. The Canadian company runs into financial difficulties, and commences a bankruptcy case in Toronto. The bank exercises its rights and commences foreclosure proceedings against the property. The Canadian company responds by filing an application under Chapter 15 in U.S. Bankruptcy Court for recognition of the foreign main proceeding in Canada. The bank argues that it would violate American public policy if it were forced to enforce its rights in a Canadian court. Under these facts, it is unlikely that a public policy objection would carry much weight. Thus, despite the overwhelming connection to Buffalo, it is highly likely that an American court would require the New York lender to pursue its claims in Toronto. A reader might, at this point, argue that the *Lauritzen-Romero-Rhoditis* test serves no purpose because all that matters is the initial determination as to whether public policy is violated (to be sure, this article does not address or attempt to define the issue regarding the nature and scope of the public policy exception). However, questions of public policy are rarely so black and white as to present an easy case, and the *Lauritzen-Romero-Rhoditis* test can assist and inform the analysis. Referring back to Hypothetical 1, for example, even though the lender might have a strong argument regarding the unfairness of and absence of due process in the Chinese courts, the *Lauritzen-Romero-Rhoditis* test could be used by the Chinese debtor to point to the matter being heard in China and governed by Chinese law. This demonstrates the flexibility of the test, as opposed to the rigid "law of the flag" test. Its value lies in the fact that it takes the factual context into account in pointing to the appropriate forum and law. It works without a pre-determined agenda to always favor the foreign forum.



United States as the proper forum, it would lend weight to, and perhaps even be dispositive of, a public policy challenge objecting to the application of foreign law. If the test points to another country as the proper forum, that would suggest that American public policy might not be violated if the Chapter 15 case were administered elsewhere. A crucial point is that it retains flexibility and permits a court to take into account the needs and circumstances of each case, as opposed to a clumsy, mechanical attempt to force every case into the same mold.<sup>232</sup>

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232. The ever-present problem with a system like universalism is that it must necessarily ignore the unique aspects of each case. However, facts do not present themselves in a predictable, cookie-cutter fashion. In a case from England, the court was asked to defer to a bankruptcy case in the United States. *Felixstowe Dock & Railway Co. v. United States Lines, Inc.*, [1989] Q.B. 360, 363. However, the English court took note of the particular facts of the local situation to maintain English control over the English portion of the case. *Id.* at 389. This is how courts act in the absence of universalist restrictions. *Felixstowe* arose out of the American bankruptcy of United States Lines, Inc. (USL). *Id.* at 365. Prior to its bankruptcy, USL was engaged in a worldwide shipping business. *Id.* It was incorporated in Delaware, had its headquarters in New Jersey, and operated in England with an address in Knightsbridge and a local office in Felixstowe. *Id.* *Felixstowe Dock & Railway Co. (FDR)* was “a statutory body responsible for the operations of the dock and railway at Felixstowe.” *Id.* at 366. USL owed FDR more than £367,000 arising out of USL’s use of berthing and dock facilities and for unpaid stevedoring and wharfage services. *Id.* *Freightliners Ltd. (FL)* was a London-based container company that was owed more than £236,000 by USL for unpaid provisions, maintenance and inspection of containers. *Id.* *Europe Container Terminus (B.V.) (ECT)* was a Dutch company, *id.* at 363, that was owed more than £1.69 million by USL for unpaid stevedoring facilities. *Id.* at 366. FDR, FL, and ECT applied for and were granted *Mareva* injunctions by a British court. *Id.* at 363. These injunctions restrained USL from removing its English assets from the United Kingdom, so that such assets would be preserved for the unpaid creditors. *Id.* USL made its own application in the British court to set aside the injunctions. *Id.* It argued that, on the grounds of international comity, the U.S. Bankruptcy Court should have exclusive jurisdiction over USL’s assets. *Id.* It also argued that the injunctions interfered with the administration of the Chapter 11 case by, among other things, giving a preference to the unsecured creditors in the United Kingdom over the unsecured creditors elsewhere. *Id.* The court denied USL’s application and kept the injunctions in force. *Id.* at 389. In denying the application, the court noted an important fact: the result of USL’s proposed reorganization would be to limit its operations to North America and discontinue its operations in the rest of the world:

No doubt this will be of great benefit both to U.S.L. themselves, and also to their North American creditors, who may well both be able to recover their debts or at least a substantial dividend thereon, and also, if the scheme succeeds continue their commercial relationship with U.S.L. as hitherto. . . .

