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Extraterritoriality, Antitrust, and the Pragmatist Style

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ABSTRACT

In the last decades of the 20th century, David Kennedy and Martti Koskenniemi made the case that the modern structure of international legal argument was characterized by "pragmatism." Taking this idea as its baseline, this Article's central argument is that legal pragmatism embodies a dominant style of contemporary legal reasoning, and that as Kennedy and Koskenniemi might have suggested, it is on display in some of the canonical antitrust decisions having an international dimension. The Article also seeks to show that pragmatism's ostensible triumph is best understood as a contest of three distinctly legal pragmatisms: "eclectic pragmatism," as evidenced in the work of Thomas Grey and Daniel Farber, "economic pragmatism," as espoused by Richard Posner, and "experimental pragmatism," represented in the work of Charles Sabel, William Simon, and Michael Dorf. While these three styles are hardly determinative, they do suggest meaningfully different orientations, as illustrated in an analysis of F. Hoffman LaRoche Ltd. v. Empagran, the U.S. Supreme Court's most recent extraterritorial antitrust decision. The irony, once one sees the three pragmatisms in action, is that they all fail to offer anything resembling the promise of a truly pragmatist moment of legal decision.

[†] This Article builds on a prior publication, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 MICH. ST. L. REV. 565 (2007). Small segments of that article have been reproduced here.

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INTRODUCTION

In law school and law practice, a standard method for approaching legal questions begins with the identification of a central set of issues and its governing rules and standards.[1] Although this step of choosing the authoritative rule will itself require a degree of strategic thinking,[2] only then does the standard call for an analysis of the nexus between the issue and the rule, and finally an estimation of the appropriate conclusion. If the legal reasoner happens to be in law school, she will likely characterize her conclusion in an exam or essay as being the "right" one—an answer that has balanced the countervailing arguments and concluded that one course of action is somehow superior to the other. In the context of practice, a lawyer will be less concerned with the supposed right answer, and more interested in the conclusion that has marshaled the very best non-frivolous arguments in support of her client. By way of example, take the Supreme Court's extraterritorial antitrust decision in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*[3] If called upon to provide a short summary to a professor or partner, the student or associate would identify the "issue" as whether foreign nationals, seeking redress for injuries caused by foreign defendants, on foreign soil, could apply U.S. antitrust law to their claims in U.S. court.[4] The Foreign Trade Antitrust Improvements Act (FTAIA) provided the "rule."[5] The Court's "analysis" phase consisted of a brief but unconvincing look at the statute's language and legislative history and a more substantial consideration of how the exercise of U.S. jurisdiction over those foreign actors might adversely affect the international legal order.[6] The "conclusion," or the holding of the case, was that the plaintiffs would lack standing if it could be proved that their injuries were independent of any anticompetitive effects in the United States.[7]

This explanation, however vague and imprecise, describes a working theory of contemporary legal reasoning. Regardless of whether the point is to

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[1] Although the names may differ, the "IRAC" method—issue, rule, analysis, conclusion—seems the standard form for first year legal writing courses. A typical example is CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 69–95 (2006).

[2] The fact that the third phase is called "analysis" implies that the choosing of the relevant rule is taken as a given. Quite clearly, much of the fight is over which rule in fact applies to a particular legal question.

[3] F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

[4] *See generally id.*

[5] *See id.* at 164–67 (applying the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a(1)–(2) (2006)).

[6] *Id.* at 161–70.

[7] *Id.* at 175. For further discussion of the case, see *infra* notes 172–209 and accompanying text.

identify the "right" answer on an exam or the "best" result for a client, when we hear talk of what it means to "think like a lawyer," this is it.

Sort of. Predictably, this description fails to identify at least one critical step in the process of legal reasoning, either as performed by the jurist or the court. Once the reasoner has found her issues and rules, but before she moves on to the analysis, what decision has she made with respect to the *style* of her analysis in reaching her conclusion?[8] When she attempts to connect the issues and the rules, in what *manner* will she develop the analysis? Which *technique* will she choose to drive the course of her reasoning? In many classrooms and law offices, these questions will be met with a single response: the sound of crickets. Although law journals continue to offer examinations of the ways, both old and new, that jurists reason their way through legal problems, training in the craft appears to largely ignore them.

