Competing Sovereignty and Laws’ Domains

Paul B. Stephan
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Abstract

We live in a world of multiple sovereignties. Many think of nation-states as the principal sovereign actors, but sovereign substates and international institutions created by states also hold sway. Each claims a domain, an area (spatial, temporal, conceptual) over which it rules. Ruling includes adopting and applying law. When domains overlap, laws can clash. Competition among sovereigns over legal domains poses a challenge to people who take law into account as they live their lives and plan their futures.

What makes these issues immediately important is the growth of the international-law enterprise over the last quarter-century. Both the ambitions and the institutions of international law expanded greatly in the decade after the collapse of the Soviet system. Even though it currently faces assaults from nationalist populists in the rich world and elsewhere, international law remains important and even indispensable. Its influence means more frequent and more intrusive claims about its domain to the derogation of national and subnational law. Such domain conflicts always existed, but they have grown in salience.

This Article argues that domain assignments based on the rational inter-

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est of sovereigns produce a defensible world in which to live. Rational-interest assignments based on adherence to formal rules provide the best response to the important questions: Why not give greater normative content to assignment rules? When should sovereigns forego the benefits of cooperation to defend particular interests? Are all normative preferences local (particular to the sovereign in question), or are there universal preferences that should or must override domain conflicts?

These questions are significant because domain assignment, however necessary for law to function, represents a specialized legal practice that receives little popular attention. Defending the use of systemic rules when they clash with a particular sovereign’s normative preferences thus becomes an exercise in justifying law as something other than expression of normative values. At bottom, the question is whether a satisfactory conception of the rule of law can embrace formal constraints that may override normative commitments to values such as human dignity and the squashing of arbitrary discrimination.

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I. INTRODUCTION

We live in a world of multiple sovereignties. Many think of nation-states as the principal sovereign actors, but sovereign substates and international institutions created by states also hold sway. Each claims a domain, an area (spatial, temporal, conceptual) over which it rules. Ruling includes adopting and applying law. When domains overlap, laws can clash. Competition among sovereigns over legal domains poses a challenge to people who take law into account as they live their lives and plan their futures.

In the contemporary world, domains overlap a lot. Modern technology makes relations at a distance, whether economic, political, or social, cheaper and more effective. With human activity (business, family, political, creative) unfolding more thickly at a greater distance, what people do increasingly implicates multiple sovereigns. Almost nothing important, whether a public act of a government or a transaction among private parties, goes forward without

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1 ROBERT FROST, The Mending Wall, in North of Boston 11, 13 (1914).
encountering overlapping domains.

What makes these issues immediately important is the growth of the international law enterprise over the last quarter-century. Both the ambitions and the institutions of international law expanded greatly in the decade after the collapse of the Soviet system. Even though it currently faces assaults from nationalist populists in the rich world and elsewhere, international law remains important and even indispensable. Its influence means more frequent and more intrusive claims about its domain to the derogation of national and subnational law. Such domain conflicts have always existed, but they have grown in salience.

Rather than thinking in isolation about international law nested within national legal systems, we can see this issue as a particular instance of the general problem of competition among sovereigns and the domains of their laws. Reframing the problem in this way lets us draw on a great body of practical experience. Domestic legal actors wrestle with domain problems all the time and have worked out approaches that manage potential conflicts in a reasonably helpful way. As the ambitions of international law have grown, we see the same practice at work here.

Examples of overlapping domains abound. The fields of conflicts of law and private international law deal directly with these issues, mostly in the context of private law. But public law also contains an abundance of overlapping domains, especially in federal states that recognize the sovereignty of their substates. In the United States, a federal tax may fall on transactions based on private, typically State, law. A criminal accused facing trial in State court

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2. Conflicts law deals generally with the application (or not) of one sovereign’s law in litigation in another sovereign’s forum, and each sovereign is said to have its own conflicts law. Private international law deals with the convergence of rules and practices among bodies of conflicts law. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 9 (1st ed. 1834). On the relationship between the fields of conflicts of law and private international law, see Ralf Michaels, COMPARATIVE LAW AND PRIVATE INTERNATIONAL LAW, in ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 417, 418–19 (Jürgen Basedow, Gisela Rahl, Franco Ferrari & Pedro Alberto de Miguel Asensio eds. 2016).

3. In addition to the United States, federal states in the contemporary world—nation-states that assign sovereign powers such as self-government, legislative power, and an independent judiciary to substates—include Austria, Australia, Belgium, Brazil, Canada, China, Germany, India, Russia, South Africa and Switzerland, among many others. The varieties of their federal arrangements and hence the potential for domain overlaps among substates and between substates and the national state, as well as the mechanisms used to mediate these overlaps, vary, but all countries of this type present domain assignment issues that structurally resemble those seen in the United States.

4. See infra notes 83–103 and accompanying text. A discussion that includes sovereign states in
may encounter a State procedural bar to raising a federal defense, such as a right to suppress evidence. A State official may refuse to recognize a federal law that, she believes, is invalid within her domain, as a Kentucky court clerk did when she balked at performing same-sex marriages. One nation may regulate people and actions in another country that pose a threat to its interests, even though other nations impose their own rules on the same actors and conduct. International law protecting the rights of persons may look to domestic law to determine what rights exist and what procedures apply to their enforcement. A State may reject claims about international law, not because of doubts about the claim’s provenance, but because applying it would violate that State’s fundamental law. In these and many other instances, one must figure out the relationships among the relevant domains. Only then can one tell what institutions will apply which law.

This Article offers the first systematic analysis of conflicts over domain assignments across different kinds of sovereignty. It argues that patterns of assignment, and particularly of deference to the law of other sovereigns, rest on rational choices by sovereigns. It provides three explanations for these patterns. First, sovereigns typically defer to other domains when potential domain conflicts occur frequently and the alternative domain represents the least-cost provider of law. This deference occurs not just in static cases, but where a dynamic iterative relationship between sovereigns affects the costs by rewarding cooperation and punishing truculence. Second, when in dynamic iterative relationships, sovereigns sometimes formalize patterns of deference through express agreements or observable adherence to custom to deal with recurring problems. Third, sovereigns regard some local policy preferences as too strong to permit deference. This may lead them not only to enter into costly domain conflicts, but also to reject or chisel on express agreements, customs, and the outcomes of dispute settlement mechanisms.

the international order (France, Russia, and the like) and the States of the United States (New York, Virginia, and the like) invites confusion. To avoid that problem, I follow the convention of capitalizing only references to the States of the United States, and not to nation-states. When I do refer to states, I mean nation-states that are subjects of international law, as distinguished from sovereigns, which comprises states, substates, and international law itself. See infra notes 10–26 and accompanying text.

5. See infra notes 104–23 and accompanying text.
6. See infra note 252 and accompanying text.
7. See infra notes 138–53 and accompanying text.
8. See infra notes 179–208 and accompanying text.
9. See infra notes 211–24 and accompanying text.
The Article begins by providing an account of the ways that domains overlap, the kinds of conflicts that may result, and how authoritative actors might resolve these conflicts. It proposes a rational-choice explanation that can explain consistent patterns of deference in domain assignments. The Article then surveys the evidence in support of this explanation, drawing on examples from tax law, the law of federal courts and other issues in U.S. federalism, Native American sovereignty within the U.S. legal system, and international law.

The Article concludes by considering whether domain assignments based on the rational interest of sovereigns produce a defensible world in which to live. Why not give greater normative content to assignment rules? When should sovereigns forego the benefits of cooperation to defend particular interests? Are all normative preferences local (particular to the sovereign in question), or are there universal preferences that should or must override other means for resolving domain conflicts?

These questions are significant because domain assignment, however necessary for law to function, represents a specialized legal practice that receives little popular attention. Defending the use of systemic rules when they clash with a particular sovereign’s normative preferences thus becomes an exercise in justifying law as something other than expression of normative values. At bottom, the question is whether a satisfactory conception of the rule of law can embrace formal constraints that may override normative commitments to values such as human dignity and the squashing of arbitrary discrimination.

II. DOMAINS AND DOMAIN CONFLICTS

One might suppose that in a world of inter-sovereign anarchy, sovereigns might try to extend their reach as far as their grasp will let them. What one sees, however, is persistent deference to the rules and policies of other sovereigns in situations where the deferring sovereign has the capacity to impose its own law. This Article describes, explains, and defends the practice of deference that we see in the world, as well as the instances where sovereigns instead dispute domains.

The first step is to define what we are talking about when we give an account of legal deference among sovereigns. This Section first defines the concept of a domain, which describes both the potential reach of a sovereign’s
authority and the actual scope of the laws it adopts. The Section then describes how domains can overlap, leading to potential legal conflicts. It provides a schematic typology of ways to manage domain conflicts. It ends with a review of current disputes over domain assignments that call out for some kind of resolution.

A. Defining Domain

Each legal system and every legal act has a domain over which it exercises authority. A legal system proposes authoritative solutions to particular problems arising in the course of social life. Sometimes that solution is a rule, sometimes a standard, and sometimes a process for constructing a rule or standard as needed. A term, either explicit or implicit, of any law is its domain, that is, a definition of persons, things, and transactions to which it applies.

In the absence of a universal sovereign, each legal system and all the acts that constitute it must fix the boundaries of that system’s domain. Boundaries invoke concepts such as space (e.g., “the territory of this country”), time (e.g., “from the founding of this Republic; from the effective date of this statute”),

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12. Another term, popular especially among international lawyers, ascribes jurisdiction to a sovereign. E.g., Michael, supra note 2, at 419; Frederick Schauer, On the Relationship Between International Law and International Constitutionalism, 11 VIENNA J. INT’L CONST. L. 1, 6 (2017) (“A]daptation of an ultimate rule of recognition is the marker for acknowledging or presupposing some collections of rules and principles as the law governing the jurisdiction (in the broadest and not necessarily geographic sense) within which that ultimate rule of recognition is accepted.”). When used in this sense, the term is a synonym for domain. I avoid that usage here, however, because of confusion between prescriptive jurisdiction, which corresponds to domain, and other kinds of jurisdiction, namely adjudicative and enforcement. See Restatement (Fourth) of Foreign Relations Law of the United States § 401 (AM. LAW INST. 2018) [hereinafter Fourth Restatement]. In the case of U.S. law, even greater potential for confusion exists because of the distinct and important concepts of personal jurisdiction and subject-matter jurisdiction, both aspects of adjudicative jurisdiction. See id. §§ 421–22.
the status of persons and things (e.g., "subjects of this sovereign and their property"), and categories of activity (e.g., "interstate commerce"). The process of law-giving thus entails mapping out a domain for those laws. Lawgivers acting on behalf of sovereigns prescribe a domain at the same time that they prescribe a law.\footnote{13}{Taking domain determination and assignment seriously presupposes a commitment to what Fred Schauer usefully describes as "source formalism." Frederick Schauer, Sources in Legal-Formalist Theories: A Formalist Account of the Role of Sources in International Law, in THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 384, 391–92 (Samantha Besson & Jean D’Aspremont eds. 2017). Specifying a domain can be one component of constituting a rule of recognition—that is a second-order rule that distinguishes legal claims from other imperatives. See Schauer, supra note 10, at 7. The jurisprudential discussion typically focuses on the question of the characteristics of a legal system as such. The domain-assignment issue arises once one moves from the issue of what is law to that of what is our law, as distinguished from the law of other sovereigns. I defend source formalism in Section V of this article.}

One must distinguish a sovereign’s domain from substantive rules applied within that domain. Domain assignments define the authority of a sovereign relative to others, rather than imposing a particular rule on primary behavior. A sovereign may accept proscriptions on its actions ("Congress shall make no law . . . abridging the freedom of speech"), but such proscriptions do not allocate authority among sovereigns. They adopt such proscriptions not as a means of enabling other sovereigns to deal with the issue, but because they regard the proscribed activity as bad. A proscription of sovereign regulation is as much an assertion of domain as a prescription.

Take as an example the First Amendment. It does not determine what level of government will abridge speech, but rather asserts a substantive rule of liberty from official interference with speech. Of course, the original enactment did come with a domain limit: It applied only to abridgment by the national (federal) government. This limit existed, however, only because the framers did not regard State interference with liberty of speech as a problem but did worry about what the untested new national government would do. They did not adopt the First Amendment to clear the way so that States or international lawgivers could come up with better abridgments of speech.\footnote{14}{Thus the United States has rejected international treaties that abridge the freedom of speech, even though treaties are not enacted by Congress. E.g., Resolution of Advice and Consent to Ratification as Reported by the Committee on Foreign Relations and Approved by the Senate, § III(2), 138 CONG. REC. 8070–71 (Apr. 2, 1992) (declaring that United States will interpret its obligations under the International Covenant on Civil and Political Rights in a manner that would interfere with constitutionally protected freedom of expression). This practice reflects a substantive judgment about the}
The concept of domain also must be distinguished from internal validity. The latter issue comes up if an act falls within a sovereign’s domain, but questions exist about the competence of the particular actor to do something of legal consequence on behalf of the sovereign. In modern societies, there is no single law-giver, but rather a range of persons to whom some kind of power to make some kind of authoritative legal determinations has been assigned. The internal validity of a law rests on the lawgiver’s authority to act on behalf of the relevant sovereign with regard to the matter that its law addresses.

Internal validity reflects the practical reality that, in complex states with separation of lawmaking powers, one must ask whether the actor concerned (government official, legislator, or judge) may undertake the legal act in question. The act might be within the authority of the legislator, for example, but not the executive. Much of the law of judicial jurisdiction, for example, deals not with the scope of the sovereign’s domain to prescribe rules, but rather, the scope of judicial authority to address the claims of particular litigants.\(^15\)

Domain, by contrast, addresses the question of whether any official representative of the sovereign could adopt the law. Within the U.S. constitutional system for example, a State could not validly adopt a law determining the number of justices that can sit on the Supreme Court of the United States. Similarly, the international system recognizes the existence of “matters which are essentially within the domestic jurisdiction of any state” and thus beyond the scope of international regulation.\(^16\) These concessions require a determination of the sovereign’s domain.\(^17\) A domain necessarily functions in relation to other domains, inasmuch as it expresses a claim that this sovereign’s claim of legal authority, and not some other’s, applies.

In analyzing the work that the concept of domain does, the distinction between sovereign regulation and private self-ordering is irrelevant. A sovereign might wield its authority to require a particular legal outcome, such as

\(^{15}\) E.g., \textit{FOURTH RESTATEMENT} §§ 421–27 (setting out rules of judicial jurisdiction in the United States).

\(^{16}\) U.N. Charter art. 2, ¶ 7. Considerable controversy, of course, surrounds the definition of what these matters are and whether “essential” means “inherent” and therefore non-delegable. \textit{See The Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law, MINISTRY FOREIGN AFF. RUSSIAN FED’N} (June 25, 2016), \url{http://www.mid.ru/en_GB/foreign_policy/news/-/asset_publisher/eKNonkJE02Bw/content/id/2331698}.

\(^{17}\) Cf. Stephan, \textit{supra} note 10, at 1583, 1583 n.20 (describing domain as dependent on valid authority).
invalidating official interference with the freedom of speech. Alternatively, the sovereign might supply a set of legal rules that people may elect to apply to their conduct, such as a contractual nondisparagement clause. Application of a public prescription or prohibition and enforcement of a privately chosen rule both function as assertions of a sovereign’s domain, even though the sovereign acts directly only in the first instance.¹⁸

Finally, one must distinguish between a sovereign’s potential domain and its asserted domain. The former covers all exercises of legal authority that the sovereign, in its view, might assert. The latter extends only so far as the sovereign has chosen to act. The domains of adopted laws must fall within the sovereign’s domain, but they do not set the limits of the sovereign’s lawful authority. Boundaries on particular acts need not indicate that a sovereign accepts that it is incompetent to do more.¹⁹

A legal act—whether the product of executive, legislative, or judicial power—carries with it its own boundaries, whether express or implied. For purposes of this Article, the set of persons, things, or transactions to which a law applies constitutes its domain. Consistent with this usage, each legal act—whether a statute, official proclamation or decision, or a judicial judgment—has a domain. The U.S. Constitution, to illustrate, has a domain that encompasses abridgement of the freedom of speech by federal, State, or local official actors.

Some examples illustrate the distinction between potential and asserted domain. A sovereign might assert the authority to regulate certain activity wherever in the world it occurs and whoever engages in it. The United States, for example, has adopted several laws that apply to all persons on the planet wherever they engage in the proscribed conduct and without requiring any specific nexus to particular U.S. interests.²⁰ Yet U.S. law limits the domain of its securities regulation mostly to sales that take place within the United

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¹⁹  Within international law, deference to another sovereign’s law in circumstances where a sovereign legitimately could apply its own law is called prescriptive comity. See William S. Dodge, International Comity in American Law, 115 COLUM. L. REV. 2071, 2099–2105 (2015). This Article considers prescriptive comity as a subset of a larger whole, looking at all inter-sovereign relations, not just those among sovereigns that are subjects of international law.

States.\textsuperscript{21} The point is that every law has a domain, fixed by the sovereign that adopts it, and in many instances a law’s domain falls short of the sovereign’s.\textsuperscript{22}

The concept of domain is critical in understanding the relationship between international law and other legal domains. One can work backwards from the proposition that international law has a domain to accepting that international law functions as a kind of sovereignty, even though it lacks any kind of centralized administration or authority. Inasmuch as it has a realm, it constitutes a legal system and thus has the most important attribute of sovereignty for purposes of this article.

This positing of sovereignty constituted by international law is provisional, because one cannot take for granted that all relevant actors will accept the idea that international law functions as a legal system with authority to bind.\textsuperscript{23} What one can say is that many official actors ascribe to a set of institutions that they call international law a certain authority that, in their view, is binding, even if they disagree about the scope and content of that legal system.\textsuperscript{24} It suffices to say that the domain of international law exists, is contested, and for some official actors might contain nothing. Even with these concessions, it is coherent to talk about international law as a legal system having a domain.

Claiming that international law has a domain is distinct from asserting that it has a widely accepted set of rules on internal validity. Passionate debates exist about who has the authority to identify authoritative rules of international law.\textsuperscript{25} Moreover, specialists within the field worry about the phenomenon of fragmentation, that is, separately constituted treaties and

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\textsuperscript{21} Id. at § 404, reporters’ notes 1, 3 (discussing securities regulation).

\textsuperscript{22} See, e.g., Id. at reporters’ note 1 (discussing the presumption against extraterritoriality in U.S. law); Stephan, supra note 10, at 1628–29.


institutions with overlapping competencies and potentially conflicting understandings of the content of international law. A few have asserted that international law does contain rules of internal validity that take care of this problem, but others think these assertions are, at best, aspirational.

The fragmentation problem, however, does not undermine the claim that international law has a domain. Determining international law’s domain does not require deciding which of its rules might apply in any particular instance. Often, where international law’s domain overlaps with those of states or sub-states, it is clear which set of international rules will apply. Even in the absence of clarity, deciding that a matter falls within the domain of international law is a critical analytic step, even if does not solve all problems.

To summarize, every legal act supposes a scope or domain within which it applies. This domain depends on the domain of the sovereign on whose behalf the act exercises authority, but also on the ambition of the particular legal act in question. To the extent one takes sources of law seriously when proposing a legal solution to the matter at hand, one must consider the domain of the law that might apply. Once the concept of domain is clear, one then can consider domain overlaps and the conflicts that result.

B. Domain Overlaps, Sovereign Competition, and Assignments

Domain overlaps, and thus the potential for sovereign competition and conflict, exist when multiple sovereigns may plausibly claim that a matter comes within their domains. Any official actor—judges, but also government officials and legislators—must determine which it will honor when faced with multiple domain claims. This choice constitutes a domain assignment. An authoritative actor decides that the law of Sovereign X, not that of Sovereign Y, applies to the matter before the actor. This decision assigns the issue at hand to the domain of Sovereign X.

The field of conflicts of law seeks to address some of these issues. But it does not grapple with many of the domain-assignment problems that law presents. First, the law of conflicts addresses itself principally to courts and those official actors whose actions will be reviewed by courts, and thus implicitly...
excludes the domain-assignment choices that upstream actors such as legislatures make. Second, the field addresses only overlaps not already covered by agreements among sovereigns (mostly constitutions and international treaties, as I will discuss below) that address domain assignments. Third, and most important for this Article, the field does not address conflicts between international (as opposed to foreign) and domestic law. Thus the rules that appear in conflicts law, as well as the related (if not conceptually identical) field of private international law, inform many domain conflicts but are significantly incomplete as an account of all of them.