But the position of the plaintiffs is entirely different. They are English creditors whose business is based here and does not extend at all to North America; it follows that, in view of the intended withdrawal of U.S.L. from Europe, there could be no possible benefit to them in seeing the *Mareva* funds repatriated to the United States, and ploughed into U.S.L.’s general funds being used in the above manner in the effort to keep U.S.L. afloat as a going concern.

*Id.* at 386. The court further observed:

Moreover, whereas the retention of the *Mareva* funds here will give the plaintiffs and their fellow European creditors security for a worthwhile percentage of their debts,

## CONCLUSION

The appeal of universalism lies in its simplicity and predictability. The law of the home country is an easy test to apply, and cuts through all the thorny issues raised by competing laws and policies. To its supporters, its simplicity provides an elegant solution to transnational bankruptcies. To be sure, simplicity can be a sign of elegance. On the other hand, simplicity can be the result of naïveté—in this instance, the notion that conflicts generated by international commerce can be resolved by a one-dimensional test agreed upon by a group of the international, technocratic elite. The line of maritime cases and the efforts of the UNCITRAL working group both address a common problem—what legal test should be applied to determine the applicable law in a world where businesses operate globally? The maritime decisions are the result of cases and controversies arising between adversarial parties acting in furtherance of their own commercial interests, decided by judges with a duty to uphold the law. The Model Law and Chapter 15 were generated by highly skilled technocrats, representing no particular commercial interest, engaged in discussions removed from the distractions of day-to-day business concerns and challenges.<sup>233</sup> The judicial process and the

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this same fund, if transferred to the United States, will be a mere drop in the ocean of the total assets, and therefore no more than the slimmest marginal benefit to U.S.L. and the United States creditors.

*Id.* at 387. This case demonstrates the nature and circumstances of the principled justifications for protection of local creditors. The court did not simply resort to atavistic nationalism to protect the local creditors. There were principled reasons based on the facts to support the decision. *Id.* at 389. Just as this case presented a compelling and unique set of facts to support the protection of local creditors, the next transnational insolvency proceeding will present its own set. Yet, the supporters of universalism wish to sweep all such reasons aside.

233. The peculiar nature of international organizations and agendas driven by the technocratic elite has drawn the attention of other commentators:

Much distinguishes these organizations, which have their own histories, cultures and agendas, but what is of particular interest are the common elements of their lawmaking process. At their heart is an interplay between an ad hoc task force consisting of academics and practitioners with great substantive command of the subject under consideration, and a broader body of lawyers, typically well-seasoned and distinguished, whose approval is necessary before the group will embrace a task force proposal as its own. Membership in the task force tends to be stable but not overlapping, while the broader group has a less stable membership but a broader range of lawmaking authority. The members of both bodies, the task forces and the broader group, bring their own preferences and interests but do not belong to parties or coalitions that can impose discipline and develop collective programs. Even in those organizations where the members in the larger body have some sort of official status as representatives of their nations, such as UNCITRAL, UNIDROIT and the Hague Conference, rarely do national governments impose substantial political constraints on their emissary. Rather, the technical nature of the subject matter ensures the relative obscurity of the process.

technocrats have generated two completely different solutions to the common problem. Which is better?