For generations, however, the questions of what it meant to think like a lawyer, and what it meant to apply the tools of legal reasoning, were quite clear.[9] Nineteenth century lawyers, for example, utilized what is known today as Classical Legal Thought (CLT).[10] Also known as "formalism,"[11] the classical style of legal reasoning began with a series of premises regarding the clear separation of public and private authority, the sanctity of individual

[8] It is easy to confuse a number of phrases that all have to do with the ways in which we think about the law. "Philosophy of law" conventionally explores meta-questions that go to whether and how laws exist, and what elements are necessary for this construction. Classic examples include: H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1997); HANS KELSEN, PURE THEORY OF LAW (1967). Similarly, theories of law often implicate the normative structure of legal systems and provide explanations for the political or moral nature of the law. With respect to legal style, this Article adopts the view of David Kennedy and William Fisher. *See* DAVID KENNEDY & WILLIAM W. FISHER III, THE CANON OF AMERICAN LEGAL THOUGHT 1–16 (2006). When we focus on the style (or method or mode) of legal reasoning, we are not concerned with philosophical questions regarding the nature of law, but rather with the more practice-oriented techniques that lawyers use to help them reason from a premise to an argument to a conclusion.

[9] KENNEDY & FISHER, *supra* note 8, at 1–3.

[10] *See generally* DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006).

[11] In Richard Posner's words:

> [Formalists] decide cases by applying preexisting rules or . . . by employing allegedly distinctive modes of legal reasoning, such as "legal reasoning by analogy." They do not legislate, do not exercise discretion other than in ministerial matters (such as scheduling), have no truck with policy, and do not look outside conventional legal texts—mainly statutes, constitutional provisions, and precedents (authoritative judicial decisions)—for guidance in deciding new cases. For [formalists], the law is an autonomous domain of knowledge and technique.

RICHARD A. POSNER, HOW JUDGES THINK 7–8 (2008).

autonomy, and the formal power of deductive logic.[12] Legal reasoning in the classical period typically entailed identifying a relevant concept, such as "freedom of contract," and deducing a conclusion based on the apparent boundaries of that right.[13] The style was crisp, guided by its unwavering confidence in natural and absolute divisions of power. In the early decades of the twentieth century, writers under the banner of Legal Realism attacked the black and white attitude of the classical style.[14] For these scholars, CLT was a style of legal reasoning shot through with contradictions and indeterminacies: an approach to legal decision-making that began with the articulation of formal principles from which practitioners could deduce legal conclusions was inevitably arbitrary.[15] Perhaps even more importantly, the classical style failed to capture what was most essential for any type of legal analysis appropriately attuned to its social milieu—explicit considerations of policy consequences.[16]

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[12] *See, e.g.*, Christopher Columbus Langdell, *Classification of Rights and Wrongs*, 13 HARV. L. REV. 659 (1900). For a discussion of CLT, see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19 (David M. Trubek & Alvaro Santos eds., 2006).

[13] In *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court illustrated the classical style of legal reasoning. In his dissent, Justice Holmes refuted the majority's deductive method which had rejected a New York statute limiting the number of hours a baker could work in a week, arguing that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Id.* at 75 (Holmes, J., dissenting).

[14] *See* JEROME FRANK, LAW AND THE MODERN MIND 42–48 (1930); Morris R. Cohen, *The Process of Judicial Legislation*, 48 AM. L. REV. 161 (1914); Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470 (1923); Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied Judicial Reasoning*, 23 YALE L.J. 16 (1913); Karl N. Llewelleyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); *see also* AMERICAN LEGAL REALISM (William Fisher et al. eds., 1993); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 169–213 (1992); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988).

[15] *See* Hohfeld, *supra* note 14, at 28–29. For Hohfeld, the capricious character of classical legal reasoning stemmed from the

> assumption that all legal relations may be reduced to "rights" and "duties," and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests . . . . Even if the difficulty related merely to inadequacy and ambiguity of terminology, its seriousness would nevertheless be worthy of definite recognition and persistent effort toward improvement; for in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression.

Id.

[16] Robert Hale explained that it was an error to perceive classic liberal market theory as apolitical, and that attention to the political commitments immanent in the private law was essential:

> [A] careful scrutiny will, it is thought, reveal a fallacy in [the apolitical view], and will demonstrate that the systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom, and with restrictions, moreover, out of conformity with any formula of "equal opportunity" or of "preserving the rights of others."