Here I undertake to offer a more complete analysis of domain conflicts and the means of their resolution. In the abstract, the domain-assignment issue presents multiple possible solutions. Five types of choices exist, although any actual solution might incorporate elements of more than one. In each case, the assignment ends the conflict for the particular actor, but may leave the issue unresolved for other actors and even trigger new conflicts with other sovereigns.

1. Categories of Assignment Rules

I set out here five different approaches to making domain assignments. Each supposes a lawmaking moment, whether upstream (adoption of a law of general applicability) or downstream (application of an adopted law to particular events), when an authoritative legal actor does something that, as a formal matter, will be regarded as providing information about the content of law.

The authoritative actor might seek to maximize the authority of the sovereign that the actor serves by always applying that sovereign’s law. This position can be called absolute sovereign autarchy. To use the vocabulary of conflicts of law, the actor might always embrace forum law, understanding forum to mean the actor’s sovereign.

The actor instead might always resolve conflicts in favor of sovereigns

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26. Conflicts law does address the comity of nations—that is, the appropriateness of multiple states proposing rules that might apply to a particular dispute. STORY, supra note 2, at § 38. But it does so from the perspective of the court or official that must choose between enactments, not from that of the upstream lawmaker deciding what to enact.

27. The “formal matter” proviso is meant to exclude acts that astute observers will regard as significant but purport to have no legal consequence. A judge or other official who gives a speech or publishes an article may provide clues about future legal acts, but as a formal legal matter such expositions do not count as exercises of authority. The same might be said about emissions from a presidential twitter account.
other than its own. This approach can be called *absolute foreign deference.* It works, however, only if no more than one other sovereign claims the matter for its domain. When forced to choose among multiple domains, the actor must fall back on some other approach to choose which sovereign will receive deference.

The actor might submit to a formalist system that dictates claim assignments. Call this *formal domain assignment.* To count as formal, the system must contain legal constraints (rules or principles) that it will apply based on some level of abstraction removed from the bare facts of the matter at hand. To say that the law of the place of harm will govern a dispute over responsibility for an injury, for example, assumes some concept about what counts as a “place” and an “injury.”

Complicating matters, actors may revert to multiple formalist systems for resolving domain conflicts. Indeed, one might think of each domain-assignment system as having its own domain. One system might apply to assignments among coequal subnational sovereigns, another to assignments among coequal national sovereigns, and yet another to assignments between the national sovereign and its constituent sovereignties. A different system altogether might govern relations between national law and international law. These systems also might sort out by subject matter. One might have one set of rules for private contracts involving sophisticated parties, on the other hand, and for those involving consumers or workers, on the other hand, as well as something completely different for vindicating human rights, however defined or sourced. The point is that there is no universal formal system for making domain assignments. The various systems that we can observe come with their own domain limits.

 Widening the domain of any one system increases its role in domain assignment generally. Shrinking the domain of particular systems and increasing the number of assignment systems opens the path to *ad hoc domain assignment.* One might imagine, for example, one set of domain assignment rules that apply to “civilized” countries and another for the rest. An extreme

28. By “foreign,” I mean any sovereign that is not the official’s own sovereign. In this sense, the law of Virginia is foreign to a federal official as well as to a New York actor or a British one.
version of this approach would come up with a one-to-one mapping of domain overlaps and assignment rules.

Although logically distinct, an approach that complements ad hoc domain assignment is to choose the domain that produces the normatively preferable rule. The official actor would establish its normative priorities and then implement them through a domain assignment that best realizes them. The conflicts-of-law field arrives at something like this whenever it embraces the rule of choosing the best law.\(^{31}\) At this point formalism disappears, as the domain choice turns on normative preferences rather than the characteristics of domains. I consider this approach in Section V of this Article.

2. The Effect of Iteration

A critically important feature of domain assignments is that they can be iterative. A transaction might come within the domain of multiple sovereigns, each of which has the present capacity to impose its law on the parties. Even if only one sovereign has a present capacity to act, the transaction might become subject to other sovereigns’ authority in the future. If so, other sovereigns can react to the first sovereign’s decision by either rewarding it for cooperative behavior or retaliating against what it sees as truculence. Yet more observers can update their assessment of a sovereign’s capacity for cooperation or truculence (reputation) in light of its behavior in the first instance.\(^{32}\) Iterativity thus implies consequences that extend beyond the immediate matter at hand.

Iterativity arises in many contexts. Two legislatures, for example, might each assert that a particular subject falls within its domain. A downstream actor, whether government official or judge, might disagree about a domain with counterparts subject to another sovereignty. An international official or adjudicative body might assert a domain that national actors might reject, or

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vice versa. The assignment might involve either past events, i.e., occurrences that need legal characterization (as in litigation), or contemplated future actions (expressive acts of officials, legislatures, or judges that provide information about the law going forward).

Contemplating domain overlaps, official actors might try to manage the problem. Domain assignments may have either an ex ante or ex post character. One could wait for a domain conflict to occur and then resolve it, perhaps in a sufficiently fact-specific manner as to preserve the ad hoc method for the future. This would be a pure ex post choice. But an official actor also might take an approach that, it could hope, will establish a precedent that constrains future actors. The more the approach looks like a rule, rather than a standard, the more it will constrain. Announcement of a rule-like precedent raises the costs to later sovereigns of reaching another outcome, because it indicates that a possibly costly domain conflict might result.

If sovereign behavior coalesces around a precedent, one might say that a custom has arisen. Once widely recognized, a custom also imposes costs on sovereigns that wish to depart from it by ramping up the potential for retaliation and loss of a reputation for cooperativeness. The custom has ex ante effect to the extent that sovereigns recognize that adherence to it will lead to rewards, and departures will lead to costs.

Custom aside, sovereigns might commit to a formal enactment that announces domain assignments between them. A federal constitution, for example, may allocate sovereignty between the national state and its components. Article I, Section 9 of the U.S. Constitution expressly limits the national government’s domain (e.g., no tax or duties on exports from any State). Section 10 limits that of the States (e.g., no impost on imports or exports) and Section 8 creates a presumption of national domain with respect to categories such as interstate commerce. The Constitution’s Supremacy Clause establishes the domain of international treaties by providing that they “shall be the supreme Law of the Land; and the Judges in every State shall be

bound thereby. Federal legislation establishing tribal sovereignty and its limits does much the same thing.

Treaties between states can do the same work. A common feature of bilateral Status of Forces Agreements, for example, is a surrender by the host state of jurisdiction to impose its penal law in favor of the other party’s military justice. In economic regulation, treaties can establish regulatory passports pursuant to which one sovereign will accept the other’s requirements for particular goods, services, or transactions. Bilateral investment treaties (BITs) and their ilk create a domain for international law that applies to otherwise domestic public fields such as taxation. Finally, sovereigns might create a dispute resolution mechanism to resolve particular domain disputes. Courts in the United States, for example, resolve domain conflicts between both the national and State domains and between American Indian sovereignties and the federal or State domains. To the extent multiple mechanisms exist, sovereigns also might work out principles of hierarchy among these bodies. No solution is perfect, however, as sovereigns might dispute both the competence of particular dispute settlement mechanisms and the relevant hierarchy among the mechanisms.

C. Contemporary Domain Disputes and International Law

The resolution of domain overlaps is important but not straightforward. What is novel and interesting in the contemporary moment are conflicts where international law overlaps with domestic law. As international law increas-

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37. U.S. Const. art. VI, cl. 2.
41. For a review of current practice, see Paul B. Stephan, Comparative Taxation Procedure and Tax Enforcement, in International Investment Law and Comparative Public Law 599 (Stephan W. Schill ed., 2010).
42. See Restatement of the Law of American Indians, supra note 38, 1, reporters’ intro (“There are three kinds of sovereigns within the United States—federal, state, and tribal.”); see also infra notes 170–77 and accompanying text.
ingly takes on the task of regulating the relationship between states and persons subject to their power, actors seek to use international law to constrain or expand choices that states traditionally have made, whether in taxation, business regulation, or criminal justice. Proponents of these constraints talk of the need for international cooperation, the significance of honoring obligations, and the risk of retaliation for dishonored promises. Opponents speak of the injustices of international sovereignty, the illegitimacy of (some) international commitments, and the wisdom of local solutions to local problems.

These debates typically rest on constitutional arguments, that is, claims based on an asserted ex ante assignment of domains. Internationalists talk about common and necessary functions of international law demonstrated by widespread state practice. They argue that the domain of international law derives from these sources and is immanent when not obvious. Their adversaries rejoin with inherent sovereign rights and non-derogation of core values.

These postures do not align with particular ideological preferences: Progressives look to international law to supplement national protection of individual dignity and personal integrity, but argue that national projects to regulate economic activity and promote redistribution of property should be immune from international interference. They argue that international rules in the economic area generally are illegitimate because they result from capture of the lawmaking process by transnational corporations and other malign interests. Economic liberals tend to prefer the reverse. Some criticize non-economic regulation, such as international human rights law, as the product of institutions that suffer from a severe democratic deficit. The point is that both sides try to resolve choices between the domains of international and national law by reference to a supposed settlement, even if they disagree about the terms of that primordial assignment.

Consider a conflict currently consuming international economic law. A new wave of multilateral treaties aspires to promote trade and investment.

46. These include the Canada-European Union Trade Agreement (CETA), which survives if on
Unlike traditional investment treaties, mostly bilateral and mostly pairing a rich country with a developing one, these projects would give investors from rich states protection from the regulatory choices of other rich states. Critics argue that these new agreements enable powerful multinational corporations to frustrate needed health, safety, and environmental rules, as well as equitable taxation and fiscal regulation. They demand that states either abandon these negotiations or write clear domain-preserving rules into the treaties to protect national regulatory flexibility.47

Relatedly, a growing number of states invoke their domestic constitutions to block enforcement of international law. The German Constitutional Court for decades has threatened to annul European law that encroaches on core constitutional values.48 Dicta in a recent U.S. Supreme Court decision questions the capacity of the United States to delegate to international courts the authority to make conclusive determinations of U.S. law.49 The Italian Constitutional Court invalidated a domestic statute meant to bring the country into compliance with a judgment of the International Court of Justice (“ICJ”).50 The Russian Constitutional Court, acting under a new legislative grant of jurisdiction, ruled that the Russian Constitution forbids the country from implementing a ruling of the European Court on Human Rights extending voting rights to convicts.51 Most recently, it barred payment of an award ordered by

life support, the Trans-Pacific Partnership Agreement (TPP), which the United States rejected in advance of its coming into force; and the Trans-Atlantic Trade and Investment Partnership (TTIP), which is receding into the distant future.

47. See infra notes 191–93 and accompanying text.


49. Sanchez-Llamas v. Oregon, 548 U.S. 331, 334 (2006) ("If treaties are to be given effect as federal law, determining their meaning as a matter of federal law is emphatically the province and duty of the judicial department," headed by the "one supreme Court."”) (citations omitted); Bradley, supra note 44, at 86–93.


the European Court on Human Rights for a treaty violation.\textsuperscript{52} In each instance, the domain of domestic constitutional law overrides that of international law, at least for the authoritative domestic actor.\textsuperscript{53}

A pervasive shortcoming in these debates is the tendency to see every domain-assignment problem as unique. They miss two important points. First, many conflicts over domain assignments are iterative. Second, accumulation of practice may provide insights into the resolution of future conflicts, what we can call precedents. The remainder of this article points to a way of managing these conflicts, already latent in contemporary practice.

As the next two Sections demonstrate, in other contexts sovereigns have worked out ways to avoid the costliest forms of domain conflicts. Their practice relies on formal assignment rules that balance the rational interests of the sovereigns involved. This approach may not appeal to everyone, as it neglects fundamental and perhaps even universal values. Moreover, popular audiences may regard this practice as opaque and mystifying. I will consider these concerns and respond to them in the final Section of this article.

\section*{III. Rational Deference – Cooperation and Truculence}

In this Section I set out an informal model of decision making by actors responsible for domain assignments functioning in a world of iterative assignment opportunities. These actors may be legislators, government officials (elected, political or civil service), or judges, and they may act at the international, national or subnational level. Their interactions with other sovereigns may reflect comparable bargaining power or, instead, gross disparity. In any and all of these instances, the model posits that actors will seek to maximize the interests of the institution that they represent within the context of the choices that they face at the time that they act.

\begin{footnotesize}
\begin{enumerate}
\item See infra note 223 and accompanying text.
\item Representatives of the international law domain, such as the Venice Commission, an expert body set up by the governments of the parties to the European Convention, have disagreed. See European Comm’n for Democracy Through Law (Venice Comm’n), \textit{Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation}, Op. No. 832/2015, at 5, 11 (Mar. 15, 2016), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)005-e.
\end{enumerate}
\end{footnotesize}
A. The Incentives of Sovereigns and Actors

A rational-choice model posits that actors seek to maximize their interests under given constraints, including information asymmetry and uncertainty about the future. It further assumes that interests arise as a result of selective pressure. Rationality in this context means choices most likely to enhance the actor's chances for survival and prosperity, rather than reflective deliberation.54

Not all international-relations specialists accept this approach. Theories abound about what one might call other-directed preference formation—that is, preferences shaped by social influences (emulation, inspiration, internalization of external norms, and the like) rather than the actor's direct interests.55 Several influential scholars assert in particular that judicial actors, at least in environments that protect their independence and insulate them from political pressure, seek to fulfill social objectives specific to the community of courts, rather than pursue more self-interested goals.56

Rather than subjecting these different theories to rigorous empirical testing, this Article will pursue the more limited goal of demonstrating how much a rational-interest approach illuminates actual practice. One should note, however, that arguments about the distinct incentives of independent judges have been rebutted, if not necessarily refuted, in the specific context of inter-sovereign competition and cooperation. The evidence indicates that, by and large, judges identify with their own sovereign’s interests rather than with the collective values of an international community of judges.57 This identifica-


55. See, e.g., MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996); RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW (2013); ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999); RESTRUCTURING WORLD POLITICS: TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS, AND NORMS (Sanjeev Khagram et al. eds., 2002).


57. Bradley, supra note 45, at 103–09; see DAVID S. LAW & WEN-CHEN CHANG, THE LIMITS OF GLOBAL JUDICIAL DIALOGUE, 86 Wash. L. Rev. 523 (2011); PAUL B. STEPHAN, COURTS ON COURTS: CONTRACTING FOR
tion might come from socialization, but a rational-choice explanation plausibly asserts that those with the authority to appoint judges generally screen out persons who might disregard national interests.58

B. Domain Assignments and Rational Deference

A rational-interest theory posits that authoritative actors assign domains to legal acts in a way that maximizes the interests that the actor, influenced by selective pressure, seeks to pursue. To simplify things, this Section will consider two constraints on domain assignments: resource limits and the reactions of other sovereigns.

Some domain assignments are likely to go uncontested because no other sovereign has a significant interest in the subject of the legal act. Rules about title to realty, for example, almost invariably have a domain equal to the territory of the sovereign enacting these rules (rule of territoriality), and states normally defer to sovereign substates in their production (rule of subsidiarity).59 The explanation for this pattern points to the general lack of foreign interest in the content of local title rules, the benefits from subsidiarity, and the costs that overlapping title rules might create.60

Where domain assignments are likely to go uncontested, a rational sovereign would fix a domain that corresponds to the benefits that the sovereign will derive from the domain in light of the costs entailed in imposing its rule on the persons, things, or transactions involved. A sovereign might determine, for example, that certain conduct (conspiracies in restraint of trade) are generally harmful, but expend resources to regulate the conduct only when it threatens local actors (persons subject to the sovereign’s immediate authority).61

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59. See infra notes 166–67 and accompanying text.

60. Even when a sovereign has a claim to title in foreign realty, it typically accepts the right of the situs sovereign to dictate the applicable rule. Cf 28 U.S.C. § 1605(a)(4) (2012) (excepting from rule of foreign sovereign immunity disputes over real estate situated in the United States).

When iterativity, and thus the risk of overlapping domain claims, arises, a different calculus applies. A sovereign might assert its domain hoping to preempt any conflict by establishing a precedent that others will respect. It might assert its domain in the belief that it would prevail were any conflict to arise. Alternatively, a sovereign might refrain from extending its domain, even though it might have an interest in a matter, because it anticipates conflicts and predicts that the cost of such conflicts would exceed any benefit it might derive from the extension.

Once one sovereign has asserted its domain, other sovereigns with an interest in the matter face a similar calculus. If their interests are great enough, they will extend their domain in spite of the first sovereign’s action. They might reduce the risk of conflict by imposing a rule that can coexist with that applied by the first-mover sovereign, or instead initiate a full-blown conflict. Otherwise, they might demur from acting because the costs of overlapping jurisdiction exceed the benefits that they might obtain.

Alternatively, sovereigns might anticipate conflicts and enter into a formal agreement to allocate their domains. These agreements might reflect equal bargaining power, but also might function as contracts of adhesion. The representatives of States that met in 1787 to frame the U.S. Constitution had roughly equal bargaining power, taking into consideration the injury that holdouts could cause the common enterprise. The terms of relations between the United States and American Indian sovereignties, by contrast, result from imposition rather than negotiation.

Where agreements exist, sovereigns have an interest in avoiding the costs, both in terms of sanctions and reputational loss, generated by stepping into the role of breacher. Embedding a dispute resolution mechanism into the agreement multiplies these costs, at least where the mechanism enjoys some respect. Still, sovereigns might breach or chisel on agreements, including commitments to abide by the decisions of a dispute resolution mechanism, where the interest in imposing its domain exceeds the costs, including retaliation and reputational loss, of doing so.

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62. Michael J. Klarman, The Framers’ Coup: The Making of the United States Constitution 527–28 (2016). Rhode Island, the most determined holdout, presented a threat of costly resistance, even if the United States, once formed, had the capacity to embargo and sanction the State.

Where domains overlap, the choices a sovereign makes to extend its domain or defer to other sovereigns can be characterized as either cooperative or truculent. Imposition of a domain where others expect that outcome counts as cooperative behavior, whether the expectation comes from past practice, a realistic appraisal of state interests, or an agreement. Either refusing to impose a domain in circumstances where others expect the sovereign to act, or creating an overlap that others either have contested or are expected to contest, counts as truculence.

The last point requires some elaboration. One might think that a sovereign’s failure to assert its expected authority never affects another sovereign’s interests. But except in conditions of anarchy, conditions in one sovereign’s domain may affect the interests of others. An extreme example would be a failed state, where ungoverned territory presents a threat to the peace and security of its neighbors. A more modest instance would be weak domestic law. Consider, for example, the general rule that only a territorial sovereign may prescribe the rules of title to realty. A state that fails to do so, perhaps to facilitate rent-seeking by political insiders, not only harms the interests of its own subjects, but reduces the opportunities for foreigners to participate in the local economy. A sovereign’s failure to provide the legal rules necessary for basic transactions to proceed, under conditions where no other sovereign reasonably can supply substitutes, thus counts as truculent, even though foreign actors bear only opportunity costs.

A final point needs to be made here. Cooperation is not always socially beneficial, whether among individuals or nations. Just as private actors may collude to harm third parties, states may cooperate in ways that injure. Think of the various legal regimes that supported European imperialism, both in the age of discovery and then again in the late nineteenth century. Consensus as to domain assignments among the imperial powers did no good for the subjugated peoples. Moreover, agreements imposed by unilateral assertions of power, as the imperial system also illustrates, need not function to the benefit of the powerless. This Article returns to this point in Section V, when it considers the normative implications of domain assignments.

C. A Rational-Choice Account of Domain Assignment

The above discussion explains the stakes that will face rational sovereigns, motivated by selective pressure, when determining domain assignments, both where uncontested and where iterativity opens the prospect of conflict over overlapping domains. Both cooperation and truculence are plausible outcomes. A rational-choice model indicates which factors will lead sovereigns to cooperation, and which to truculence. This Section breaks down these predictions in greater detail.

First, where overlaps occur, the model predicts that a sovereign will defer to another’s rules where domain overlaps are frequent and the other sovereign’s rules conserve on the costs of rule production and present no or little offsetting costs to this sovereign. Legal stability, with its accompanying protection of reliance interests and concomitant discouragement of opportunism, will come into the calculus. A sovereign still will reserve the capacity to edit and overturn particular rules coming from the other domain when necessary to protect the integrity of its legal regime and its objectives. One can call this approach provisional deference.

The case for provisional deference rests ultimately on the concept of least-cost-provider of legal rules. Potential domain overlaps may occur, for example, in areas where one sovereign is an incumbent with a well-developed body of legal rules validated by adoption and confirmation, while the other is a newcomer driven into a policy area by technological or political change. Modern achievement of economies of scale for information and transportation, for example, have changed patterns of commerce and, relatedly, the demand for more extensive legal regimes. New regimes find themselves building on the backs of more developed local ones. Instances include the imposition of national rules of taxation on local private transactions, whether commercial or family, as discussed in Section IV.A.2 below, and international regimes to regulate international transactions, as discussed in Section IV.B.1.