It is easy to see the justifications that the members of the Working Group would advance in defense of their efforts. The fact that they did not represent any particular commercial interest should actually be viewed as a benefit, they would argue, because the process was free of financial self-dealing.<sup>234</sup> By being independent, they were able to focus on the needs of all parties and the entire process and framework, and were not pushing selfish interests without regard to the effect on the whole.

Despite these justifications, it seems fair to question the merits and results of a process that operates in a vacuum, where the goal is to create and preserve a pristine forum unsullied by the grit and grime of commerce.<sup>235</sup> The process by which the Model Law was developed

What these bodies seem to represent, in other words, is a fairly complete realization of the technocratic ideal of lawmaking. Each nation's leading specialists convene to draft an instrument that ought to embody the best rules that they can devise for international commerce. National politicians participate only indirectly, mostly by retaining the final say over accepting the completed instrument. The technical experts have a relatively free hand to discover the common ground that can transcend differences in culture, history, levels of economic development, and social structure.

Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 755-56 (1999). Moreover, the members of the Working Group "do not formally represent organized interests, although they may have some affinity or professional ties with particular groups." *Id.* at 758.

234. However, there is a contrary view to this assertion:

The official commentary notes that bankruptcy practitioners, both in the private bar and the judiciary, had an important role in developing the [Model] Law, during the drafting process and through an international meeting held to review the Working Group's draft. The expansion of discretionary authority of bankruptcy tribunals doubtlessly appealed to this group. Judges would have more power, thereby enhancing the prestige and satisfaction of their work. Lawyers who specialized in the field could charge more for their skills as a result of the more challenging legal environment.

*Id.* at 786-87.

235. Plus, a one-factor, bright line test invites manipulation and gamesmanship. Professor LoPucki has written extensively on the incentives to engage in manipulation of the home country standard, and the ease with which the home country can be shifted by a debtor acting in anticipation of bankruptcy. See, e.g., LoPucki, *Cooperation in International Bankruptcy*, *supra* note 56; LoPucki, *The Case for Cooperative Territoriality*, *supra* note 31; LoPucki, *Global and Out of Control*, *supra* note 25; LoPucki, *Universalism Unravels*, *supra* note 27. Just like the vessel owner shopping for a more relaxed regulatory standard in order to escape the burdens of its home country, a strategic debtor can alter the "center of its main interests" to select the desired bankruptcy law. Indeed, it is out of this discussion regarding forum shopping that the comparison between multinational debtors and vessels flying a flag of convenience was drawn. The attractions and drawbacks of a bright line test arise out of a fundamental tension in any legal system:

In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private

stands in stark contrast to the Supreme Court's maritime cases, which were decided under the "case or controversy" requirement of the Constitution.<sup>236</sup> Through a system where actual conflicts and competing interests are heard and resolved, a distinct line of reasoning and analysis over a span of centuries has repeatedly rejected the simplicity of the law of the flag as the controlling test. The multi-dimensional analysis of the *Lauritzen-Romero-Rhoditis* trilogy may be messy, difficult to apply, and lacking in *ex ante* predictability. Nevertheless, this test, and rulings such as *Spector* and *Cunard*, represent the accumulated experience of the Supreme Court, and international bankruptcy theory may find guidance from that experience.

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individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case. In some legal systems at some periods it may be that too much is sacrificed to certainty, and that judicial interpretation of statutes or of precedent is too formal and so fails to respond to the similarities and differences between cases which are visible only when they are considered in the light of social aims. In other systems or at other periods it may seem that too much is treated by courts as perennially open or revisable in precedents, and too little respect paid to such limits as legislative language, despite its open texture, does after all provide.

HART, *supra* note 28, at 130.

236. The "case or controversy" requirement is one of the bedrock principles underlying litigation in the federal courts:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III § 2. The reason for the "case or controversy requirement" is clear and well settled:

[I]t is quite clear that "the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." Thus, the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts. . . . [T]he rule against advisory opinions also recognizes that such suits often "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests."

*Flast v. Cohen*, 392 U.S. 83, 96-97 (1968) (citation omitted).