Where the classical style rigidly separated law and politics, legal realists smashed that divide.[17]

The deconstruction of the classical style was not just an Ivory Tower affair.[18] As David Kennedy and William Fisher explain, "[b]y the 1950s, it had become common sense that the legal materials did not generate unique solutions to individual cases."[19] But despite the widespread acceptance of CLT's faults and the customary ability to identify deductive errors and stale recitations of the rhetoric of "tradition," Legal Realism failed to offer practitioners a steady replacement for the received forms of legal analysis.[20] The resolution appeared in the 1950s and 1960s with the advent of the Legal Process approach, generated by Henry Hart, Jr. and Albert Sacks.[21] This approach not only instructed the legal reasoner to first understand that law is a purposive policy instrument (as taught by the Realists), but also to focus on the institutional and procedural aspects of the legal order.[22] Indeed, for the jurist informed by Legal Process, her adventure in legal reasoning was primarily guided by an eye for the competing jurisdictional realms occupied by the courts, Congress, and administrative agencies.[23] As for the style of decision, Legal Process scholars suggested that the aim was to produce a "reasoned elaboration" that monitored the procedures constituting the multiple legal orders, and appropriately balanced the principles and political considerations implicated in the issues.[24] Although something like this may seem familiar to the contemporary sensibility, the Legal Process style deteriorated in the 1970s and 1980s on a number of fronts.[25] Foremost among the new styles of legal

Hale, *supra* note 14, at 470.

[17] *See, e.g.*, Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991).

[18] KENNEDY & FISHER, *supra* note 8, at 10–11.

[19] *Id.*

[20] Singer, *supra* note 14, at 467–68; *cf.* Kennedy, *supra* note 12, at 40 (listing four positive proposals that the "social people," including legal realists, had for reconstructing the law).

[21] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li-cxxxvi (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[22] *See* Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 632–42, 653–70, 692–705 (1993).

[23] *Id.* at 685–92.

[24] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 123 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

[25] For critiques, see for example DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Frank H.

reasoning were those taking their cues from economics,[26] sociology,[27] critical theory,[28] political philosophy,[29] feminism,[30] and racial theory.[31] Unlike the aftermath of the realist attack on CLT, in which Legal Process achieved hegemonic stability, a new consensus failed to emerge in the late twentieth century.[32]

The re-telling of this well-known story begs a familiar question: Is there now a dominant style of legal reasoning? One would think, probably not. First, the mere fact that most law practitioners would regard this question with ennui suggests that the answer is probably in the negative. Second, the sectarian nature of the methodological landscape indicates a wide diversity of views regarding the best style of legal reasoning instead of just one. Third, there is substantial evidence that contemporary legal analysis is more than just a hodge-podge of "law and" movements—relics of the classic style, Legal Realism, and Legal Process continue to live on.[33] Today's jurist apparently faces a veritable smorgasbord of legal styles.

Despite these appearances, this Article wonders whether there is, in fact, a dominant style of legal reasoning—a style known as Legal Pragmatism. Consider again the style of reasoning summarized above. After identifying the issue and the relevant rules and standards, the reasoner enters that apparently style-free wasteland known as the analysis phase on her way toward a conclusion. While the majority of what actually happens here is left to personal discretion, at least three points remain constant. First, there is a premium on the ability to rationally balance competing considerations. Second, it is important to engage in some degree, however limited, of policy analysis.[34] Third, and this is key, the "best" analysis will be the one that

Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). *See generally* Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

[26] *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

[27] *See generally* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

[28] *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV L. REV. 1685 (1976).

[29] *See, e.g.*, Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

[30] *See, e.g.*, Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

[31] *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

[32] KENNEDY & FISHER, *supra* note 8, at 8–12.

[33] *See* ROBERTO M. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 41–52 (1996).

[34] Duncan Kennedy provides a description of policy analysis:

achieves the "best" results. To be sure, this is not the only way in which to craft a legal analysis, but admitting this lack of universality hardly denies its prevalence. As it turns out, an approach to legal decision-making that trades heavily on the power of "reasonableness," "balancing," and "what works," has a name.[35]

One might wonder, nevertheless, how the contemporary situation—littered with remnants of the classical, realist, and process styles, along with the interdisciplinary methodologies of the late twentieth century—is reconciled with the suggestion that legal pragmatism might be the sign of the times. The connection is subtle but ultimately simple. Legal Pragmatism is often manifested in a fundamentally eclectic fashion, allowing the student, practitioner, or judge to analyze a set of legal questions with whatever tools are necessary "to get the job done." Indeed, "eclectic pragmatism" is a widely practiced, widely unrecognized, shape-shifting, accommodating mode of legal reasoning that manages to compile the debris of American legal thought into a single, identifiable style. This style favors consequences, disfavors overt political discussions, leans toward empirical analysis, shies away from a formal connection with precedent, is wary of formal techniques of reasoning, and largely relies on a rule of reason and the ability to balance conflicting considerations.[36]