Even though the new domain has different functions and objectives than does the incumbent, it faces powerful incentives to confirm the incumbent’s practices whenever it can afford to do so. A presumption of validity and applicability of the rules found in the incumbent regime promotes stability as well as simplicity. More generally, a rational-choice theory assumes that actors will look to the least-cost-provider of rules in making domain assignments. The incumbent’s advantage in having developed a user-tested body of
law often will give it an advantage. Not only has it already incurred production costs, but also it does not present the risk of opportunism inherent in the creation of new rules for relationships that lack a track record.

A presumption in favor of applying the rules found in the incumbent domain need not function as a rigid and absolute assignment. The new regime, by hypothesis, has come into being to serve different purposes than the old regime. In the United States, federal regulation of interstate commerce emerged because exclusive reliance on local rules presented a barrier to the project of building a national common market. Thwarting actions that run counter to the interests that inspired creation of a domain would be seen, from the perspective of the federal domain, as beneficial, indeed essential. Hence the model predicts only a presumption, not a hard rule of deference.

The second prediction a rational-choice model supports is that the terms of express agreements will affect sovereign behavior, but not determine the outcome of all domain conflicts covered by such agreements. The existence of these terms will clarify (to some degree, depending on their precision) whether particular behavior counts as cooperative or truculent. These stakes include the likelihood of rewards for cooperation and retaliation for truculence, as well as reputational effects.

The terms of an agreement will not completely compel sovereign choices. Changes in circumstances since the execution of an agreement may make truculence attractive. These might include a shift in relative power or capabilities (including exogenous changes in the environment that affect each sovereign’s payoffs from cooperation or truculence), as well as new information generated endogenously by the ongoing relationship. These arguments indicate that the likelihood of submitting to domain assignments found in an agreement will go down as circumstances affecting the agreement change.

The third prediction follows directly from the second. Any agreement between sovereigns that establishes a dispute resolution mechanism will clarify even more precisely the distinction between cooperative and truculent behavior. Declarations by such a mechanism will create focal points for cooperation. Sovereigns that reject the solutions provided by such a mechanism will do so in the knowledge that others will understand their actions as truculent. To the extent that observers attach independent importance to adherence to the outcome of third-party dispute resolution (what rhetorically will be described as accepting the rule of law), a truculent sovereign will suffer an additional reputational cost.
Even with these added costs, sovereigns might defy the outcome of the dispute resolution process where they regard the benefits as greater than the costs. It might see the tribunal as a declining force, either due to general geopolitical changes or surprising actions by the tribunal that might undermine its legitimacy. The act of truculence might rest on what the sovereign regards as a vital interest, too important to sacrifice to a need for the respect of other sovereigns or of the tribunal itself.

To test the force of these three predictions, and thus the value of the rational-choice model that underlies them, this Article considers outcomes in a diverse set of important domain-assignment problems. It first looks at the U.S. system, which has managed multiple and overlapping sovereignties for centuries. It then looks at the more diffuse and tenuous rules that divide the domestic from the international around the world. This informal review of practice does not purport to prove the theory’s validity, as it neither rigorously organizes the data nor considers systematically failures to take up cooperation projects. Even this casual review of practice, however, indicates that the theory is plausible and even helpful in understanding how sovereigns make domain assignments.

IV. Domain Conflicts and Deference in Practice: Tax, Federal Courts, U.S. Federalism, and International Law

This Section looks at contemporary practice in assigning domains. It considers first U.S. practice. The United States is the oldest federal system with an express domain-assignment compact—its Constitution—and thus has had ample opportunities to grapple with domain conflicts. It also has an institution—the Supreme Court of the United States—with specific responsibility to resolve some, but not all, of these conflicts. This Section then considers the experience of several states with the allocation of domains between international and domestic law.

A. Domain Assignments Within the United States

One might think that because the United States has an express agreement that posits a hierarchy between federal and State law, its practice cannot offer much insight into other kinds of domain conflicts. Identifying a domain as federal, one might think, results in automatic and uncontroversial ouster of the State. Not only does the national government have the capacity expressly to override State law, but various preemption doctrines provide for implicit ousting as well. Moreover, the Supreme Court, an organ of the national government, stands ready to enforce this disposition, potentially subjecting any official act anywhere in the country to its supervision. The arrangement seems more like top-down administration than shared sovereignties.

But complications lie behind this seemingly straightforward account. The first basic question involves the scope of the superior domain. A superior domain can oust an inferior one only when the law in question falls within its competence and the actor that makes it has the legal capacity to act. Thus a federal law might not oust a State rule if the enacting body lacked the power to do so. An act of Congress that rests on none of that body’s constitutionally delegated powers, for example, would not override a duly adopted State law. 67


Consider a recent Supreme Court decision on the domain of federal criminal law. The core question in *Bond v. United States* was the applicability of a federal statute to an assault, conduct normally governed by State law.68 Without questioning the general principle that valid federal legislation may override State law, the Court ruled that the statute in question did not reach matters within the normal domain of State regulation. Three Justices would have ruled that Congress, as a constitutional matter, lacked the capacity to regulate the conduct at issue. They regarded the entire regulatory project, with respect to the defendant’s behavior, as outside the federal domain, not that the particular statute’s domain did not go that far.

Second, the federal-State hierarchy is not always one-way. For example, the State-action doctrine in antitrust law produces an inversion of the conventional structure. Federal statutory law provides a general framework for regulating anticompetitive conduct in the national economy. The Supreme Court, however, has construed these provisions as inapplicable to behavior that conforms to State laws regarding industrial organization.69 Accordingly, in this field State law may oust otherwise valid federal law.

Third, the horizontal relationship among States is subject to some federal control. But many overlapping domains persist, and some domain conflicts are not subject to Supreme Court oversight. Where federal oversight does not exist, States have formed some customs that eliminate domain conflicts, the best example of which is the rules governing conflict of laws. Domain conflicts persist, but mostly in contexts where they do not generate excessive costs.

A related issue is the authority of the organs that interpret and apply law and thus enforce federal-State hierarchy. The United States adheres to a norm that, among judicial bodies, the Supreme Court of the United States has the


final say on interpreting federal law, and the highest State courts have the last word on the content of State law. This settlement, however, came only after significant dispute in the early days of the Republic, and faced later challenges through doctrines such as nullification and interpositionism, as well as the invention of “general law” as a way around State common law. Even today we can observe occasional irruptions from State judges challenging the supremacy of the Supreme Court.

When one extends one’s gaze beyond courts to legislatures and executive officials, the complexity and richness of domain conflicts are readily apparent. Consider the dispute over consular notification that occupied U.S. courts and the International Court of Justice for a decade. The United States bears an international legal obligation, namely a duty to give foreign nationals arrested for a crime timely notice of the availability of consular assistance, but looks to front-line law enforcers, mostly local police, to honor it. The practical impossibility of effective federal supervision of the police frames the problem, which so far has eluded a comprehensive solution.

What these examples show is that the U.S. federal system has been ripe with potential domain conflicts, going back to the founding. More than two centuries later, the system has served as a great laboratory for assignments, some reached easily and others only after years of struggle. Rather than dismiss this experience as a product of American exceptionalism, one should


72. E.g., State v. Archuleta, 577 P.2d 547, 549–51 (Utah 1978) (Ellett, C.J., concurring) (suggesting that the Constitution only applies to federal law); Dyett v. Tumer, 439 P.2d 266 (Utah 1968) (questioning the validity of post-Civil War Amendments and authority of the Supreme Court derived therefrom). These decisions present both a domain conflict and an internal validity challenge; they reject the applicability of a portion of federal constitutional law with respect to other bodies of law and question the authority of the Supreme Court of the United States to resolve the conflict. For a more recent episode, see James v. City of Boise, 351 P.3d 1171, 1192 (Idaho 2015) (rejecting Supreme Court interpretation of a federal statute on the ground that it did not address State, as opposed to federal, judges), rev’d and remanded, 136 S. Ct. 685 (2016) (interpreting federal law as binding on state courts), opinion withdrawn and superseded, 376 P.3d 33 (2016).

mine it for evidence of how domain assignments work.

First, this Article considers the persistence of domain conflicts in spite of a formal assignment and dispute-resolution mechanism. Then this Article focuses on several areas where domain-assignment questions frequently arise in U.S. law. Each is significant, and to my knowledge no one previously has considered them together. Commonalities in the solutions to these domain-assignment problems are revealing precisely because they appear in such diverse settings.

1. The Persistence of Domain Disputes

The framers adopted the U.S. Constitution to resolve domain disputes between the national (federal) state and the several States, and created a Supreme Court to enforce and interpret these assignments. Article I, Sections Eight through Ten are the most discursive in this regard, but Article VI, Clause Two (the Supremacy Clause) also lays down assignments that address international, national, and subnational (State) law. The Supreme Court created by Article III acquired jurisdiction to resolve disputes over the meaning of these constitutional texts inasmuch as it had jurisdiction over “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.”

Execution of an express agreement, and creation of a judiciary with final authority to interpret and enforce the agreement, did not put to rest all disputes. The long arc of U.S. constitutional history, including a horrific civil war, reveals ongoing struggle over these boundaries. Today’s Supreme Court takes on many cases that dispute the terms of the original domain-assignment settlement.

74. The framers, of course, intended the Constitution to do lots of things besides resolving domain assignments. My argument is only that resolution of these disputes was one of the principal purposes of the project.

75. To be precise, Article III, section 1 vests the “judicial power” in the Supreme Court and such lower courts as Congress chooses to create, and section 2 extends the “judicial power” to cases arising under federal authority and specifies that the Supreme Court will exercise appellate jurisdiction in such disputes. If Congress had not created the lower federal courts, as it did in the Judiciary Act of 1789, the Supreme Court presumably still could have exercised its authority through appellate review of State court decisions, unless Congress determined otherwise.

For purposes of this Article, the details of these disputes and their history is less important than the general point that, at various points in time, both the national and State authorities have asserted domain assignments that the other has rejected. Many factors explain these challenges, including long-term economic and social trends as well as acute political flash points.

A second broad point is that creation of the Supreme Court has resulted in some management of these conflicts, but not their elimination. Perhaps the most notorious of the Supreme Court's domain assignment cases—Scott v. Sanford,77 which resolved in the States' favor a domain dispute over an exclusive power to create property rights in human beings—exacerbated the political conflict and made war more likely. Moreover, rather than providing timeless information about the meaning of the original assignment, the Court consistently has revisited, revised, and sometimes repudiated its earlier interpretations.

European supranational law—the human-rights regime based on the European Convention on Human Rights and the economic (and more) regime embodied in the European Union—manifests similar characteristics, even though its history spans less than a third of the United States. Domain disputes recur and even fester.78 The Human Rights Court has made abrupt changes in direction as to the scope of the supranational domain.79 This experience, as much as that of the United States, points to the contingent nature of express domain assignments, even when provided with independent and authoritative

77. Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). To be precise, the Court ruled that Article IV, section 3, clause 2, which gives Congress authority to legislate with respect to territories of the United States, did not comprise a power to emancipate slaves in territories acquired after the making of the Constitution, and that the United States further lacked the power to undo the law of any State on this subject. Id. at 417–18. Although this part of the opinion could be dismissed as dicta, inasmuch as the Court already had determined that it had no subject-matter jurisdiction, it was far more consequential than the jurisdictional holding.

78. The former European Court of Justice (now the Court of Justice of the European Union) asserted early on the authority to enforce domain assignments under the treaties that form the European Union. See Case 6/64, Costa v. E.N.E.I., 1964 E.C.R. 585. Not all member states accepted this claim, however, which necessitated the creation of a sanctions mechanism to induce compliance. The Commission initiates proceedings to penalize noncompliance, subject to review by the Court of Justice of the European Union, as it now is known. See Treaty on the Functioning of the European Union, art. 260, Mar. 25, 1957, 2012 O.J. (C 326) 47, 161.

dispute settlement.

A rational-choice theory of domain assignments can explain this contingency. Express assignments are necessarily incomplete, in the sense that it is beyond the drafters’ capacity to envision the optimal resolution of all potential assignment disputes.80 Delegation to a third party of authority to revise the agreement in light of new information can increase the value of an agreement, but not without cost.81 A delegation both induces more disputes than would arise under a clear rule and, perhaps more importantly, licenses the third-party dispute provider to revise its view in light of future developments. The incidence of disputes under express domain assignments and the tendency of authoritative dispute resolvers to renounce earlier pronouncements produce this (sometimes justifiable) cost.

2. Tax Law

In the United States, taxation by the federal government rests on statutes as well as administrative and judicial decisions that purport to implement and interpret those statutes. A few issues of constitutional authority may linger, but most were put to bed in the early years of the New Deal Court and have not reemerged.82 In almost every case, therefore, the rules of federal taxation come within the domain of federal non-constitutional law.

This simple observation, however, hides a host of complexities. Rules of taxation depend heavily on the status of persons and the characteristics of transactions, but federal law rarely addresses these issues directly. Significant federal tax consequences thus can flow from determinations of State law.83

Consider the federal income tax implications of family law. Aside from the ephemeral moral panic expressed by the so-called Defense of Marriage Act, federal law has not addressed generally what constitutes a married couple.84 As a result, legal actors (officials of the Internal Revenue Service, the

80. I am borrowing this conception of completeness from contracts literature, which distinguishes between formal completeness (providing a solution to all matters covered by the contract) and efficient completeness (providing an optimal solution to all such matters). Robert E. Scott, The Law and Economics of Incomplete Contracts, 2 ANN. REV. L. & SOC. SCi. 279, 291–92 (2006).
81. See Scott & Triantis, supra note 11, at 846.
84. The Supreme Court invalidated the Defense of Marriage Act on the ground that the statute infringed individual liberty interests protected by the Constitution. United States v. Windsor, 133 S.
Treasury, and courts) normally look to State law to address questions such as what counts as a valid marriage.

Several things about this practice are interesting. First, the domain assignment is provisional rather than absolute. The official actor (judges, but also IRS and Treasury officials) retains the power to substitute a federal rule for that found in the State domain. Second, the federal domain is a relative newcomer, arising only with the establishment of a federal income tax in 1913. The State domain of private law, by contrast, goes back to the founding and draws on ancient antecedents, including Roman and canon law. Third, as a consequence of the second point, the State domain is legally abundant, while the federal is sparse.

Provisional deference does not mean blind adherence and literalism. Courts have interpreted the terms of federal tax law functionally rather than formally and recognize that marital status in State law does different work from what it does in federal taxation. At the same time, withdrawal of deference remains exceptional and receives special justification.

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Ct. 2675, 2695–96 (2013). One lower court, by contrast, analyzed the issue instead as a domain problem, where Congress lacked the authority to encroach on a domain traditionally assigned to State law. Massachusetts v. U.S. Dep’t of Health and Human Servs., 682 F.3d 1, 11–12 (1st Cir. 2012). That case did not rule that the federal government lacked any authority to recharacterize marital status, but rather that it had no valid reason to disregard same-sex marriages recognized by States. Id. at 16.

85. Kevin M. Clermont, Degrees of Deference: Applying vs Adopting Another Sovereign’s Law, 103 CORNELL L. REV. (forthcoming 2018) (speaking of this practice as “adopting” rather than “applying” the other domain’s rule). Clermont explains the distinction as follows:

‘The domestic lawmaker might adopt the other sovereign’s law as its own law. Adoption usually represents only the consultation of the other’s law while formulating the sovereign’s own law. Adoption could be static, adopting the other’s law as it now is, or dynamic, adopting the law as the other sovereign might change it in the future. . . . [But that] static/dynamic difference . . . [is] not a concern for present purposes. This Article’s concern is with the general notion of adoption . . . rather than the particular manner of adoption.

. . . [I]n other circumstances a domestic legal actor might concede that another sovereign’s law applies. Application fundamentally differs from adoption, in that it requires recognition that the other’s law has a claim actually to govern. . . .

Application would result from some dictate, external (another sovereign’s constitutional, statutory, or judicial command that is binding on the domestic sovereign) or internal (a self-imposed choice-of-law rule deriving from domestic constitutional, statutory, or judicial decision). An internal directive does not really result in the other sovereign’s law applying ex proprio vigore, but rather represents a choice by domestic law to treat the other’s law as if it were directly applicable. It is thus essentially a recognition of the status of the other’s law as being at least co-equal.

Id. (galley proof at 4) (footnotes omitted).
Again, marital status is illustrative. Under State law, marriage results in a variety of civil rights and duties, some mandatory and others optional. Federal law uses the status to determine a person’s fiscal obligation to the state, usually but not always to the advantage of the taxpayer. Federal officials might guard against taxpayers changing marital status for reasons that harm the tax base, exactly because a State might be indifferent to this harm.

One would expect tax law, grounded in the federal domain, to borrow copiously from State law governing marriage. Developing a separate federal body of marriage law presents significant costs. Not only would creating this body of law entail significant up-front expenses to the government, but also taxpayers and their advisors would either have to invest in learning the new rules or run the risk of unanticipated and undesired tax results. The stability of marriage law itself would take a hit, as people would become less sure of what constitutes a valid marriage and avoid transactions (perhaps desirable ones) where the cost of uncertainty exceeds the benefits of the desired course. Here is a good illustration of the least-cost-provider outcome predicted by our rational-choice model of domain assignment.

Allowing well-heeled and well-informed taxpayers to manipulate State marriage law to minimize their tax liability, however, presents significant risks to the federal system. Beyond the immediate revenue loss, taxpayer morale—the willingness of most people to conform to the system’s rules because they know others behave likewise—would suffer. Given this cost, one might expect an assignment rule that rejects State rules in the narrow category of cases where the State is not the least-cost provider. Again, this outcome would confirm one of the predictions of the rational-choice model.

Indeed, U.S. practice does this. The leading case is Boyter v. Commissioner. The taxpayers, seeking to avoid the marriage penalty that applies to spouses with similar incomes, vacationed annually in a Caribbean jurisdiction that allowed them to obtain a divorce before the end of the tax year, the date that determined their filing status. They would remarry in their domicile once the new tax year commenced. A lower court determined that the taxpayers’ domicile would not recognize these divorces and that they therefore had to file as a married couple. The Fourth Circuit, in contrast, ruled that the issue came within the domain of federal law, which could disregard transactions undertaken to evade tax obligations even if local law accepted their validity. The State rules thus did not matter.

In other words, the Fourth Circuit embraced the provisional nature of the
domain assignment. Federal tax law generally borrows State family law,
largely because doing otherwise would be costly. But it reserves the power to
reverse an assignment where particular rules drawn from the State domain
present an unacceptable cost to the federal system.

The laws of property derived from the marital estate displays a similar
pattern. United States v. Craft involved taxpayers who resided in a State that
recognized the tenancy by the entirety, a form of co-ownership of property
limited to married couples.87 Under State law, a member of the marital part-
nership could not alienate such property unilaterally, which meant that credi-
tors could not reach that property to satisfy their claim unless both partners in
the marriage were liable under the debt. The Court ruled that, notwithstanding
State property law, a federal tax lien could attach to this property even though
the tax claim ran only against the husband. The Court argued that any other
result would enable taxpayers improperly to shield assets from legitimate tax
collection.88

The Court’s explanation may beg a few questions. What makes this par-
ticular feature of State property law worthy of respect as a matter of tax
enforcement? One might suppose, however, that the Court feared systemic
State hostility to federal fiscal claims.89

For our purposes, it suffices to note that federal deference to the State rule
is provisional rather than absolute. The costs of inventing a separate federal
body of property law are self-evident, so normally the State domain would
count as the least-cost provider. But risks to the federal system sometimes
produce costs that require creating a special-purpose federal rule even in the
face of the arguments against generally displacing State law.

Another example of provisional deference at work involves the federal
tax consequences of transfers of property among spouses. A recurring trans-
action involves a wealthy person rendering substantial assets to a prospective
or current spouse in return for a waiver of State marital rights. Whether this

88. Id. at 284–85. To similar effect, the Court in United States v. Rodgers, 461 U.S. 677, 684–85
(1983), held that a federal tax lien against one member of the spousal partnership could attach to
homestead rights that, under State law, could be alienated only jointly.
89. This suspicion seems to explain the creation of exceptional federal-common-law priority rules
for the priority of federal tax liens. See infra note 106 and accompanying text.
transaction qualifies as a gift or a sale has significant and opposite consequences under the federal gift tax and the income tax. Gifts go into the tax base of the gift tax but are treated as nonrecognition events (and hence generate no immediate tax consequences) under the income tax.

The courts, rather than looking to State law to come up with a label, constructed their own interpretation, motivated by a desire to protect the tax base. In Commissioner v. Wemyss, the Supreme Court found the transaction constituted a gift for purposes of applying the gift tax. In Farid-es-Sultaneh v. Commissioner, the Second Circuit characterized the settlement as a sale, not a gift, for income tax purposes, enabling an immediate recognition of gain in the appreciated property that was surrendered as compensation for the waiver. The functions of taxation, not of property or contract law, drove these determinations.

The tension between State law and federal taxation goes beyond matters bound up with family law. General re-characterization doctrines such as “sham transaction,” “step transaction,” and “substance over form” allow federal tax collectors to disregard State law treatment of transactions (e.g., dividends, stock redemptions, interest payments, and loans) in circumstances where tax consequences seem to drive the taxpayer’s choices. These cases

90. 324 U.S. 303, 306–07 (1945); see also Merrill v. Fahs, 324 U.S. 308 (1945) (reaching the same result under different facts and in a different procedural posture). Congress reversed this outcome as to transfers among married spouses when it adopted the Internal Revenue Code of 1954. 26 U.S.C. § 2523.

91. Under the general rules of federal income taxation, a sale of an asset constitutes a realization event that results in the recognition of any gain or loss accrued in the asset sold, I.R.C. § 1001 (2012), while a gift is a non-recognition event that delays an accounting for gain or loss until the donee disposes of the asset, id. § 1015. Congress reversed the sale treatment of inter-spousal transfers through adoption of § 1041 as part of the Internal Revenue Code of 1986.

92. Somewhat in tension with these decisions is Commissioner v. Estate of Bosch, 387 U.S. 456 (1967). There the Court declared that when a federal tax rule is based on State law, “the State’s highest court is the best authority on its own law.” Id. at 465. The dissenters in the case would have gone further and given conclusive effect to any State court proceedings in the absence of fraud, id. at 471 (Douglas, J., dissenting), or as long as sufficient indicia of adversarialness existed, id. at 481 (Harlan, J., dissenting). The matters in dispute involved only State trial court decisions, which the Court declared had some weight but were not controlling.

93. E.g., Knetesch v. United States, 364 U.S. 361, 366 (1960) (denying interest deductions on a “sham transaction” whose only purpose was to create the deductions); Comm’r v. Court Holding Co., 324 U.S. 331, 334 (1945); Goldstein v. Comm’r, 364 F.2d 734, 735 (2d Cir. 1966); Helvering v. Gregory, 69 F.2d 809 (2d Cir. 1935), aff’d, 293 U.S. 465, 469–70 (1935). See generally Marvin A. Chirelstein, Learned Hand’s Contribution to the Law of Tax Avoidance, 77 YALE L.J. 440 (1968) (unpacking doctrines).
show that legal actors may not accept absolute application of State law regarding the character of transactions in instances where strong systemic interests of federal taxation justify a separate federal rule.

Again, a rational-choice theory offers an explanation. State contract and property law is too extensive and entrenched in private transactions to permit wholesale substitution with separate federal rules. Particular instances of private law, however, may cause direct revenue losses and undermine taxpayer morale. As a result, we should expect to see, and do observe, provisional deference to State law.

Reversal of the domain assignment remains exceptional. Indeed, what is interesting is how often legal actors defer to State law even in cases where federal tax interests might indicate otherwise. To return to family law, several Supreme Court decisions ruled that the attribution of property ownership between spouses depended exclusively on State law.94 As a result, the later growth of the income tax gave States a strong incentive to modify their spousal ownership laws to permit income-splitting, a strategy that reduces the tax burden on single-earner couples. Faced with nationwide transformation of State law driven by federal tax considerations, Congress imposed a uniform federal regime on spousal income sharing.95

Tax-motivated structuring in transactions reveals a similar picture. In Frank Lyon Co. v. United States, the Court held that the choice between a sale-and-leaseback and a secured financing contract turned on those factors that State law makes relevant and not federal tax interests, absent a complete lack of non-tax considerations in the transaction.96 A few years later, Congress federalized the question as a means of addressing distinct tax objectives.97

More broadly, the lower courts often follow the Frank Lyon approach by

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94. See Poe v. Seaborn, 282 U.S. 101, 111–13 (1930) (holding that State community property law results in equal division of income between spouses for tax purposes); Lucas v. Earl, 281 U.S. 111 (1930) (holding that in a common law jurisdiction, a person who earns income owns it, even if that person is subject to a valid contractual obligation to transfer half to his or her spouse); cf. Comm’r v. Harmon, 323 U.S. 44, 47–48 (1944) (interpreting State law allowing married couples to elect into community property as leaving initial ownership with earner).


tolerating adherence to State law transactional rules in spite of the tax consequences. Policy advocates decry the result, which they portray as enabling indefensible and demoralizing tax shelters.\textsuperscript{98} Congress sometimes responds with ad hoc substitution of bespoke federal rules, but always at the price of complicating tax law and increasing the costs of tax compliance.\textsuperscript{99}

Even more critically, the thousands of Treasury and Internal Revenue Service employees who administer and apply the tax laws almost always accept State law characterization of transactions absent an express federal law to the contrary. The few instances where provisional deference is withheld almost always rests on a prior centralized determination, such as a Treasury Regulation, Revenue Ruling, or Revenue Procedure. These determinations require the approval of either the Assistant Secretary for Tax Policy or a senior Internal Revenue Service official.\textsuperscript{100} It is extremely unusual for line employees responsible for auditing and enforcement to reject a State law outcome without such guidance.

What matters for this Article is not picking the optimal rule for making a provisional domain assignment of State transactional rules.\textsuperscript{101} Rather, the point is that some kind of provisional deference is inevitable and pervasive in federal taxation. The U.S. system presumes the existence of certain kinds of statuses and transactions, almost entirely based on non-federal law, to which federal tax law then attaches consequences.\textsuperscript{102} This combination of State legal base and federal legal superstructure creates a dilemma. Uncritical deference to State rules, designed for different purposes and unmindful of tax issues, opens the door to disruption of the tax system. Ignoring the base entirely puts an impossible burden on the designers of taxation. What results is a complex and dynamic relationship in which federal law sometimes incorporates State law, subject to some degree of provision, and sometimes displaces State law.


\textsuperscript{99} See, e.g., id. at 1948–50.

\textsuperscript{100} I.R.C. § 7805(a) (2012) (granting the Secretary of Treasury authority to make regulations); IRM 32.2.2.1 (Aug. 8, 2004) (establishing procedure for issuing revenue rulings, revenue procedures, notices, announcements and news releases).

\textsuperscript{101} For an influential account of this problem, see David A. Weisbach, \textit{Formalism in the Tax Law}, 66 U. CHI. L. REV. 860 (1999).

\textsuperscript{102} To complicate things further, many State taxes incorporate federal definitions of taxable status and transactions and then attach their own tax consequences. See Ruth Mason, \textit{Federalism and the Taxing Power}, 99 CAL. L. REV. 975 (2011). Thus a State transactional rule might be applied in federal tax law and then incorporated back into State tax law. See id. at 1019–20.
altogether. Each of these approaches serves as a precedent for the resolution of other issues.

3. The Law of Federal Courts and Statutory Interpretation

In the United States, the law of federal courts encompasses many domain issues. At the most general level, the field seeks to sort out the relationship between federal law, whether constitutional, statutory or judge-made, and other domains, both State and foreign. While it has constitutional dimensions, this project also entails an array of statutory-interpretation problems that implicate domain assignments.

Most discussions of these issues, whether by practitioners or scholars, concentrate on the legitimacy or optimality of particular resolutions of domain issues in light of various principles or objectives. This Section instead looks at the general structure of domain issues, both within particular cases and through the generation of precedent.

a. Borrowing State Rules

Federal tax law has an abundance of provisional-deference issues because of its pervasive dependence on State legal rights that existed before federation taxation. This pattern appears in many other areas of law. For example, Congress often enacts entitlements without specifying secondary rules. Courts find themselves confronted with a choice between constructing a federal common law rule and letting a State rule apply instead. When deferring to the State domain, the court must consider whether the State rule conforms to the general properties of the relevant federal rule. If not, the court will suspend provisional deference and craft a new rule.103

Again, the rational-choice theory of domain assignment can explain why courts do this. In the areas where these issues arise, State law is intensely developed and in common use; federal law arrives late on the scene with its own special concerns. Constructing new federal rules would incur both direct and indirect costs as law becomes more complicated and less stable. Some

particular instances of deference to the State domain, however, present such risks to the federal interest as to justify the costs entailed in devising a special federal rule.

United States v. Kimbell Foods, Inc., a leading decision on lien priority, provides a good example of a rational cost-benefit assessment.104 The rules specifying creditors’ rights come mostly from State law. As to personal property, Article 9 of the Uniform Commercial Code, in effect in every State, does most of the work. The case involved liens resulting from both federal loans and private loans, where the debtor lacked funds to satisfy both. But for the federal element, State law would have dictated the priority of security interests among the creditors.

The Court noted that “federal law governs questions involving the rights of the United States arising under nationwide federal programs.”105 Before Congress enacted specific rules to govern tax liens, the Court had developed federal-common-law priority rules for these obligations. Those cases gave priority to all federal tax liens created before other liens had become “choate,” that is, clearly specified as to the creditor and its rights.106 The loans at issue in Kimbell Foods enjoyed priority as a matter of State perfection law but not under the federal “choateness” rule.

Kimbell Foods distinguished the tax-lien decisions as dictated by the particular exigencies of federal tax collection. In cases where the federal government voluntarily contracts to extend credit, the available State law of priority suffices:

Because the ultimate consequences of altering settled commercial practices are so difficult to foresee, we hesitate to create new uncertainties, in the absence of careful legislative deliberation. Of course, formulating special rules to govern the priority of the federal consensual liens in issue here would be justified if necessary to vindicate important national interests. But neither the Government nor the Court of Appeals advanced any concrete reasons for rejecting well-established commercial rules which have proven workable over time. Thus, the prudent course is to adopt the readymade body of state law

104. 440 U.S. 715 (1979). For a similar analysis of the case, see Clermont, supra note 85 (galley proof at 13–14).
105. 440 U.S. at 726 (citing Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943)).
as the federal rule of decision until Congress strikes a different accommodation.\footnote{107}

As a result, the federal rule governing the rights of the federal government as creditor rests on deference to State law, excepting tax liens.

Another context that frequently entails incorporation of State law is the choice of a statute of limitation. Congress frequently creates rights of action for civil suits based on federal claims, but in the past, it rarely supplied secondary rules such as a limitations period for the claims.\footnote{108} In these instances, a court must get a statute of limitation from somewhere, and often a State limitation period is applied.\footnote{109}

Deferring to a State statute of limitation for federal legal claims presents its own challenges. First, where multiple candidates among State limitation periods exist, deference to State law still involves choosing among the alternatives. Second, federal courts must consider whether the State rule subverts the substantive policies of the federal claim. Both questions have a common core: The federal courts do not want to invent a separate body of limitations law but remain wary of State legislative acts that might undermine federal policy.

\textit{Wilson v. Garcia}, a 1985 decision involving civil-rights suits, provides a plausible response to these challenges.\footnote{110} The Court ruled that both the borrowing of a State limitation period and the characterization of civil-rights claims for purpose of choosing which State rule are federal questions.\footnote{111} It then required that a simple and broad characterization applicable to all civil rights claims. It defended this outcome as advancing the ends of certainty and the need for statewide uniformity.\footnote{112}

Deference thus proceeded on a wholesale basis, rather than identifying

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\begin{itemize}
\item \footnotemark[107] 440 U.S. at 739–40.
\item \footnotemark[111] \textit{Id.} at 268–71.
\item \footnotemark[112] \textit{Id.} at 275.
\end{itemize}
separate limitation periods for each kind of civil-rights issue. A plausible explanation for this approach is that piecemeal characterization tailored to the diverse interests covered by federal civil-rights law might encourage States to adopt narrow statutes to undermine particular federal interests.\(^{113}\)

Other examples abound. The point here is that many kinds of federal enactments create a need for supplementation. A common strategy for meeting this need is provisional deference to State law. The process of borrowing in turn requires selectivity among the available State choices as well as, on exceptional occasions, reclaiming the issue for the federal domain.\(^{114}\) In some instances, Congress steps in with an enactment that ends the need for borrowing, but often it does not.

\(b.\) **State Bars to Application of Federal Law**

State law can oust federal rules in at least two situations. First, State procedural rules may preclude application of federal law. For example, they may require assertion of the federal interest at a particular moment in proceedings upon pain of waiver of the claim.\(^{115}\) This occurs frequently in criminal proceedings, but forfeiture of a legally protected interest for failure to assert it in a timely fashion occurs in civil law as well.\(^{116}\) Second, State rules may render federal law redundant and thus irrelevant to the outcome of a dispute.\(^{117}\)

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113. *See* López-González v. Municipality of Comerío, 404 F.3d 548 (1st Cir. 2005) (holding the Puerto Rican “restart” tolling rule was inapplicable to dismissal of prior § 1983 claim for party misconduct); Ramirez de Arellano v. Alvarez de Choudens, 575 F.2d 315 (1st Cir. 1978) (Campbell, J.) (holding a broad and idiosyncratic interpretation of a tolling provision to facilitate civil rights claims under Puerto Rican law was not incorporated into § 1983 suits in federal courts).

114. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226 (1985), decided the same term as *Wilson*, offers an unusual example of rejection of deference to State law even where no analogous federal statute applies. The case involved a federal-common-law claim for interference with tribal land rights. The Court had recognized the existence of such a claim only a decade earlier, reacting to the failure of the federal government adequately to perform its fiduciary duty towards these tribes. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). Congress responded with a series of enactments dealing with claims brought by the United States on behalf of Indian tribes, all of which expressly rejected State statutes of limitation. The Court drew the inference that application of any State limitation period to claims brought by a tribe itself would conflict with federal policy. 470 U.S. at 240–44. As a result, no limitation period applied to these claims.


Again, a rational-choice theory of domain assignment can explain contemporary practice. Conventional State procedural rules and substantive laws are typically adopted prior to federal regulation. Even when not, they benefit from a presumption of local fit: Rules tailored to the particularities of State processes and circumstances are more likely to advance local welfare than would nationwide, one-size-fits-all federal rules. Saying the same thing more technically, some rules may not produce economies of scale that override the benefits of local fit. Moreover, local rules induce reliance, and destabilizing them with federal substitutes entails both direct costs (identifying which rule applies when) and indirect harms (reducing reliance on, and therefore future projects that require, stable legal rules).

At the same time, an absolute approach to domain assignment presents a risk of opportunism. States might invent special-purpose rules especially to defeat federal interests. A local political economy might motivate actions that harm national welfare. To say the same thing technically, the local rule might generate negative externalities.

Provisional deference to the State domain, with application of a federal rule occurring where the costs of using the State rule exceed the costs of devising a federal substitute, is consistent with a rational-choice model. It takes advantage of better-established State rules, diminishing uncertainty and enhancing reliability, while leaving the door open to protecting federal interests.

Implementation of provisional deference requires solving two practical problems. First, federal actors need a means of determining whether State actors in particular cases used State law or applied federal law. Second, they need a screening rule that sorts out suspicious from acceptable State rules.

The first problem arises where State actors engage in buck-passing, that is, justifying unpopular actions by attributing them to a federal mandate for which the State actor bears no responsibility. A common instance is application of a rule that requires throwing out criminal convictions. Such rules may be needed as a means of disciplining police or prosecutors but may produce a popular backlash. Buck-passing leads State actors to make claims about the domain of federal law that does not match its purposes. The second problem occurs if the State actor seeks to defeat the objective of the federal law, perhaps because local interests do not align with national ones.

U.S. practice manifests a range of possible solutions. The Supreme Court has developed the “adequate and independent State grounds” doctrine to address buck-passing issues. The Court uses other approaches to override State
rules that impose excessive costs on the federal domain.

The scope of the "adequate and independent State grounds" doctrine has evolved over the years. Earlier decisions regarded it as the Court's function to determine whether such a ground could be found in a case and tended to resolve uncertainty against federal jurisdiction. A significant 1945 decision opened up the possibility of a remand to the State courts for clarification on this point.\(^\text{118}\) Later, the Court adopted a plain-statement rule that requires the State-law ground to appear on the face of the State court decision for the doctrine to apply.\(^\text{119}\) This shift made it harder for States to justify outcomes that they deem desirable but know are unpopular by shifting responsibility to the federal judiciary.

The Court also will disregard State law that it perceives as adopted specifically to thwart federal jurisdiction. Longstanding precedent stands for the proposition that "the adequacy of state procedural bars to the assertion of federal questions is itself a federal question."\(^\text{120}\) An easy case for refusing to apply the doctrine was a State supreme court's invocation of an uncodified practice regarding brief format as the basis for dismissing an appeal of a federal civil rights suit during a period of State resistance to federal mandates.\(^\text{121}\) On occasion, the Court has detected State hostility to a federal interest on less overwhelming evidence.\(^\text{122}\)

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\(^{118}\) Herb v. Pitcairn, 324 U.S. 117, 125–28 (1945).


\(^{121}\) NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 293–302 (1964). To similar effect was NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457–58 (1958), where the same State court insisted that the distinction between certiorari and mandamus condemned the civil rights claimants to dismissal of their request for appellate review, notwithstanding the court's earlier precedent.

\(^{122}\) See, e.g., Bush v. Gore, 531 U.S. 98, 114–15 (2000) (Rehnquist, C.J., concurring) (reviewing precedent); Presnell v. Georgia, 439 U.S. 14 (1978) (rejecting appellate decision affirming a criminal conviction because it rested on a different State law ground from the trial court decision); Henry v. Mississippi, 379 U.S. 443 (1965) (disregarding a State court ruling on procedural default); Bouie v. City of Columbia, 378 U.S. 347 (1964) (finding that a change in court interpretation of State criminal law cannot justify criminal punishment); Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673 (1930) (finding that States have a duty under federal law not to use surprising interpretations of State procedural law to destroy the right to challenge an administrative action in court); Missouri ex rel. Mo. Ins. Co. v. Gehner, 281 U.S. 313 (1930) (finding a federal claim not forfeited through procedural default.)
From the perspective of rational-choice theory, several things are interesting about this practice. First, the variation in approach over time, as seen in the “adequate and independent State grounds” doctrine, suggests the importance of iteration and reciprocity. Some subjects induce significant interaction among actors in different domains because of duplicative jurisdiction. State criminal cases, for example, are subject both to direct review by the Supreme Court, with the possibility of remand to State jurisdiction, and to parallel review by lower federal courts exercising habeas jurisdiction. The frequency of these interactions may induce adjustment in domain assignments in light of knowledge gained by earlier engagements. Similarly, distinguishing pretextual from functional procedural rules benefits from context and familiarity.

c. Parallel Federal and State Domains

Another example of domain assignment within the U.S. federal system is the different treatment of arbitral awards and foreign judicial judgments. The law of recognition and enforcement of domestic judicial judgments is reasonably clear: The Constitution, through its Full Faith and Credit Clause, assigns to the national domain the law governing the effect in other jurisdictions of the judgments of courts of the several States. As a result, a State judicial proceeding that produces a valid, final, and conclusive judgment will be given legal effect anywhere in the United States. Different rules, in substance and domain, apply to arbitral awards and judgments of non-U.S. courts.

Arbitration is a creature of contract law, so recognition and enforcement of arbitral agreements and the resulting awards turn first on each jurisdiction’s contract law. For many years, each State had the authority to determine whether these contracts were enforceable or instead against public policy. Congress displaced this regime in 1925 by adopting the Federal Arbitration Act (FAA). This statute imposes a federal regime of recognition and en-

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when surprising application of State law created the federal claim); Saunders v. Shaw, 244 U.S. 317 (1917) (basing a State appellate court decision on a fact finding that the lower court held to be irrelevant violates due process); Fairfax’s Devissee v. Hunter’s Lessee, 11 U.S. (7 Cranch) 603 (1813) (finding that a State supreme court misconstrued its forfeiture laws in confiscating land of British subject).