> The analysis presupposes that there are many policies, or desiderata, in rule making, that they often though not always conflict, that they are well conceptualized as forces or weights or vectors in a force field, and that they vary in force or weight according to the precise factual circumstances to which they are applied within the field. Policies come in conflicting pairs of different types, including conflicting welfare arguments, conflicting moral maxims, and conflicting subjective rights. There are also as we will see an important class of "institutional" policies.
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> Rational decision is defined in policy analysis as choosing a norm to apply to this case and to a class of similar others in the future on the basis of a total-value-maximizing balance of the conflicting policies.

Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1072 (2004); *see infra* notes 60–61 and accompanying text.

[35] *See* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 59–60 (2003); Richard A. Posner, *Pragmatic Adjudication*, *in* THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE 235, 238 (Morris Dickstein ed., 1998). In another article, I provide an extensive discussion of pragmatism in the context of law. Justin Desautels-Stein, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 MICH. ST. L. REV. 565 (2007). The variety of Legal Pragmatism referenced above is what I call "eclectic pragmatism" due to its voracious capacity for seemingly inconsistent attitudes regarding modes of legal reasoning. *Id.* at 590–94. The two rival forms of legal pragmatism are "economic pragmatism" and "experimental pragmatism." *See id.* at 595–96, 611–14.

[36] *See* Kennedy, *supra* note 34, at 1073–75; Desautels-Stein, *supra* note 35, at 590–94.

The characterization of pragmatism as a style of legal reasoning constitutes this Article's first argument. The Article's second move follows from the first: a focus on style has its uses. Returning to the *Empagran* decision, a focus on style reveals a great deal about how the Court found its way from what was in the lower courts a very technical question of statutory interpretation to a consideration of the balance of power in the international legal order; about how the Court turned away from the relevant decisions in *Hartford Fire Insurance Co. v. California* and *Timberlane Lumber Co. v. Bank of America N.T. & S.A*;[37] about how the Court flirted with an empirical analysis of comparative antitrust law, but ultimately kept its distance;[38] about how the Court was skeptical of making what threatened to be an overtly "political" decision;[39] and about how the Court was guided by an eclectic sensibility to balance these conflicting considerations on its way to what it perceived as the most pragmatic result.

Beyond the facts of the *Empagran* decision, legal pragmatism imbues the field of extraterritorial jurisdiction—one of the fundamental legal doctrines generating the passage of norms across territorial borders.[40] Or, at least, those extraterritoriality decisions that involve commercial law seem particularly pragmatic. Indeed, as Jonathan Turley explained, questions of extraterritorial jurisdiction[41] tend to be answered quite differently when the subject matter is

[37] F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164–65 (2004) (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); Timberlane Lumber Co. v. Bank of America N.T. & S.A, 549 F.2d 597 (9th Cir. 1976)).

[38] *See id.* at 163–67.

[39] *See id.* at 163–64.

[40] For general treatments, see EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO (Cecil J. Olmstead ed., 1984); WERNER MENG, EXTRATERRITORIALE JURISDIKTION IM ÖFFENTLICHEN WIRTSCHAFTSRECHT (1994); CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW (2008); Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5 (2003); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002); Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11 (1987); Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005); Robert Malley, Jean Manas, & Crystal Nix, Note, *Constructing the State Extra-territorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273 (1990). This question also implicates the field of conflict of laws, traditionally understood as a component of "private" international law. *See generally* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101 (1998); Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

[41] These questions include: Should one nation's laws be allowed to govern the affairs of another? If so, when does one national court have jurisdiction over the controversy? How will the judgment be enforced?

perceived as private, as opposed to public.[42] In particular, courts have often sided with a presumption against an exercise of extraterritorial power in the context of environmental and labor controversies, while in the context of antitrust matters, this presumption has been declared all but dead.[43] Attention to the style of legal reasoning at work in some of these decisions, this Article suggests, helps explain this kind of divergence and underscores the point that the manner in which we reason through legal questions is often just as important as our answers.