124. An Act To make valid and enforceable written provisions or agreements for arbitration for
foremost on a wide range of arbitral awards that have a connection to interstate commerce or maritime affairs.\textsuperscript{125}

Recognition and enforcement of foreign judicial judgments, by contrast, rests on State law, excepting only foreign defamation judgments.\textsuperscript{126} In the pre-\textit{Erle} era, the Supreme Court regarded the subject of foreign judicial judgments as governed by general, rather than State, law.\textsuperscript{127} \textit{Erle} undid that settlement. Since 1962, a majority of States have adopted legislation in accordance with two uniform laws adopted by a private body, the National Conference of Commissioners on Uniform State Laws.\textsuperscript{128} It remains possible that this domain assignment is provisional, because doctrinal tools exist to override any State law seen as discriminatory or inimical to federal interests.\textsuperscript{129} To date, however, no such a case has arisen.

The puzzle here is why most arbitration falls in the national domain, but not most foreign judgments. Some scholars have argued for federalization of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations, Pub. L. No. 68–401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–16 (2012)). Judicial decisions applying the Act to consumer transactions and employment have attracted criticism. The argument maintains that the consent paradigm that underlies contract law does not work in these contexts. For one important instance of this criticism, see Judith Resnik, \textit{Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights}, 124 YALE L.J. 2804 (2015). The controversy is over particular substantive values, rather than the structure of domain assignments as such. I return to this general issue, although not this specific critique of federal law, in Section V of this Article.


\textsuperscript{127} See Hilton v. Guyot, 159 U.S. 113, 137, 234 (1895).

\textsuperscript{128} See UNIF. FOREIGN–COUNTRY MONEY JUDGMENTS RECOGNITION ACT (UNIF. LAW COMM’N 2005); UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (UNIF. LAW COMM’N 1962); Paul B. Stephan, \textit{Unjust Legal Systems and the Enforcement of Foreign Judgments, in FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 84, 84 (Paul B. Stephan ed., 2014).

\textsuperscript{129} See supra notes 120–22 and accompanying text.
foreign-judgment law through common law displacement of State law. The courts, however, have not yet agreed. Instead, they accept the validity of State laws that address the subject, notwithstanding the parallels with arbitration.

To make sense of these choices, one can begin with the general tradeoff between a cooperative and truculent approach to recognition and enforcement of foreign dispute resolution, including contract-based arbitration. Cooperation, namely embracing the foreign actions as effective within the domestic legal system, frees the parties as well as the forum from the need to revisit the dispute. This both avoids wasteful duplication of effort and enhances the legal force of all judgments. Truculence allows the forum to limit the impact of foreign tribunals on assets and actors within its territory and encourages disputants to bring their claim to the forum.

Withholding of support to other forums that, in the course of dispute resolution, implement policies with which the forum does not agree represents an exercise of autonomy. Unless its policies result in harm to others, forum autonomy can be a good thing. One potential negative effect, however, is protectionism. To the extent that forum rules reflect, for example, the preferences of lawyers who appear before them, they might discourage disputants from going elsewhere to obtain dispute-resolution services, even if services provided elsewhere generally benefit consumers. The challenge becomes one of striking the balance between reinforcing forum autonomy and suppressing wasteful protectionism in the market for dispute-resolution services.

The federalization of the law governing domestic judicial judgments and (most) arbitral awards is consistent with the notion that local protection of the market for judicial services produces costs that exceed the benefits derived


131. Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) (“Pennsylvania distinguishes between judgments obtained in the courts of her sister states, which are entitled to full faith and credit, and those of foreign courts, which are subject to principles of comity.”); Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009, 1011–12 (E.D. Ark. 1973) (“While it can be argued that the enforceability of a foreign judgment in the courts of one of the United States should be determined by reference to a general rule of federal law . . . . it appears to the Court that as the law stands today, Erie v. Tompkins is applicable and that in this case the governing law is that of Arkansas.”) (citation omitted)).
from local autonomy. The Full Faith and Credit Clause reflects an ambition
to create a federal common market. Local discrimination against non-local,
but U.S., counterparts interferes with that goal.

The argument for the FAA’s consistency with a rational-interest model is
more complicated. The statute differentiates between domestic and interna-
tional arbitration tribunals. States must accord recognition and enforcement
to awards produced by the former, even if the award violates a local public
policy. In the case of international awards, by contrast, U.S. courts may with-
hold recognition or enforcement if public policy so requires.132 Determina-
tion of such public policy rests largely, but not exclusively, on federal law.133

Treating domestic arbitration under the FAA as equivalent to domestic
litigation reflects an assessment that the risk of local protectionism outweighs
the benefits of local autonomy. Congress apparently believed that arbitration
in matters covered by the FAA was a good enough substitute as to put State
efforts to bar it under a cloud. International arbitration, by contrast, increases
the risk of outcomes that might offend U.S. interests. Limiting the public-
policy defense to federal, rather than State, interests, however, makes it hard
to use that defense to mask protectionism.

The different treatment of foreign judgments, the recognition and en-
forcement of which fall almost entirely into the State domain, also reflects a
reasonable judgment about the balance between autonomy and protectionism.
One would expect that policy differences will be greater between foreign
states and States than among the States. The risk of protectionism seems
lower because foreign and local courts are less likely to be good substitutes
for each other than are arbitral tribunals for local courts. Moreover, construc-
tion of a new body of federal common law to govern foreign judgments would
likely be costly and would probably require considerable borrowing from lo-
cal rules.

132. Compare Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V,
award may . . . be refused if . . . [t]he recognition or enforcement would be contrary to public pol-
arbitration award was enforceable under the FAA on the ground that the FAA preempts conflicting
State law, including a State’s determination of its own public policy).
133. RESTATEMENT (THIRD) OF THE U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 2–16 cmt. d
(A.M. LAW INST., Tentative Draft No. 4, 2015); cf. id. § 4–16(c) (A.M. LAW INST., Tentative Draft No.
2, 2012).
Some authorities have argued for federalizing the recognition and enforcement of foreign judgments on that ground that the local domain presents unacceptable risks to national interests. Local courts might express inflammatory hostility to particular foreign judicial systems that could redound to the detriment of the entire country. Courts that, for example, denounce foreign judicial systems as failing to comport with fundamental fairness, one of the bases most State laws permit for withholding recognition and enforcement, might offend foreign countries and interfere with the foreign relations of the United States. Federalization would diminish this risk by removing local nonfederal courts from the process.\textsuperscript{134}

There is not enough practice to make a convincing case one way or the other, but what evidence we have suggests that such fears are overblown. Surprisingly, only a few reported cases have denounced entire foreign judicial systems as inadequate, although some cases have portrayed the foreign judgment at issue as the result of flawed proceedings.\textsuperscript{135} The handful of cases that have denounced entire foreign legal systems all involve federal, not State, courts.\textsuperscript{136}

d. The Presumption Against Extraterritoriality

In the United States, the federal domain may overlap not only with that of States, but also with foreign states. Administering these overlaps with foreign states presents different challenges than federal-State conflicts do. Very few treaties address the problem, which leaves official actors to work out accommodations indirectly or to behave truculently.\textsuperscript{137} No single court has the

\textsuperscript{134} See Paul B. Stephan, supra note 71 (describing arguments).

\textsuperscript{135} See Stephan, supra note 128, at 93–94; see also FOURTH RESTATEMENT § 483 reporters’ note 4.

\textsuperscript{136} See Bridgeway Corp. v. Citibank, 201 F.3d 134, 141–44 (2d Cir. 2000); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1411–13 (9th Cir. 1995). Even these cases were less than complete denunciations. \textit{Bank Melli Iran} expressed a conviction that the sister of the Shah could not get a hearing in Revolutionary Iranian courts. \textit{Bank Melli Iran}, 58 F.3d at 1408, 1412. \textit{Bridgeway} limited its ruling to a period when Liberia’s regular courts had ceased to function due to civil war. \textit{Bridgeway}, 201 F.3d at 138, 141–42. See also Dejoria v. Maghreb Petroleum Expl. S.A., 38 F. Supp. 3d 805, 817–18 (W.D. Tex. 2014) (holding that the Moroccan judicial system did not comply with due process), rev’d, 804 F.3d 373, 386–89 (5th Cir. 2015) (holding that Moroccan judiciary sufficient under State law governing foreign judgments).

\textsuperscript{137} In the European Union, a series of treaties and EU legislation provides domain assignments with respect to certain categories of private law. \See, e.g., Regulation (EU) No. 1215/2012 of the
capacity to adjudicate these conflicts, forcing the sovereigns to cooperate by other means. A domain assignment, while substantive, can also have significant procedural consequences. The existence of a statutory cause of action within the statutory domain might supply a necessary federal question for purposes of federal court jurisdiction.\textsuperscript{138} Assignments can also affect standing to make a claim for compensation with regard to activity that comes within a statute’s domain.\textsuperscript{139}

These domain assignments necessarily implicate foreign states. The U.S. statute may impose different substantive requirements than those applied by other sovereigns. To the extent that the extension of the U.S. domain also extends the jurisdiction of U.S. courts, foreign actors might find themselves facing different procedural rules from those followed by foreign judicial bodies. These procedural rules in turn might affect the value of claims and thus have an impact on behavior.

In an earlier time, technological constraints on transportation and communication made it easier to align the domain of a state’s laws with its physical territory. The invention of real-time communication in the nineteenth century and the radical reduction of its cost throughout the twentieth century, along with transformation in the means of moving people and things across distance, made it easier for people to operate across boundaries in ways that can concern multiple sovereigns. These developments in turn produced legal regimes that reject territoriality in favor of sovereign interest. Thus the potential for significant domain conflicts emerged.

U.S. practice exemplifies the move from formal territoriality to more open-ended domains. Earlier statutes mostly adhered to the territoriality principle, even when extraterritorial regulation did not entail great technological barriers.\textsuperscript{140} During the mid-twentieth century, domains broadened to reflect

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{138} \textit{E.g.}, \textit{Sosa v. Alvarez-Machain,} \textit{542 U.S.} \textit{692, 719 (2004)} (holding that federal common law is implicitly authorized by a jurisdictional statute satisfying the constitutional federal-question requirement).
\item\textsuperscript{139} \textit{E.g.}, \textit{Hoffmann-La Roche,} \textit{542 U.S.} \textit{at 163–67} (holding that the domain of the compensation portion of antitrust law extends only to domestic injuries).
\item\textsuperscript{140} \textit{Compare} \textit{The Apollon,} \textit{22 U.S.} (9 \textit{Wheat.}) \textit{362, 370 (1824)} (“The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.”), \textit{and United States v.}
\end{enumerate}
\end{footnotesize}
the increasing impact that foreign transactions had on domestic interests.¹⁴¹ This broadening in turn produced domain conflicts, in some cases entailing significant costs. Over the last quarter century, the United States has sought ways to manage these conflicts.

One technique for managing domain assignments is the presumption against extraterritoriality. Beginning with EEOC v. Arabian American Oil Co.,¹⁴² and more recently with Morrison v. National Australia Bank Ltd.,¹⁴³ Kiobel v. Royal Dutch Petroleum Co.,¹⁴⁴ and RJR Nabisco, Inc. v. European Community,¹⁴⁵ the Supreme Court has invoked and extended this doctrine. Under the presumption, whether a particular federal statute rather than State, foreign or international law governs conduct turns presumptively on the location of the conduct in question. As explained in RJR Nabisco, Inc., the most recent of the Court’s cases, a statute will be presumed not to apply extraterritorially absent a clear expression of congressional intent.¹⁴⁶ This test applies separately to a statute’s substantive and remedial provisions.¹⁴⁷ If a statutory provision, whether substantive or remedial, does not apply extraterritorially, a court then must determine the “focus” of the provision. Even if something did occur within the United States, the statute will not apply unless that domestic activity falls within the provision’s focus.¹⁴⁸ Focus here means the characteristics that define the statute’s domain.¹⁴⁹

The Court has disavowed basing this approach on a felt need to encourage

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¹⁴¹ Palmer, 16 U.S. (3 Wheat.) 610, 633–34 (1818) ("The court is of opinion that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act . . . "), with United States v. Klintock, 18 U.S. (5 Wheat.) 144, 152 (1820) (pirates "are proper objects for the penal code of all nations," and thus limiting interpretation made in Palmer did apply to acts on a vessel subject to no sovereign). ¹⁴² See FOURTH RESTATEMENT § 409 & reporters’ note 1; Stephan, supra note 68, at 1472.
¹⁴⁵ 569 U.S. 108 (2013). Technically, this case involves not the extraterritorial scope of a statute as such, but rather the extraterritorial scope of federal common law inferred to be authorized by a statute governing subject-matter jurisdiction. See FOURTH RESTATEMENT § 404 & reporters’ note 3.
¹⁴⁶ 136 S. Ct. 2090 (2016). ¹⁴⁷ Id. at 2100.
¹⁴⁸ Id. at 2106.
¹⁴⁹ See FOURTH RESTATEMENT § 404 cmt. c.
bargaining with other states. Rather, it anchors the presumption on a belief that Congress normally prefers to address solely domestic concerns.\textsuperscript{150} This assertion, however, only shifts the attribution of a strategy to promote international cooperation. The effect of the presumption is to construct a focal point to which other states might accede when making domain assignments. The entire project seems to have as its goal the reduction of domain conflicts through use of a domain-assignment rule that minimizes the risk of domain overlaps.

The presumption applies only where statutes are unclear as to their territorial scope. If, however, the specification of a statute's territorial domain during the legislative process entails costs and thus does not typically occur, the effect of the presumption is to make limited application more common. In other words, the presumption functions more like a rule than a standard by making extraterritorial effect rare and dependent on fairly specific \textit{ex ante} pronouncements. It thus avoids, although it does not bar, statutory domain extensions that run the risk of conflict with foreign domains.\textsuperscript{151}

Evolution of a rule, rather than a standard, to separate national regular domains fits a rational-choice model of domain assignment. No express agreements apply, and, unlike the problem discussed above of detecting State law that discriminates against federal interests, no authoritative tribunal exists to resolve disputes. In the absence of these institutions, sovereigns have to induce cooperation through the establishment of, and compliance with, focal points that others can observe. A clear rule makes compliance easier to detect and thus lowers the costs of enlisting other sovereigns in the cooperative enterprise.\textsuperscript{152}

4. Conflicts of Domain Among States

The United States divides domains not only between the federal and the State, but also among States. While Great Britain was the general template for the U.S. legal system, the United States differed in that it recognized many subordinate States as sovereigns.\textsuperscript{153} Accordingly, from the beginning it had

\textsuperscript{151} Stephan, \textit{supra} note 68, at 1494.
\textsuperscript{152} Scott & Stephan, \textit{supra} note 32, at 99-101.
\textsuperscript{153} At the time of the founding of the United States, the United Kingdom mostly lacked sovereign substates, excepting a few places such as the Isle of Man. Its legal system did distinguish local from
to develop rules assigning the domain of each State and regulating overlaps among State domains. The resulting system of domain governance has remained remarkably stable, at least in its broad structure.

Two elements stand out. First, the Constitution, supplemented by a few Supreme Court glosses, provides for some federally supervised domain assignments, but much of the system depends on uncoordinated actions of the States. Second, these uncoordinated actions have resulted in a set of rules that minimize the costs of domain overlaps while maximizing sovereign autonomy.

Federal oversight of State domain assignments comes in two forms. First, the Supreme Court has invoked the Due Process Clause of the Fourteenth Amendment to constrain State domains that unreasonably overlap with those of other domains, both State and foreign. Second, the implied negative interstate Commerce Clause developed by the Supreme Court precludes State domain overlaps that have the effect of discriminating unreasonably against interstate commerce and promoting local protectionism. The application of these principles has varied over time, but not their basic contours.

Due process challenges to State exercises of prescriptive jurisdiction, as distinguished from adjudicative jurisdiction, are infrequent and rarely successful. A typical case is Allstate Ins. Co. v. Hague, involving an insurance dispute. 154 A Minnesota court applied its own law to a claim filed by a Minnesota beneficiary with respect to a policy sold in Wisconsin to a Wisconsin

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1 common law, but local law did not derive from local legislatures or executives so much as local judicial practice. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *93–114. Perhaps for this reason, Blackstone did not deal with private international law or the conflicts of law as such in his foundation treatise on the common law. See 3 id. *436 (passing reference to law of the proper forum); 4 id. *67–68 (“But, though in civil transactions and questions of property between subjects of different states, the law of nations has much scope and extent, as adopted by the law of England; yet the present branch of our inquiries will fall within a narrow compass, as offences against the law of nations can rarely be the object of the criminal law of any particular state.”); cf. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND § 599 (William Carey Jones ed. 1916) (Orin Kip McMurray, Supplemental Chapter) (“The subject of Conflict of Laws has been developed as a branch of English law since the publication of Blackstone’s Commentaries. Very few questions involving the application of foreign law had before that date come before the English courts, and, generally, no attempt had been made to apply such law even in cases where justice would seem to demand it. To some extent, in matters of status particularly, English courts were obliged to recognize the binding force of foreign law, as in the case of marriages contracted abroad or in Scotland. But in general, questions as to the applicability of foreign law or the validity of foreign judgments seem to have been disregarded both by bench and bar.”).

resident with respect to an accident that occurred in Wisconsin at a time when both the insured and beneficiary were Wisconsin residents. A divided Court upheld the application of Minnesota law to the case. The plurality ruled that the issue turned, much like an adjudicative jurisdiction dispute, on the totality of contacts between the sovereign and the claim, and found the beneficiary’s non-pretextual acquisition of Minnesota residency and the insured’s history of Minnesota employment constitutionally sufficient. Justice Stevens, supplying the necessary fifth vote, characterized the Minnesota court’s conflict-of-laws analysis as deficient, but not unconstitutional.

Phillips Petroleum Co. v. Shutts shows that Allstate does not represent a complete surrender of a federal domain over State prescriptive-jurisdiction decisions. The Court ruled that Kansas could not apply its law to disputes over natural gas leases where neither the leased property nor the parties to the lease had any connection to Kansas, even though the case had validly proceeded as a class action based in Kansas. A parallel case decided three years later undermined the vigor of that ruling by holding that, although Kansas could not apply its own law, it could interpret foreign law in a manner that harmonizes that law with its own as long as no express foreign authority mandates otherwise.

Federal supervision of domain conflicts between States and foreign nations has somewhat more bite. In Home Insurance Co. v. Dick, a case not unlike Allstate, an insured resident sought to apply the forum’s insurance law to a contract between himself and a Mexican insurer for property and activity in Mexico. The Court invoked due process to rein in unjustifiable assertions of prescriptive jurisdiction over foreign transactions. The case suggests that

157–59 and accompanying text, also applied the Full Faith and Credit Clause, although the Court did not indicate any significant differences in the effect of the two doctrines. See id. at 321–22 (Stevens, J., concurring in judgment) (discussing Full Faith and Credit Clause).
155. Id. at 313–20.
156. Id. at 324–25 (arguing that the decision did not conform to settled conflict-of-laws jurisprudence, but did not pose a threat to Wisconsin’s sovereignty).
158. Id. at 814–23.
160. 281 U.S. 397 (1930).
161. Id. at 407–08. Although one could argue that this is a stale precedent, the Court has cited it approvingly in modern times, including in Shutts. 472 U.S. at 820.
a gap may exist between the limits on domain overlaps with other States and those with foreign countries.\textsuperscript{162}

Of even greater significance is the act of state doctrine. This rule of federal common law requires States to accept the domain of a foreign sovereign with respect to matters within that sovereign's territory. In particular, it forbids any State from questioning the validity (as distinct from effects) of official acts applied within a foreign sovereign's territory. Unlike the conventional rules governing conflicts of laws, the doctrine forbids States from inquiring into the internal validity of official acts performed within that domain.\textsuperscript{163}

Finally, federal law polices the content of otherwise permissible domain overlaps by prohibiting States from making rules that discriminate invidiously against other States or foreign nations. Most recently, the Supreme Court struck down a Nevada rule allowing unlimited damages for claims based on misconduct by other States' officials, despite a law capping damages against its own officials in similar circumstances.\textsuperscript{164} Although Nevada was entitled to apply its own law to the case, it could not apply a law that manifested a policy of hostility towards another State.\textsuperscript{165}

Even with these modest federal limits in place, most of the negotiation of domain overlaps among States, as well as between States and foreign nations, relies on self-policing by independent sovereigns. As Allstate illustrates, States seems to have a wide range of permissible choices and can impose their own rules on persons, things and transactions outside their territory. What is interesting, however, is the extent that States have converged on focal points that eliminate domain overlaps in areas where the cost of conflicts is likely to be especially high.

A strong example illustrating State convergence on focal points to eliminate domain overlaps is the local action doctrine. Its modern form requires

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  \item \textsuperscript{162} 281 U.S. at 407–08. The Allstate Court distinguished Dick on the ground that Allstate Insurance, unlike Home Insurance, was licensed to do business in the forum and that the insured, although a resident of the forum, was working and domiciled abroad. See Allstate Ins. Co. v. Hague, 449 U.S. 302, 309–11 (1981). For an argument that federal supervision of domain overlaps with foreign jurisdictions should be more relaxed than of domestic ones, see Laycock, supra note 159, at 259–61.
  \item \textsuperscript{163} See Fourth Restatement § 441. On the distinction between validity and effects, see John Harrison, The American Act of State Doctrine, 47 George Mason J. Int'l L. 507, 533–37 (2016).
  \item \textsuperscript{164} Franchise Tax Bd. of Cal. v. Hyatt, 136 S. Ct. 1277, 1279 (2016).
  \item \textsuperscript{165} Id. at 1282–83.
\end{itemize}
not only the application of the law of the territorial sovereign to issues about title to reality, but normally excludes litigation of those issues anywhere but in the local sovereign’s courts. In instances where the court of a non-territorial sovereign must determine those issues, it must apply both the primary and choice-of-law rules of the territorial sovereign.\footnote{\textit{See} Eldee-K Rental Props., LLC v. DIRECTV, Inc., 748 F.3d 943, 946–49 (9th Cir. 2014) (discussing the history of the local action doctrine).} In other words, all U.S. jurisdictions accept that real “property questions are within the exclusive competence of the place where property is located.”\footnote{\textit{James Y. Stem, Property, Exclusivity, and Jurisdiction}, 100 VA. L. REV. 111, 119–20 (2014).}

One might dismiss this rule as an atavistic remnant based on the tangibility of reality, the locality of which is manifest. Yet something very similar exists in corporate law, a body of law that rests on layers of legal fictions. Without exception, U.S. States accept that the law of the place of incorporation governs most issues of internal governance and ownership of corporations. This uniformity is especially striking given that in other countries a different domain assignment rule choosing the law of the “real seat” of the enterprises applies instead.\footnote{\textit{Roberta Romano, The Genius of American Corporate Law} 132–34 (1993).}

These examples illustrate a propensity towards uniformity and formality in domain assignments where conflicting rules would impose significant costs. The concept of property, for example, implies an ultimate owner with exclusive authority to act as gatekeeper over the asset’s use.\footnote{\textit{See} Henry E. Smith, \textit{Property as the Law of Things}, 125 HARV. L. REV. 1691, 1710–11 (2012) (noting that the right to exclude provides the owner with a “gatekeeper right” and “indirectly protects interests in use.”); Thomas W. Merrill & Henry E. Smith, \textit{Optimal Standardization in the Law of Property: The Numerus Clausus Principle}, 110 YALE L.J. 1, 24–42 (2000) (examining the costs associated with property rights, and suggesting that the \textit{numerus clausus} principle promotes an “optimal standardization of property rights”).} Recognition of multiple gatekeepers without using any rule to sort out contradictory commands raises the cost of managing and developing the interest in question. Recognizing this problem, the States have gravitated toward a domain assignment rule that is both universal and, because of its formality, transparent in application.

Taken together, the rules regulating domain overlaps among States and between States and foreign countries conform to the rational-choice theory. States do not attempt to extend their domains over foreign matters of a highly localized character. Some of this reticence reflects the low payoff to a State
from doing so, but also the implicit retaliation that might follow from truculence. The federal domain is limited largely to instances of discrimination, where a State’s benefits might outweigh its costs even though the domain assignment would generate negative externalities. Hence, we observe a lax general regime combined with prohibition of domain assignments seen as hostile to other States.

5. Tribal Sovereignty, the United States and the States

In addition to the States proper, the United States comprises another class of substate sovereigns, namely American Indian tribes. The class has a distinctive history as well as contemporary status. The tribes had no role in making the Constitution, which addresses relations between the national government and them. Their legal status has evolved over the years from that of foreign sovereigns empowered to make treaties with the national government to that of dependencies of the national government bound by a trust obligation that the national government itself defines and controls.170

The fundamental elements of the respective domains of the national government, the tribes, and the States have remained in place since the early nineteenth century. The national government has plenary power over the tribes.171 The tribes enjoy inherent sovereignty expressed legally in their capacity to make treaties with the national government.172 States may not regulate tribal affairs except to the extent that the national government permits. The adoption of the first of the Nonintercourse Acts in 1790 expressly asserted the exclusive authority of the national government to validate transactions in land between tribes and other persons.173 Congress in turn has authorized tribes

171. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning....”).
and States to enter into compacts regarding specific subjects, which may take effect upon approval of the Department of Interior.\textsuperscript{174} The status of tribal sovereignty depends ultimately on choices made within the federal domain. In the past, the national government has not shied away from abrogating treaty terms when it chose to.\textsuperscript{175} The modern federal policy, however, promotes self-sufficiency and hence protects tribal domains both against the States, through the doctrine of preemption, and the national government, through the doctrine of trust relationship.\textsuperscript{176}

Some evidence suggests that the modern policy has positive welfare effects. By allowing Indian tribes to function as sovereign federal enclaves, rather than promoting their absorption into State domains, overall welfare is enhanced. Given their history of oppression, discrimination, and deprivation, American Indians suffer from unusually high incidence of distress, as measured by indicators such as unemployment, chronic illness, incarceration, and the like, when relegated to State domains. These costs had social ramifications: Put technically, Indians suffering generated negative externalities. Self-sufficiency and the accompanying independence from States seems to have reduced these social costs.\textsuperscript{177}

This arrangement is consistent with a rational-choice model of domain assignment. A single dominant sovereign dictates the assignments. Because of externalities, however, the dominant sovereign must take account of the impact of the choices on the subordinate one. Trial and error have led to an arrangement that seems, if not optimal, at least with greater welfare benefits than that which it succeeded.
B. International Law

The patterns we see when looking at domain assignments in the domestic U.S. context also emerge when one explores the domain of international law. Domain-assignment issues saturate this field. For international law to do much work, a wide range of national officials must do, or not do, something, and those somethings are seldom pro forma or ministerial. Whenever international law calls on a responsible national actor to carry out its commands, the actor confronts a domain assignment question. The actor must compare its national authorities to those of the international lawmaker to determine both the validity and the scope of the law. As the examples reviewed below indicate, international law often does not come out on top.

Even where international law applies, it often must borrow from, or at least react to, domestic law. Much of international law assigns outcomes based on premises about domestic legal entitlements. In these instances legal actors, such as judges in tribunals, must determine the content of domestic law as a predicate to applying an international legal rule. In this context, international law defers to the state domain but, as we shall see, only provisionally.

Complicating these interactions is the absence of authoritative third-party dispute-resolution institutions to which all relevant actors defer. Aside from a few regional structures such as the Court of Justice of the European Union and the European Court on Human Rights, international tribunals lack express authority to command obedience to their decisions from domestic actors.178

178. Even within these regional arrangements, the obligation to defer to decisions of the international tribunal is not absolute. Member states to the Treaty on European Union and the European Convention on Human Rights retain and have asserted the power to determine whether the tribunal possessed the competence to decide the matter at hand. See, e.g., Pham v. Sec’y of State for the Home Dep’t, [2015] UKSC 19 ¶ 90 (“A domestic court faces a particular dilemma if, in the face of the clear language of a Treaty and of associated declarations and decisions . . . the Court of Justice [of the European Union] reaches a decision which oversteps jurisdictional limits which Member States have clearly set at the European Treaty level and which are reflected domestically in their constitutional arrangements. . . . [A] domestic court must ultimately decide for itself what is consistent with its own domestic constitutional arrangements, including in the case of the [U.K.] 1972 Act what jurisdictional limits exist under the European Treaties and upon the competence conferred on European institutions including the Court of Justice.”). In the case of the European Court on Human Rights, the deference burden on national courts is even lighter. The Convention obligates states to pay the monetary compensation ordered by the Court, but leaves domestic actors free to reject what they consider to be incorrect interpretations of the Convention. See, e.g., R v Horncastle, [2009] UKSC 14, [2010] 2 AC 373; Chester v. Sec’y of State for Justice, [2013] UKSC 63, [2014] AC 271; Moohan v. Lord Advo-
What results is competition between national and international actors and among international actors, rather than consensus about both the content and domain of international law.

Competition, however, does not mean chaos. Interactions among national actors as well as between international and domestic actors does produce some cooperation, even if not inevitably or always. I review some instances of cooperation on domain assignments below.

1. Provisional Deference to International Law: Law of Private Transactions

At the time of the founding of the United States, international law dominated many economically critical fields. Until the development of canals and railroads in the mid-nineteenth century, most commerce at a distance required water transport. The Framers of the U.S. Constitution recognized the significance of the field by providing expressly for the admiralty jurisdiction of the federal courts, a power that the Judiciary Act of 1789 promptly executed by giving these courts original jurisdiction over admiralty and maritime claims.\(^{179}\) Everyone expected that these courts would apply the law of nations, an ancestor of what we now call international law, without necessarily specifying whether this practice reflected a legal obligation or a nonbinding accommodation to the interests of other states.\(^{180}\) Contemporary judicial opinions did not maintain that national law could not displace international rules, but rather that the common practice of states purporting to take part in an international legal order was to apply international rules until a valid domestic lawmaker decided otherwise.\(^{181}\)

A rational-choice theory of domain assignment can explain this posture.

cate, [2014] UKSC 67, [2015] 1 AC 901. Russia has rejected the duty to pay compensation for violations of the Convention. See infra note 224 and accompanying text.
179. U.S. Const. art. III, § 2, cl. 1; Judiciary Act of 1789, § 9, 1 Stat. 73, 76–77.
181. This approach continued into the twentieth century. See, e.g., The Paquete Habana, 175 U.S. 677, 708 (1900) ("This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.").
The various national practices that made up the law of admiralty long preexisted the United States. The nature of international shipping meant that goods and carriers could wind up in multiple jurisdictions and become subjects of a dispute almost anywhere in the European-dominated world. Treating domestic practice as falling within the international domain had the effect of developing focal points around substantive rules that largely sustained, rather than hindered, a critical economic activity. Recognizing the scope of the international domain allowed the United States, a newcomer to the law of nations, to minimize reliance and stability costs and to induce reciprocity by other states with respect to U.S. ships and shippers.

Interestingly, the initial practice of the revolutionary States did not always conform to this logic. Several of the States exercised not only the right to confiscate the real and personal property of enemy aliens, a power that Anglo-European practice upheld, but also impaired their contractual rights as creditors, a practice that many European powers rejected.\(^{182}\) The Treaty of Paris, in setting the terms of the peace with Great Britain, promised to reverse this outcome, and the new Constitution in turn created the institutional arrangements to make honoring that promise possible.\(^{183}\) This episode suggests that the United States made the domain assignment indicated by a rational-choice calculus not immediately, but rather as a result of trial and error, updating in light of the responses to its earlier truculent acts.

The basic structure of domain assignments evident in early U.S. approaches to admiralty and maritime law can be usefully compared to contemporaneous practice regarding the international law of commercial transactions. For the purpose of illustration, this Article focuses on the U.S. approach to the UN Convention on the International Sale of Goods.\(^{184}\) In essence, the structure of this assignment constitutes the opposite of admiralty law.

International sales of goods and the contract law that sustain them existed long before the UN Convention (which entered into force for the United States in 1988) came along. The Convention did not devise innovative solutions to international contracting. Rather, it provided a means for states that had not

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183. Id. at 242–43 (finding that federal courts created by the new Constitution can overturn State impediments to payments of debt contracts under the Supremacy Clause and the Treaty of Paris).
developed a significant body of relevant law, especially decolonizing states and, later, formerly socialist states, to acquire a complete body of sales law at a relatively low cost.\textsuperscript{185}

The problem that the UN Convention presents for states that have a preexisting and well-developed body of rules for international sales contracts is high switching costs with only modest offsetting benefits. The Convention’s provisions mostly impose standards, rather than rules, on these contracts, for reasons related to the exigencies of international negotiation rather than the needs of persons engaging in these transactions.\textsuperscript{186} Recognizing this shortcoming, the Convention allows contracting parties to opt out of its domain.\textsuperscript{187} As a result, it not only brings these contracts within the international domain, but also allows individual contractual parties to assign a different domain as they wish.

Sales contracts between sophisticated parties do not present significant coordination problems. As long as these actors can rely on governing law and choice-of-forum clauses, they can address most potential disputes within the confines of the contract itself. The interests of third parties not subject to the contract normally have no bearing on sales contracts. Tailoring legal rights and duties to the interests of particular transactors is exactly what contract law enables.\textsuperscript{188} Accordingly, the Convention does not produce economies of scale: Individual contracts do not grow in value to the extent that more contracts use Convention rules. Permitting private opt-outs thus presents no social cost and potentially considerable benefits for contracting parties.

A secondary issue is whether to make revocation of the treaty domain assignment more or less costly. On the one hand, U.S. courts have required contracting parties to use language \textit{ex ante} that adverts to the Convention as a means of exercising the opt-out right.\textsuperscript{189} On the other hand, they also have allowed parties to indicate by their behavior once a dispute has arisen that they do not want the Convention to apply, mostly by making it easy for a party to

\begin{footnotes}
\item[186] \textit{Id.} at 756–61.
\item[187] See CISG, supra note 184, at art. 6 ("The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.").
\end{footnotes}
waive an argument based on application of the Convention. 190 Both rules can be understood as respecting party autonomy, and thus as basing domain assignment on private choice alone.

This approach fits a rational-choice theory of domain assignment. The purpose of the Convention is not to facilitate sovereign cooperation, but rather lowering the costs of making and enforcing a particular class of contracts. Preserving the opt-out feature is an essential part of this cost-minimization objective because across a broad range of transactions application of the Convention could increase contracting costs. Using rules intended to surface party preferences as the basis for triggering the opt-out, and not invoking broader structural arguments such as the importance of treaty enforcement, makes it more likely that the rules that the parties prefer, and not those supplied by the Convention, will apply to international sales contracts.

2. Provisional Deference to Domestic Law: Public Law

International law reacts to domestic legal interests in diverse contexts, such as business investments and criminal proceedings. In these instances, as in others, the international obligations arise only once certain domestic legal rights, whether property or procedural, are realized. To apply the international obligation, one first must determine the domestic legal landscape.

Treaty-based protection of foreign investments illustrates this. In the past few decades, an extensive network of treaties has sprung up to replace traditional state-to-state dispute resolution with arbitral mechanisms that private persons can invoke against states. 191 Although much variation exists, in general the treaties protect investors from expropriation, discrimination, and unfair treatment. However, these standards require a great deal of filling in to take on meaning.

These investor-protection regimes have great political salience. They have become a flash point in the general populist resistance to the liberal international economic order, as exemplified by events such as Brexit and the


2016 U.S. presidential election. Critics see them as embodying a pernicious political economy pursuant to which rapacious multinational corporations thwart desirable sovereign regulatory power to the detriment of the general welfare.\textsuperscript{192} Much of the debate turns on how these treaties define the relationship between their domain and the domestic competence of states to which they apply.\textsuperscript{193}

As a formal matter, investment treaties do not annul or otherwise invalidate government actions. A state that expropriates an investor’s assets, for example, does not have to disgorge the property and return it to the former owner. A determination that a regulatory course, such as a tax assessment, violates the treaty obligations does not result in invalidation of the regulation itself. What the treaties do instead is attach monetary penalties to certain official conduct. A state that expropriates does not have to return the property, but it does have to pay compensation. To this extent, the rules in the treaty domain operate independently of domestic law. They determine the financial consequences of national acts, but do not affect the legal validity of those acts.

This formal point, however, is incomplete. From a purely functional perspective, the treaties attach fines to certain governmental acts, making those acts more costly. Even if these fines do not negate government regulation, they probably deter it.\textsuperscript{194} Hence, the criticisms of the regime have real bite.

From the perspective of domain assignment, application of treaty standards to domestic acts does not make domestic law irrelevant. Built into the international standards are issues that depend on the content of domestic law. No investment treaty, for example, attaches consequences to the imposition of taxes, something seen as a core sovereign function. But a sovereign may


not disguise an expropriation by labeling it a tax. Sorting out the difference between costly sovereign acts of the sort that investors should anticipate, on the one hand, and pretextual actions designed to circumvent international obligations, on the other hand, requires a background assessment of national law. Identification of the pretextual requires determination of what expectations national law encouraged.195

What this means in practice is that investment treaties create institutions, namely ad hoc arbitral panels, that have the power, and indeed duty, to make determinations about the content of domestic law even as they apply law drawn from the international domain. The international law they apply for the most part constitutes standards rather rules, which gives the treaty bodies some discretion as to when and how to award compensation. This discretion makes the assessment of domestic law especially important.196

Resort by tribunals to national law functions as a provisional assignment rule. A tribunal purports only to discover national law and not to shape it to fit the exigencies of the treaty that it applies. However, it would defeat the purpose of these treaties to allow official representatives of states to have the final say on what national law does. Resorting to national courts to settle unclear issues will not work if those courts lack independence and instead back up whatever current national officials assert. Accordingly, sometimes the tribunals will reject sources of authority about the content of national law that, were the issue exclusively within the national domain, they would be bound to follow.

The Yukas dispute illustrates this practice. In three different treaty-based proceedings, investors asserted that the Russian government’s tax-assessment


196. See Stephan, supra note 41, at 606–07. Most investment treaties contain a mechanism that allows substitution of rules for standards. Investors can negotiate an express agreement with a sovereign that fixes the sovereign’s regulatory authority with some precision. Many such agreements address tax issues by specifying exactly the boundaries of the state’s discretion. The treaties, in turn, contain an “umbrella clause” that makes violation of a compact an independent ground for relief).
and tax-enforcement actions destroyed the economic value of what had been 
that country’s largest energy firm and thus effected an expropriation under the 
relevant treaties.\textsuperscript{197} In each case the tribunals determined that an expro- 
piation, rather than a legitimate tax assessment followed by normal enforcement 
measures, had occurred. To make this distinction, the tribunals had to deter-
mine both what would have been a plausible tax assessment on the firm and 
what measures to collect that assessment would have been expected. By hold-
ing that the tax was an expropriation, the tribunal necessarily rejected argu-
ments by national officials and decisions by Russian courts finding that the 
government’s actions rested on established rules of Russian law.

The context of these cases explains why, within the terms of a rational-
choice theory, the national domain is provisional rather than complete. On 
the one hand, an investment tribunal that disregarded national law for most 
legal characterizations of transactions and regulatory actions would put a large 
burden on international law, which would have to devise substitutes. Inves-
tors would lose legal reliability and stability. In most cases, the national do-
main should be the least-cost provider of these rules.

On the other hand, were deference to the national domain absolute rather 
than provisional, the investor-protection regime could not do its job. Domes-
tic actors have an incentive to justify official actions after the fact, and states 
create these treaty regimes precisely because they lack complete confidence 
in such justifications. An absolute assignment to the national domain would 
degrade the value of the treaty commitments by licensing expropriation, dis-
crimination and unfair treatment to the extent ascribed to preexisting tax and 
other regulatory law. Giving investment tribunals the capacity to disregard 
claims about national law that seem hostile to the investment regime can be 
beneficial, even taking into account the costs of substituting new rules from 
the international domain.

If one accepts the political-economy arguments of the critics of the in-
vestment-arbitration regime, one might conclude that any step that frustrates 
the purpose of these treaties enhances welfare. This Article will return to this 
kind of argument in its next Section. From the perspective of the treaty-mak-
ers themselves, however, the provisionality of the assignment is necessary for 
achieving the cooperation to which the treaties purport to promote. The tri-

bunal, rather than national authorities, thus serves as the least-cost provider of

\textsuperscript{197} See Paul B. Stephan, Taxation and Expropriation—The Destruction of the Yukos Oil Empire, 
rules in a narrow range defined by the purposes of the treaties.

These examples show the pattern of provisional deference to the least-cost provider of law that we saw in the U.S. federalism context. Both the deference and the provisionality are consistent with a rational-choice model based on maximizing the benefits from cooperation. Rather than relying on a simple hierarchical rule such as international law always wins, official actors make domain assignments that, in broad terms, correspond to what a rational-choice theory predicts.

3. National Interests and Domain Conflicts

States do not always join cooperative enterprises. Alternatives for any given project include abstention and obstruction. In terms of international law, this means a state can either refuse to consent to an obligation, imposed by either a treaty or customary law, in the first place or, having made a commitment, breach it.\footnote{A third alternative is to withdraw from an obligation, either by denouncing the treaty or rejecting the custom. See Bradley & Gulati, supra note 180, at 204–05. But, upon reflection, exit reduces to either obey or breach. If international law recognizes the exit, then there is no obligation to dis-honor.} We observe states taking these paths with some frequency.