Part I outlines the abstract characteristics of the eclectic style of pragmatist legal reasoning and situates it against the broader background of its philosophical counterpart. Those thinkers who have best articulated the working elements of eclectic pragmatism are Thomas Grey, Daniel Farber, and Richard Posner. In similar schematic form, Part II turns to the basics of extraterritorial jurisdiction and elaborates on sovereign independence, the "effects test," reasonableness, and comity as the key elements of the doctrine. Part III brings together the discussions in Part I (eclectic pragmatism) and Part II (extraterritorial jurisdiction) in a review of four major cases in the field of extraterritorial antitrust litigation (*United States v. Aluminum Co. of America* (*Alcoa*),[44] *Timberlane*, *Hartford Fire*, and *Empagran*). This Article argues that these cases demonstrate a steadily evolving commitment to the pragmatist sensibility, culminating in the recent *Empagran* decision.

In Part IV, the discussion shifts gears. Although eclectic pragmatism—a style of decision that *balances* competing considerations on its way to a decision that has the most *reasonable* consequences—may be prevalent in contemporary legal consciousness, it is not the only pragmatist sensibility available to the jurist. In fact, there are at least two rival camps in the legal literature that have made explicit claims on the pragmatist tradition, which I refer to as economic pragmatism, best represented by Richard Posner,[45] and experimental pragmatism, best represented by Charles Sabel, William Simon, and Michael Dorf.[46] Drawing on techniques from economic and industrial analysis, these styles approach the moment of legal decision with far more

Jonathan Turley, *"When in Rome": Multination Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 599, 601 (1984).

[42] *Id.*

[43] Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 564 (2000).

[44] United States v. Aluminum Co. of America (*Alcoa*), 148 F.2d 416 (2d Cir. 1945).

[45] *See generally* POSNER, *supra* note 35.

[46] *See generally* Charles Sabel & William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

clarity and purpose than eclectic pragmatism, and ultimately are opposed to or aligned with the philosophy of pragmatism in ways that the eclectics are not. After introducing the elements of economic and experimental pragmatism, Part IV demonstrates the conceivable effects of these sensibilities on the *Empagran* decision.

The Conclusion argues that while economic and experimental pragmatism certainly have their faults, they are more attuned to the distributive consequences of legal reasoning than eclectic sensibility and, as a result, are relatively more desirable. Furthermore, experimental pragmatism at least attempts to make good on the promises of the classic pragmatists like William James, John Dewey, and Oliver Wendell Holmes, while eclectic pragmatism actually reproduces some of the very defects first identified in the machinery of Classic Legal Thought. Despite its emphasis on action, results, and a sense for "what works," the pragmatist sensibility is, as Roberto Unger has explained, a status quo sensibility that "suits an institutionally conservative politics: one that renounces persistent and cumulative tinkering with the institutional structure and seeks, instead, to redistribute rights and resources within that structure."[47] Eclectic pragmatism is therefore a bastardized version of the pragmatism that initially set itself against such institutional reticence and, as a consequence, stands as a rejection of its own, self-professed beliefs.

I. ECLECTIC PRAGMATISM: A DOMINANT STYLE OF LEGAL REASONING?

A. Pragmatism in Context: From the Vernacular to the Philosophical

Susan Haack has described the history of pragmatism as confusing, disturbing, and chaotic. In one catalogue of criticisms, Haack dictates:

> Long ago, A. O. Lovejoy complained that there were thirteen pragmatisms; Ralph Barton Perry suggested that pragmatism was the result of James's misunderstanding of Peirce; and British pragmatist F. C. S. Schiller cheerfully acknowledged that there are as many pragmatisms as pragmatists. More recently, Rorty writes that "'Pragmatism' is a vague, ambiguous and overworked word," while H. O. Mounce and Nicholas Rescher argue that there are two pragmatisms: the honorable, descending from Peirce, and the

[47] *See* ROBERTO M. UNGER, THE SELF AWAKENED: PRAGMATISM UNBOUND 52 (2007).

> dishonorable, descending from James and Dewey to Rorty and his admirers.[48]

In another article, I have attempted to consolidate these many voices into three fundamental groups: (1) everyday pragmatism, (2) philosophical pragmatism, and (3) legal pragmatism.[49] Everyday pragmatism is the sort that is common in the contemporary vernacular and describes an attitude that loves results over ideas.[50] For example, a recent New York Times article lauded the Bush Administration for its recent move toward pragmatism and away from conservative ideology.[51] In the context of the Bush Administration's posture against diplomatic relations with the "axis of evil," the Times noted Bush's decision to initiate talks with Iran and Syria as an about-face away from ideology and toward "pragmatism."[52] The article quoted a supporter of the shift as saying, "[I]t's absolutely clear to me that you have to talk to who you have to talk to, in order to get things done."[53] Whereas the pragmatist label may have at one time been rather gauche, it now smacks of something distinctly American.[54] Perhaps no better indicator of the rise of pragmatism is a line from President Obama's inauguration speech, in which he plainly states the guiding standard of a new generation: "The question we ask today is not whether our government is too big or too small, *but whether it works . . . .*"[55]