First, treaties commonly have express opt-outs. These provisions identify interests that states may refuse to compromise in the course of the joint project. In some but not all cases, the treaty allows self-judging. Such clauses permit unilateral withdrawal from treaty obligations, which degrades the reliability of the promises that underlie these obligations.

to informal pressure not to abuse these opt-outs, but do not automatically accept the judgment of third-party tribunals about their scope.\textsuperscript{200}

Second, general international law itself contains opt-outs for its obligations. Even without an express provision in a treaty, states may authorize treaty breaches by suspending their own obligations.\textsuperscript{201} In addition, the doctrine of \textit{rebus sic stantibus} allows states to take into account fundamental changes of circumstances as a means of determining what obligations apply.\textsuperscript{202} Principles of good faith and proportionality may limit resorting to these options, but their existence indicates a general recognition of the ability of states to put aside international cooperation where (their leaders believe that) important national interests dictate.

Third, a state can dispute a domain assignment while pursuing overall compliance with the cooperative project. This can arise, for example, with respect to procedural rules. A state might accept the content of the international obligation but maintain that its fulfillment within the domestic legal system is subject to general and neutral domestic rules regarding governmental processes, such as those found in the criminal justice system. Departing from these rules to implement a particular international obligation might, from the state’s perspective, put its entire system of procedures at risk and produce unacceptable disruption.

Two recent episodes illustrate this problem. One involves the ongoing conflict between the United States and the International Court of Justice, the other involves a simmering dispute between the United Kingdom and the European Court of Human Rights. In each instance, the national sovereign accepted the primary obligation imposed by the relevant treaty, but sought to reconcile its obligation with its general procedural rules, while the international tribunal rejected any reconciliation.

In the U.S. case, the Supreme Court acknowledged that under the Vienna Convention on Consular Relations, an alien accused of a crime must be informed by proper authorities of the right under the Convention to seek consular assistance. It nonetheless upheld the application by State courts of a waiver rule that barred a criminal defendant from belatedly seeking a new trial based...

\textsuperscript{200} \textit{Scott} \& \textit{Stephan}, supra note 32, at 159–62.


on a violation of the treaty right. The ICJ has held that no waiver rule could apply to decisions made by a defendant’s lawyer as distinguished from choices made by the defendant directly.

In the British case, the Supreme Court upheld the application of a statutory exception to the hearsay rule in criminal cases. The Court believed that the protections provided by the statute, including judicial findings about the significance of the evidence and the jury instructions as to the limited weight of testimony where a defendant could not confront the source, were sufficient. The European Court of Human Rights earlier had declared that the statute failed adequately to protect the defendant’s rights because it did not require the court to take into account the importance of the testimony in light of all evidence considered at trial. The Supreme Court noted that in a jury trial, a court could not withdraw submitted evidence and thus could not make an assessment that required foreknowledge of everything that might be submitted. In each instance, national lawmakers rejected a domain-assignment assertion made by a treaty-based international court regarding the internal procedural rules of criminal adjudication.

One way of looking at these two episodes is disagreement over a domain assignment based on different understandings of what constitutes normal criminal procedure in the common-law system. The greater role, and therefore responsibility, of defense lawyers in the adversarial common-law system may explain why the civil-law judges who dominate the ICJ failed to give credence to the procedural default rule invoked by the United States. Someone accustomed to civil-law procedures, where judges take a more proactive

205. Al-Khawaja and Tahery v. United Kingdom, (2009) 49 E.H.R.R. 1, 15–17. In an appeal to the Grand Chamber, the European Court of Human Rights backed off from some of the stronger pronouncements of the first opinion in the case, but a fundamental conflict between the jurisprudence of the two courts remains. Al-Khawaja and Tahery v. United Kingdom, (2012) 54 E.H.R.R. 23, ¶ 130. In essence, the European Court of Human Rights conditions admissibility on the evidence’s potential for prejudice given all the other evidence submitted at trial. Id. at ¶ 135. The U.K. law, by contrast, requires the court to take a number of precautions against prejudice, but does not use the condition that the European Court of Human Rights mandates. Stephan, supra note 58, at 221–22.
rule, might have difficulty holding a defendant accountable for a choice by a lawyer not to raise an issue in a timely fashion. Yet a U.S. judge would regard abandonment of client accountability for competent attorney choices as inconceivable.

Similarly, the statutory hearsay exception applied in the United Kingdom operates within the context of a jury system, which requires determinations about admissibility on the fly, rather than at the end of the submission of all evidence. A failure to appreciate this difference may explain why the civil-law judges of the European Court viewed the British rule as aberrant, while the U.K. judges saw the Court’s rule as unworkable.207

Framing plays an important role in understanding the calculus of the international and national courts in these disputes. Each sought to vindicate an important principle within its domain. For the international courts, a primary rule limiting state conduct—access to consular services for the ICJ, the right to confront and rebut inculpatory evidence in the case of the European Court—was at stake. Each saw its core mission of vindicating these rights as the purpose of the proceeding. For the domestic court, the issue instead was administration of criminal justice in light of fundamental procedural choices. In the case of the United States, the issue was the ability of the defendant’s lawyer through procedural default to bind the defendant to a waiver of a claim. In the case of the United Kingdom, the issue was one of managing the timing of presentation of evidence to a jury.

From the perspective of this framing, the stakes were significantly different for the international tribunals and the national courts. The tribunals were vindicating a particular application of a particular right, not the issue of whether the right existed or whether they had the authority to interpret the right’s meaning. In neither case did the tribunal seem to understand the procedural issue, much less address it. The national courts, by contrast, did not disagree with the substantive rule, but saw their entire procedural system at risk. The asymmetric implications of the international rule for a critically important domestic field, namely the functioning of criminal justice, may explain why both states chose to take on the international regime in spite of the attendant costs.

Also relevant is the absence of direct costs for the truculent approach of

the domestic courts. Domain conflicts over procedural rules, as illustrated by the U.S. and U.K. examples, are unlikely to present reciprocity issues. As long as the procedural rules are not a pretextual effort to eviscerate the right, other parties to the cooperative enterprise should not retaliate by limiting their own enforcement of the right. The U.S. position on consular notification, for example, should not induce other states to refuse to notify U.S. nationals of their rights upon arrest. Rather, these states can interpret the U.S. approach as permitting each state to follow its own general and neutral procedures in determining at what point in the criminal justice process a person may seek relief for violation of the right to notification. Similarly, given that no other party to the European Convention, save Ireland, uses a criminal jury in the way that the United Kingdom does, defections from the general rule of limiting the use of hearsay evidence should not result from the Supreme Court’s insistence on a local solution to this general problem.

One might respond that any defection from application of a rule of international law undermines the strength of all international law, not just the rule in question. Showing other states that defiance is possible, the argument indicates, allows states to pick and choose which obligations to respect and which to disregard. As such, anarchy will follow.

This response, however, represents a kind of legal utopianism that too easily can morph into legal nihilism.208 State compliance with international law never is complete and probably has decreased as efforts to expand the domain of international law have increased. Truculence is not inevitably fatal to cooperation, and its possibility may encourage states to tolerate growth in international law to begin with.

Consider a different manifestation of truculence. Some states have claimed that domestic constitutional law limits their ability to honor international legal obligations. These situations, like disputes over procedural rules, represent a domain conflict. Unlike the procedural issues, however, these conflicts normally entail a broader withdrawal from the international domain.

The assertion of constitutional impediments to honoring international

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commitments inevitably comes after the fact, as states normally do not disclose these barriers at the time that they undertake these obligations. Rather, states raise constitutional arguments either when the nature and content of an international obligation changes, relative to the state’s expectation at the time of commitment, or when the state’s interest in either the specific international-cooperation project at issue or international cooperation generally changes. From the perspective of international law, domestic-law impediments are all alike and, almost always, equally ineffectual, constitutional or not. International law, as a general matter, does not excuse breaches of international obligations by resort to domestic law.\textsuperscript{209} From a state’s viewpoint, however, constitutional constraints fall into a separate category because of their relative entrenchment.\textsuperscript{210}

Attributing an inability to honor international law to a constitutional requirement may indicate the degree of a state’s seriousness about and commitment to its chosen course of conduct. The signal gains strength to the extent that ultimate control over domestic constitutional interpretation rests in an independent and prestigious body, such as a well-regarded constitutional court. But constitutional arguments do not depend on the existence of such courts.

Illustrative is the question of voting rights for criminal convicts. The European Court on Human Rights has interpreted the Convention as banning automatic and permanent disenfranchisement of persons convicted of serious crimes.\textsuperscript{211} The United Kingdom’s parliament, however, declined to revise its legislation to comply with this mandate, and the Supreme Court has ruled it lacks the authority to bring about this outcome on its own initiative.\textsuperscript{212} The constitutional rules at work here are structural rather than substantive: The British courts recognize the principle of parliamentary supremacy and will not

\begin{footnotesize}
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\item \textsuperscript{209} See VCLT, supra note 201, art. 27.
\item \textsuperscript{210} States vary considerably in the degree of entrenchment associated with constitutional provisions. The gap between constitutional and non-constitutional entrenchment can be large (as in the case of the United States or Germany’s eternity clauses) or relatively small (as in jurisdictions that impose only a modest supermajority-vote requirement on the legislature as a condition of changing many constitutional provisions). See Mila Versteeg & Emily Zackin, \textit{Constitutions Un-Entrenched: Towards an Alternative Theory of Constitutional Design}, 110 AM. POL. SCI. REV. 657 (2016). The point is the ascribing constitutional status to a legal issue increases entrenchment relative to most other ascriptions, even if the degree of that entrenchment is not great.
\item \textsuperscript{211} Hirst v. United Kingdom (No. 2), App. No 74025/01, 2005-IX Eur. Ct. H.R., 187, 216.
\end{itemize}
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incorporate the case law of an international tribunal into domestic jurisprudence without some legislative indication that it may do so.

Compare the Russian approach to this problem. Russia’s constitution expressly incorporates its treaty obligations into domestic law and, unlike the U.S. Supremacy Clause, endows them with hierarchical priority over legislation.\textsuperscript{213} The principle of constitutional supremacy, however, means that Russian law will not recognize a treaty provision that conflicts with the Constitution. The Constitutional Court of the Russian Federation has ruled that the principle of felon disenfranchisement has constitutional stature and thus overrides the requirements of the European Convention.\textsuperscript{214} The Russian approach requires a constitutional amendment, rather than a mere act of Parliament, to bring about compliance with the Convention.

The reciprocity dimension of these claims is especially interesting. Some have argued that all human-rights issues represent a departure from classic international-cooperation problems because an offended state has no reason to abandon its obligation because of another’s breach. No one has proposed, for example, that the United Kingdom start torturing people as retaliation for (alleged) breaches of the Convention Against Torture by the United States.\textsuperscript{215} As a result, it would seem that reciprocity and the risk of retaliation have no work to do in explaining compliance with human-rights rules.

The matter is more complicated. Historically, recognition of human rights reflected the interests of sovereigns in minority populations of other states in which they have a significant affinity, such as co-religionists at the end of the Thirty Years War or, in the case of Russia at the Congress of Berlin, Orthodox Armenians in the Ottoman Empire.\textsuperscript{216} In some cases, however, the observation that reciprocity and the threat of retaliation play no role is correct. Voting rights presents an especially clear example because international law limits voting rights to nationals of the sovereign in question.\textsuperscript{217} Concerns

\textsuperscript{213} See KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 15(4).
\textsuperscript{215} See POSNER & SYKES, supra note 54, at 73.
\textsuperscript{216} See STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 80-81, 87-88 (1999).
\textsuperscript{217} See, e.g., European Convention on Human Rights art. 16, Nov. 4, 1950, 213 U.N.T.S. 221 (containing an express opt-out clause permitting discrimination against aliens with respect to political activity). Contrast Article 16 of the convention with the right at issue in the consular notification
about reciprocity thus have no bearing on the decision to breach, whatever the impact of other forces such as reputational concerns. Accordingly, the low international-cooperation payoff might explain the truculence of the United Kingdom and Russia with respect to prisoner voting.

One notorious case, however, arose in a context where reciprocity and retaliation seem more plausible. A prolonged dispute between Italy and Germany over the permissibility under international law of haling a foreign sovereign into a domestic court led to a decision of the ICJ declaring that principles of foreign sovereign immunity recognized no exception for grave human rights abuses. The Italian constitution provides for direct effect of international law within the domestic legal system, and the Italian legislature promptly adopted a statute implementing the ICJ judgment. Italy’s Constitution Court then invalidated the statute. It reasoned that the constitutional principle of access to civil justice overrides the duty to honor international legal obligations.

One might suppose that Germany could respond to Italy’s transgression of its international legal rights by opening up its courts to suits against Italy, say for fascist crimes against socialists and Jews. Thus Italy, in rejecting sovereign immunity, exposed itself to potentially substantial costs. Moreover, the supposed constitutional benefit advanced—protecting access to civil justice in Italian courts—seems rather problematic, given the notorious deficiencies in the Italian court system. At first glance, then, this episode seems

cases, Medellin v. Texas, 552 U.S. 491 (2008), which extends only to aliens and therefore might be withdrawn on a retaliatory basis, or the confrontation right at issue in R v. Horncastle, [2009] UKSC 14, which could affect aliens as well as nationals.

218. Scholars dispute whether a bad human-rights record affects a state’s reputation for honoring other kinds of obligations, such as arms control or trade. See Scott & Stephan, supra note 32, at 17–18.


221. Delays in civil litigation are so extreme in Italy that the European Union amended its rules for court jurisdiction to limit the so-called “Italian torpedo.” This strategy allowed potential defendants with losing hands to rush to file in Italy so as to delay indefinitely any legal reckoning. See Margaret Moses, Arbitration/Litigation Interface: The European Debate, 35 NW. J. INT’L L. & BUS. 1, 9–12 (2014). The Italian civil suit that provoked the dispute that went to the ICJ reached judgment only because Germany, resting on its rights under international law, refused to appear to defend the case.

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inconsistent with the rational-choice model of domain assignments.

On reflection, however, the inconsistency of the Constitutional Court’s action with a rational-choice model may be less than it seems. First, the rational-choice model focuses on national interests, rather than particular institutions. There are many reasons for thinking that the Italian Court might not care about the foreign-relations consequences of its decision: It might distrust Italy’s political institutions to act in the country’s interests, or it might value its own prestige over the interests of the country as a whole. Second, and perhaps more importantly, the Court may have guessed that the odds of Germany retaliating were low, given that country’s investment in its reputation as an upholster of international law. If the only way that Germany could make Italy pay for its defiance of the ICJ was to itself act inconsistently with the ICJ’s pronouncements, it most likely would take no action.222

The last example of constitutional barriers to the international domain is the most problematic. Just recently the Russian Constitutional Court invalidated an order of the European Court on Human Rights to pay compensation to former shareholders of Yukos, a Russian company that had been wiped out by tax enforcement methods that the European Court held to violate the Convention.223 The Constitutional Court ruled that the Russian Constitution’s principles of equality and justice forbade honoring a judgment in favor of a company that (the Court maintained) had engaged in gross legal violations for which the Russian state had not been compensated. Paying the company or its shareholders compensation was tantamount to refunding a lawful tax. Countenancing the conduct of Yukos in any fashion, the Court held, also would violate the constitutional principle of rule of law.

The implications of the Russian decision are far greater than that of the


Italian Constitutional Court. It posits a general power of judicial review, under which the national court can reject on the merits any money judgment against the Russian Federation. This reasoning potentially could apply to any action of the state that the Russian courts have upheld, but that the European Court regards as a treaty violation. If the Court were to follow through on the implications of the decision, it would amount to a comprehensive repudiation of the core enforcement mechanism of the Convention.

The Constitutional Court’s decision in Yukos remains open to multiple interpretations. One might treat it as a one-off, reflecting the peculiar political salience of the Yukos dispute, in which Russian President Putin played a prominent part. Even this take, however, suggests that Russia asserts a veto over enforcement of the Convention in any case that matters to its political leadership. A broader reading of the decision suggests that the Court will block enforcement of any ruling of the European Court that questions the validity of decisions made by high-level actors, not the least its own.224

Assessing the cost of this truculence is complex. On the one hand, the classic human-rights paradox applies: Other parties to the European Convention have no reason to stop enforcing money judgments of the European Court just because Russia does, except in the rare case involving Russian claimants against those states. On the other hand, the enforcement part of the European Convention is central to the entire system, which magnifies the significance of Russia’s truculence. To the extent that other states link compliance with the Convention to eligibility for other cooperation projects, this particular act of truculence runs the risk of excluding Russia from a wide range of endeavors. One can view the Constitutional Court’s decision, and the Russian government’s procurement of it, as a bet on the poor prospects of international cooperation in Europe in the near term.

C. Review and Analysis

This Section has proceeded anecdotally rather than systematically. It thus does not purport to provide conclusive proof of the validity of the rational-choice model of domain assignments or to preclude other explanations of ob-

224. See Bill Bowring, Russia’s cases in the ECHR and the question of implementation, in RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS – THE STRASBOURG EFFECT 199, 221 (Lauri Mälksoo & Wolfgang Benedek eds. 2018) (“[I]t may be that the recent Yukos judgment of the Russian CC provokes a final rupture in relations between Russia and the [European human rights system].”)

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served practice. Even so, these anecdotes demonstrate the prevalence of domain assignments that respond to competing claims of sovereignty consistently with a rational-choice account.

Domain assignments occur not only in areas where traditional legal fields address them, especially conflicts of law, private international law, and the international law of prescriptive jurisdiction, but also in managing competing sovereignties within federal states and the relationship between international and domestic law. Some assignments result in conflicts, such as the ongoing dispute between the ICJ and the United States over procedural default and consular access or that between various European states and the European Court on Human Rights on convict voting rights. In many instances, however, assignments converge, no matter which actor makes them.

Throughout a rational-choice model of domain assignments illuminated the observed behavior. Sovereigns enter into agreements that address potential conflicts ex ante and even create a formal mechanism to resolve conflicts, even if actors exploit slack in these agreements as well as drift in the mechanism’s interpretation to revisit and revise these agreements. In the absence of agreements, actors typically make rational choices about assignments, rather than defaulting in favor of their sovereign. These choices are rational because they adopt the domain of the least-cost-provider of legal rules. In calculating the costs and benefits of a particular assignment, actors will account for the consequences of reciprocal actions by other sovereigns’ actors as well as the importance of the interest implicated by the assignment to its sovereign.

Domain conflicts expressing truculence do not occur very often, and typically only where significant sovereign interests are at stake. In areas where a third party has the capacity to resolve disputes conclusively, we see many initial disputes but few where truculence survives the third party’s determination. Where binding dispute resolution does not apply, such as where neither sovereign recognizes the other’s tribunal as conclusive, the conflicts that endure tend to expose important interests of the truculent actor. Again, these acts may rest on a plausible judgment that the costs of truculence will be less than those of compliance.

More broadly, one can see similar approaches to domain assignments where a broad ex ante agreement applies, such as the U.S. Constitution and the European treaties, as well as where cooperation depends on choosing a focal point. In particular, a review of U.S. domestic federal-State practice, as well as domain assignments among states, illuminates how states respond to
international law. What a rational-choice model predicts and what we observe are reassuringly similar, even if these observations do not represent a stringent empirical test.

It is reasonable to conclude, even though the point is not proved definitively, that, in general terms and subject to the qualifications that a messy reality demands, official actors make domain assignments in a way that advances the interests of the sovereigns on whose behalf they act. This is important, but it leaves open an important question: Is rational interest the right way to think about lawmaking?

Domain assignment is a formal and in many ways technical practice, dependent on the special knowledge of legal experts. As such, it carries with it a risk of mystification and illegitimate frustration of cherished values. Is there a case for formalist, legalist approaches to problems that have significant substantive ramifications?

If by formalism one means giving effect to rules rather than values, then formalism in domain assignments is defensible. I make the case for it in the next Section.

V. IN DEFENSE OF RATIONAL FORMALISM

This Article provides a rational-choice explanation for domain assignments based on sovereign interests. It both sketches out what a system of rules based on rational interest may look like and provides anecdotal evidence that much practice conforms to these rules. The rules both predicted and observed are formal in the sense that are definite and trans-substantive.

A critic, however, might argue that this focus on rationality and formalism is all wrong. What domain assignments should promote, the critic might contend, are values that advance human dignity and a full realization of human potential. These values transcend narrow personal or national interest and instead provide a foundation for greater human flourishing. Domain assignments should turn on substantive results that advance these values, not on an independent set of rules for allocating domains based on accommodations among sovereigns.

Prominent specialists in international law, for example, seek to navigate domain conflicts by using human rights as a lodestone. First, they see the human rights revolution as predominantly a shift in domains from the national
to the international. Second, they would disregard international obligations that encroach on human rights, whatever the provenance of the international rule to be ignored and of the national rule to be vindicated. Judge Cançado Trindade of the International Court of Justice has put the point forcefully. Responding to a claim that rules of international law rest on state consent, he complained that “[t]his exercise is characteristic of the methodology of legal positivism, over-attentive to facts and oblivious of values.” He would give “the principle of humanity and the principle of human dignity” paramount effect and disregard “the counterpositions of ‘primary’ to ‘secondary’ rules, or of ‘procedural’ to ‘substantive rules.’” He always would ask, “Where are the values?”

Others offer a more nuanced analysis that recognizes the complexity of domain conflicts but still puts a heavy thumb on the scales in favor of human rights. Yet other projects assert that the question of domain assignment is only interesting within the framework of value promotion. A vivid and ongoing example is the practice of the European Court on Human Rights. That institution has embraced a teleological and decidedly nonformal approach to the treaty that it applies based on its belief in the progressive development of human rights. The functional result of this jurisprudence is domain creep, as a wider swathe of traditionally domestic public-law issues is brought into the international domain. Similarly, one might argue that some assertions of

225. For a review of this shift, as well as an argument that the revolution's historical moment has passed, see Ingrid Wurth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279 (2017).


national interests by some sovereigns never should receive deference, because the interest asserted is repugnant to values, such as those expressed in human rights law.

This shift in ways of thinking about domain assignments is not limited to international lawyers. Progressive courts and scholars in the United States have rethought the virtues of federalism and local government in light of shifts in the political and cultural landscape. For an earlier generation, federalism provided a bastion for regressive States, especially those in the South and border regions that opposed racial equality and civil rights. Empowering the national government meant advancing equality and freedom. In this world, domain assignments that bolster the State domain too often promoted injustice.

Today we face a messier world. In the United States, forces hostile to contemporary progressive agendas intermittently capture branches of the national government, and as of 2017 command all of them. Moreover, we have come to unpack States and their constituent localities as residents of cosmopolitan cities contest the legal acts of State majorities across a broad range of issues. Courts and scholars have sought new ways of privileging laws and actions that vindicate important values, but run afoul of traditional domain-assignment practices within the U.S. system.232

These pressures to rethink formal, historically based domain assignments raise two questions. First, would jettisoning formal domain assignments in favor of a more open-ended values-driven approach itself threaten core values that a society should strive to respect? Second, how confident can we be in the ability of legal systems, operating in the world as we know it, to arrive at and vindicate practices that will advance human flourishing and self-realization?

This Section demonstrates that value-driven disruption of domain assignments poses a threat to important human values and may be unable to deliver on its promise of promotion of values generally. First, disruptions of domain rules are more consequential, destabilizing, and demoralizing than other forms

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of legal change, and thus impose a greater burden on the desire of people to plan for their futures and live a social life. Second, the ability of legal actors to recognize normative preferences and implement them through domain choices rests on shakier ground than advocates acknowledge. Formalism tied to practice has underappreciated virtues. Value-fulfilment has shortcomings. I offer some reasons for these conclusions here.

A. Reliance and Planning

Autonomy and the opportunity to shape one’s life in an uncertain world are values that undergird many, although not necessarily all, conceptions of human flourishing and self-fulfillment. Legal rules advance those values to the extent that they extend the range of individual capacity to pursue these ends, consistent with other values such as equal respect and avoidance of the unjustifiable harm of third parties. One can argue about the concrete realization of these values, such as distinguishing competition from exploitation. But many will see their pursuit as part of a good society, and legal rules that enable this pursuit therefore as good too.233

To promote these values, legal rules must possess clarity, stability and, consequently, reliability. These are not absolute goals, of course. Society must retain the capacity to rewrite rules to correct injustices and to adapt to change.234 But one must weigh in the balance the values reflected in clear and settled rules—stability, reliability, predictability—when considering any departures.

Changes in domain assignments pose a particular problem for these values. Instability of domain assignments, I have argued before, has a multiplier effect on the unreliability of law.235 Not knowing how a domain assignment will be made means not just uncertainty about a particular rule, but also about

both the constellation of rules within a domain that might apply to a planned activity and the process for selecting which domain applies. Disrupting domain assignment also can have consequences for availability of enforcement mechanisms, further increasing the stakes and the cost of uncertainty.

Consider a prosaic but recurring problem, whether to explore for a scarce natural resource (energy, mineral, molecular, etc.) at an outlay of many billions of dollars. One factor that the investor should consider, as it calculates whether to risk the search, is the legal security of the transaction’s many components. If the investor makes a discovery, will it enjoy the right to exploit it? What impediments to exploitation might a public authority make? Will that authority be satisfied with taxes, or will it demand a handing over of the discovery at a price that it will set? Will it use seemingly legitimate kinds of public law, such as taxation or environmental regulation, to bring about a confiscation of the investment?

Law might contain answers to some of these questions, but that assumes that we know what law applies. If the search takes place in a country with an unsettled legal (and political and economic) system, must the explorer trust the local sovereign? If some other sovereign extends its protection—an obvious possibility would be a BIT, itself a creature of international law—to what extent can the explorer count on application and enforcement of the treaty at some future date when it seeks to exploit its discovery? What will determine whether the treaty will apply or not?

One might view these questions as uninteresting, because all such explorers despoil the environment, abuse local populations, or grasp monopoly profits that enrich a few at the cost of many.\textsuperscript{236} But if one entertains the possibility of discovery as a means of enriching human lives and solving daunting problems (whether conquering disease or global warming), then one might worry about the searcher’s inability to answer these questions. Not knowing which category of law (domain) will apply, much less which particular rule, deepens one’s concerns. Without legal reliability, long-term projects with both high risk and high rewards become problematic. The harm is not only financial, but goes to the heart of human hopes of mastering, or at least managing, the future.

In the field of conflict of laws, a stock response to this concern rests on the claim that formal rules mean manipulable rules. Critics of the Bealean

\textsuperscript{236} See, \textit{e.g.}, THOMAS PIKETTY, \textit{CAPITAL IN THE TWENTY-FIRST CENTURY} (2014) (posing inevitable connection between investment and inequality).
approach to resolving this class of domain assignments, which emphasized seemingly clear and formal rules such as the place of injury caused by a tort, the place of performance of a contract, the location of the person owing a debt, or the location of property, argue that people can exploit clarity to achieve outcomes that they prefer ex post.\(^{237}\) Even if this is not always true, it is true often enough, they argue, to render the supposed certainty of formal rules chimerical. This argument can extend to other kinds of domain assignments that depend on formality for their determination.

A satisfactory response to this criticism is that it makes the perfect the enemy of the good. The issue is not elimination of uncertainty and opportunism, but rather minimizing these qualities at an acceptable cost.\(^{238}\) Delegating domain choices to downstream actors such as courts with only the most general guidance works only if judges are reliably rigorous in the principles they use and the way they apply them. Under realistic assumptions about downstream actors, formal rules increase predictability even when one considers the possibility of manipulation, when compared to untethered interest balancing by judges and arbiters of various quality and inclination. That formal rules do not achieve absolute predictability does not mean that they provide no reliable information that can help people better face the future.

In sum, abrupt changes in domain assignment rules pose a unique threat to the stability of law and the values that this stability serves. This does not mean that values-driven changes are never justifiable. A well-studied example is the surrender of the national domain to the international that societies sometimes make upon the overthrow of an illegitimate authoritarian regime.\(^{239}\) The point, rather, is that these sudden domain shifts normally are the product of catastrophe such as war, revolution or other social disruption. They do not provide a model for everyday progress in the development of the legal system.


B. Diversity and Instability of Preferences

A different kind of objection to values-based domain assignments rests on the instability of values. Aspirations to the identification and expression of universal values across humanity have a long, sometimes glorious but sometimes tragic, history. The tragedy arises in moments when regimes discover that not everyone shares their particular universal values and choose to stigmatize and even exterminate the heretics. The great and awful totalitarian movements of the twentieth century, for example, claimed to have discovered fundamental scientific truths that justified the murder of those who denied them. Earlier in the history of Europe, both Roman Catholics and various brands of Protestantism justified torture and murder as vindication of revealed universal truths. These episodes may not make the case against the ongoing search for universal values, but they strike a cautionary note.

If one uses as the baseline contemporary practice across cultures and nations, it is very hard to find universal allegiance to particular values. Advocates have proposed the prohibitions of torture and extrajudicial killing as commitments shared across states. In the wake of the distributed conflicts of the last fifteen years sometimes lumped together as antiterrorism, however, the claim of universality seems harder to make. State actors facing what they consider to be grave, if not existential, threats engage in terrible conduct, whether it meets the technical definition of torture or is “merely” cruel, inhumane, and degrading. Extrajudicial killings, seen as a repugnant remnant of authoritarian rule not too long ago, have enjoyed a comeback in places such as the Philippines. The United States achieves the same outcome more artfully. Rather than repudiating the norm, it limits its scope by a creative and expansive interpretation of the law of armed conflict, a domain in which the no-extrajudicial-killing norm concededly does not apply.

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Casting the net for universal norms more broadly, one struggles to find them. Values that rank high in the United States and Europe, such as equal treatment of women and persons with minority sexual preferences, face hostility in Russia, much of East Asia, and most of Africa. Views on freedom of expression range widely. The regional popularity of President Lee Kuan Yew’s “Asian-Values position” demonstrates the wide divide between Europe and the United States, on the one hand, and much of the rest of the world, on the other, about these values. Criticism of international-law universalism as failing to reflect either the values or interests of the developing world underscores the point.

Also relevant is the tension between the concept of progress and that of universality. The idea of progress implies changes in values based on advancement in learning and wisdom. Yesterday’s cherished values may find themselves tomorrow in the dustbin of history. Even if particular moments of time indicate something like a consensus about values, never are they entrenched across time.

A possible response to these arguments is that universal values emerge out of action, and that their creation entails acts that shape preferences by their moral example, even if they are not immediately and universally embraced. As a general point, this may be true, but, as an argument about the legalization of values, and thus the implementation of values through legal rules, one must remain skeptical. Depending on what counts and who does the counting, we have lived in world where international human rights have claimed universal and peremptory status for at least forty years. Yet we have, if anything, less moral clarity about these claims today than existed decades ago. At some point, one must put the burden of proof on those claiming that the values have become entrenched.


247. See Matthias Mahlmann, Normative Universalism and Constitutional Pluralism, in Liber Amicorumandrás Sajó: Internationalisation of Constitutional Law 279 (Iulia Motoc,
Even more troublesome is the lurking instability underlying the claim that progress brings about value transformation. A faith in progress involves a conviction about human improvement, if not perfectibility. In many cases, improvement means changes in, and perhaps transformation of, values. If true, then values-based domain assignments are inherently unstable, because new values must lead to new assignments. Harnessing a commitment to progressive development of values to a claim that norm formation requires expressions and action that occur in advance of widespread embrace of the values at issue, leads to both instability and mistakes—that is, an assertion of values that fail the test of history.

Again, the point is not that values do not matter. Rather, the question is whether assertions of values by themselves justify domain assignments, and especially assignments that are likely to lead to domain conflicts. If values are contested and ephemeral, then promoting them at the cost of instability and the resulting impairment of human autonomy and flourishing seems problematic.

C. Legal Actors in General

One might respond to all this by arguing that claims about values are really claims about institutions. Some range of legal judgments, the response might go, must belong to a special class of lawmakers, namely those with expertise and independence. These lawmakers can promote and channel values that rise above the conventional political process and lead a society (subnational, national or global) to a better version of itself. To the extent these persons get the final say in any legal matter, their values matter all the more. Conventionally, we call such lawmakers judges, although not all judges fit the description made by this argument and in some societies other actors might.

Influential scholars have defended the idea of judicial discretion based on principles, rather than rules, as the foundation of legality. These arguments are addressed to judges, rather than all lawmakers, because of an assumption that judicial independence and a culture of judicial integrity lends itself more to principled decision-making than does the interest-based democratic accountability that binds many legislators and officials, and the naked interest
that governs actors generally in undemocratic authoritarian regimes.\textsuperscript{248}

Even were one to buy in to this exalted view of judges (and I do not),\textsuperscript{249} it is not clear what it has to say about value-based domain assignments. Domain assignments as often as not fall to legislative and executive actors, especially in democracies. Judicial review may come late or even never. To the extent the constitution is not implicated, for example, even judges with strong powers will not have the capacity to undo domain assignments expressly made by the legislature. Doctrines of judicial abstention might also bar judicial interventions in conflicts over domain assignments, such as disputes between the executive and Congress over which branch of government has the final say in questions of foreign relations.\textsuperscript{250}

Even where domain assignments can come before judges, it remains an open question whether the values commitments of the judiciary always should prevail. Discretion to interpret primary rules governing conduct and status, for example, might stand on a different footing from the rules for determining domain assignments. One might accept the institutional role of a court as the ultimate arbiter of the values deployed in primary rules, and still question judicial discretion to revise domain rules based on these values.

A strong argument for judicial review in the U.S. system, for example, posits that judges as a class are more likely than political actors to enforce second-order structural rules, such as those governing domain assignments, rather than simply to choose the outcome with the greatest immediate pay-off.\textsuperscript{251} One may quibble whether the claim is descriptively accurate either as

\textsuperscript{248} E.g., Ronald Dworkin, Justice in Robes (2006).
\textsuperscript{249} Stephen, supra note 58, at 229 (suggesting that Ulysses, rather than Hercules, might serve as a better model for how even expert and independent judges behave). To unpack the metaphor, williness, rather than commitment to principle, might better explain what most judges do.
\textsuperscript{251} Frederick Schauer, The Annoying Constitution: Implications for the Allocation of Interpretive Authority, 58 WM. & MARY L. REV. 1689, 1703–05 (2017). An arresting example of a State official challenging a domain assignment for values-driven reason is the sorry story of Kim Davis, a Kentucky court clerk who refused to obey the Supreme Court’s mandate to provide marriage to same-sex couples because, she asserted, only the State could address this question. Miller v. Davis, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015). Judicial intervention to compel compliance with the Supreme Court’s holding seems justifiable on structural grounds, without getting into the merits of the decision.
to U.S. judges or as to judges as a worldwide phenomenon. For our purposes, however, it seems sufficient to note that this claim defends judicial control over domain assignments, not because judges have better preferences as to primary outcomes (what I mean by values), but because they are more likely to elevate structural issues with long-term implications, such as domain assignment stability, over immediate payoffs. This claim, whatever its force, does not support an argument for allowing judges to destabilize domain assignments to pursue the payoffs they prefer.

The point is a general one: Assigning to a single institution the authority to resolve domain conflicts promotes legal stability and the human values that this stability encourages. Exercising ultimate power, however, raises its own risk, if the institution with this authority behaves recklessly. An ultimate arbiter that promotes its own parochial preferences, rather than the structural, long-term interests of the society that it serves, endangers its role as final decision-maker.

Consider, as an instance of U.S. judicial domain choice that put the entire institution of judicial review at risk, the unhappy example of Scott v. Sanford. The core of that ruling was a determination that the Constitution precluded Congress from prohibiting slavery in new states or addressing the status of African-Americans as citizens of the United States. This put out of the reach of the national political branches any effort to compromise on the question of slavery. The Justices perhaps believed that doing what they did would preserve the institution of slavery for the foreseeable future, an outcome that expressed their primary preferences. They may further have believed that settling this question would put to rest an ongoing controversy that had unsettled relations between the North and South.

What Dred Scott did, however, was provoke the political process to overthrow judicial authority. The conflict moved from the courtroom to the battlefield. Lincoln did not wait for a new decision or a constitutional amendment before challenging its holding. The Court proved impotent to channel

254. See GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 5–6 (2013); Sanford Levinson, The David C.
events.

Of course, the specific issue at stake in Scott v. Sanford remained constitutionalized, but, thanks to the adoption of the Thirteenth Amendment, with a different substantive result. The point remains: Surprising shifts in legal domains present risks that are different in kind from changes in outcome within settled domains. These risks, where a legal system has an ultimate arbiter of domain assignments and that arbiter acts on the basis of its primary preferences, can bring that role into question.

D. Summary

The case against values-driven domain assignments stands ultimately on the claim that domain assignments are different. Approaches to domain assignments that increase the likelihood of domain conflicts produce greater legal instability than do changes in primary rules governing behavior. Uncertainty over the boundaries of a domain affects not only all the primary rules that occupy the domain, as well as attendant rules of procedure and enforcement, but also the rules for determining domain boundaries. Not knowing whether a matter falls into the national or international domain, for example, raises doubt about where the line falls generally. As a result, one cannot tell with confidence whether any matter will come under international or national law. This results in a much greater level of instability than a change in any given primary rules within a set domain would produce.

That these costs exist does not mean that domain conflicts must be avoided or that domain assignments should never vary over time. Legal systems must adapt to change or fail. Moreover, the development of new values, as much new material circumstances, counts as changed circumstances to which law must adapt.

An illustration makes the point. At the beginning of the nineteenth century, slavery was tolerated, if not necessarily valorized, throughout Europe and most of its former colonies. Enforcement of the institution in turn rested
on domain assignments.\textsuperscript{255} By the end of the century, tolerance had disappeared in this part of the world. Without speculating as to what brought about this transformation in values, one confidently can say that law had to change to reflect it. Domain assignments followed accordingly.\textsuperscript{256}

The issue is not whether domain assignments should adapt, but rather how orderly the changes should be. Sudden and profound disruption of values, as much as ruptures in material circumstances, may justify rapid and transformative adjustments of domain assignments. This Section argues only that justification should take into account the costs of transformation, rather than treating changes in values by themselves as grounds for redoing domain assignments.

The case for taking account of disruption costs is twofold. First, these costs are demonstrable, even if laypeople not thinking of legal systems as having a particular structure may not focus on them. Second, identifying societal value transformations, rather than aspirations, is hard and fraught with uncertainty. Just as ignoring value transformation is a bad strategy for legal systems, so is ignoring the dispersed costs of unlimited legal change. Sudden changes in domain assignments, and especially changes that provoke domain conflicts, entail such costs.

\section*{VI. Conclusion}

Thinking about legal domains as an expression of competition among sovereigns produces three conceptual benefits. First, it allows us to approach particular problems, such as the complicated relationship between domestic and international law or, in the United States between federal, State, and tribal law, more broadly. We can draw on an extensive range of practice and take account of the results, once we accept the similarities between domain-assignment problems and potential domain conflicts. Second, it makes common patterns in the expression of cooperation and truculence clearer. A general explanation of domain assignments, based on rational choices that reflect the official actor's interests, is more persuasive as the field of vision increases.

\textsuperscript{255} Compare The Antelope, 23 U.S. (10 Wheat.) 66, 120–23 (1825) ("Slavery, then, has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent, cannot be pronounced unlawful."); \textit{with} United States v. La Jeune Eugenie, 26 F. Cas. 832, 845–48 (C.C.D. Mass. 1822) (discussing the illegality of the slave trade under the law of nations).

\textsuperscript{256} Rutherf.\textit{ vol. note 254}, at 34–37.
Third, it allows a shift in perspective from looking only at judicial decision-making to considering the behavior of official actors more generally. These conceptual advances have practical consequences. The rational-choice model both provides a basis for predicting what actors do and gives us a means of assessing their decisions. It highlights intensity of preferences and disposition for cooperation or truculence. These indications can inform future decisions to undertake cooperation or resistance.

As a normative matter, a rational-choice approach to domain assignments is more stringent than simple values-driven justification. It requires the official actor to take into account the potential effect of surprising domain assignments on legal stability, an effect that is likely to matter more with regard to domains than as to primary rules. It also imposes an extra level of discipline on all categories of official actors, rather than treating judicial decision-making as special and perhaps rarefied. It permits flexible adjustment to changing community norms, but avoids quick triggers and resulting disorder, if not chaos.

Most importantly, a rational-choice approach helps official actors around the world negotiate the dynamic and complex relationship between international and domestic law. It recognizes the inevitability as well as value of international law as a means of ordering life in an interconnected, globalized world. It provides a pathway to legal coexistence through mechanisms such as provisional deference. At the same time, it helps us to trace the border between complexity and adjustment, on the one hand, and outright truculence, on the other. It points the way toward managing sovereign competition and conflict while preserving law as a useful means of social ordering. In today’s world, this is no little thing.