The problem with everyday pragmatism is that people will disagree about which tactics work and which ones do not. The inability of the pragmatist to provide norms in the quest for distinguishing "bad" acts from "good" acts is not a pedestrian problem. However simplified, this is an artifact of philosophical pragmatism, the view on truth, meaning, and knowledge developed by thinkers like Charles Sanders Peirce, William James, and

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[48] Susan Haack, *Pragmatism, Old and New*, 1 CONTEMP. PRAGMATISM 5 (2004) (citation omitted), *reprinted in* PRAGMATISM, OLD & NEW 18 (Susan Haack & Robert Lane eds., 2006).

[49] Desautels-Stein, *supra* note 35.

[50] *Id.* at 570.

[51] Helene Cooper, *Pragmatism in Diplomacy: Why the U.S. is Ready to Talk to Adversaries*, N.Y. TIMES, Mar. 1, 2007, at A1.

[52] *Id.*

[53] *Id.*

[54] *See generally* MICHAL ALBERSTEIN, PRAGMATISM AND LAW: FROM PHILOSOPHY TO DISPUTE RESOLUTION 1 (2002) ("[P]ragmatism is described in this chapter as having a central role in the constitution of the American subject."); CLASSICAL AMERICAN PRAGMATISM: ITS CONTEMPORARY VITALITY (Sandra B. Rosenthal et al. eds., 1999); BRIAN LLOYD, LEFT OUT: PRAGMATISM, EXCEPTIONALISM, AND THE POVERTY OF AMERICAN MARXISM, 1890–1922 (1997); James T. Kloppenberg, *Pragmatism and the Practice of History: From Turner and Dubois to Today*, 35 METAPHILOSOPHY 202 (2004).

[55] Barack H. Obama, President, United States of America, Inaugural Address (Jan. 20, 2009) (emphasis added).

John Dewey, and more recently in the so-called "neo-pragmatist" vein, Richard Rorty and Hilary Putnam.[56] In short, pragmatist philosophy is focused on the benefits of context, function, empiricism, and experimentalism.[57] The philosophy can be grossly summarized in the following way: (1) "truth" is best understood as a compliment one group of people have attributed at one particular historical moment to a concept due to that concept's high cash-value; (2) the domain of "means" is favored at the expense of so-called "ends;" (3) the powers of observation, study, and the scientific method can be usefully applied to questions of ethics and morality; (4) human beings are inevitably committed to provisional, and not conclusive, epistemological projects due to an inherent penchant for getting things wrong; and (5) the fact that despite our incapacity to ever know what is really "true" or "good" in the world, we refuse to let this fact disrupt the way in which we would ordinarily live in it: even with our eyes closed, the show must go on.[58]

B. Legal Pragmatism and the Eclectic Style

Eclectic pragmatism[59] represents the manifestation of the everyday pragmatist attitude as a style of legal reasoning. It is a style that is essentially characterized by an accommodating impulse that enables the decider to confidently reason with a can-do attitude, balancing conflicting considerations as needed.[60] This eclectic method, or to use Duncan Kennedy's phrase, policy analysis, involves "the commitment to balancing conflicting policies, with an eye to consequences, in a context in which rules represent no more than the means to implement the resulting compromise."[61] The eclectic style therefore

[56] For a history, see generally LOUIS MENAND, THE METAPHYSICAL CLUB (2001). For collections of the classic texts, see PRAGMATISM (Alan Malachowski ed., 2005); PRAGMATISM: A READER (Louis Menand ed., 2001).

[57] RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 176, 195, 308 (1979).

[58] *See id.*; RICHARD RORTY, CONSEQUENCES OF PRAGMATISM xiv (1982); RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 5 (1989); HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY 30–31, 102 (2002); HILARY PUTNAM, REASON, TRUTH, AND HISTORY 168–73 (1981).

[59] The best representatives of this view are Thomas Grey and Daniel Farber and to a lesser extent, Cass Sunstein. *See* Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1590 (1990); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 788 (1989) [hereinafter Grey, *Holmes*]; Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 CARDOZO L. REV. 21, 21–22 (1996) [hereinafter Grey, *Freestanding*]. *See generally* Daniel A. Farber, *Building Bridges Over Troubled Waters: Eco-pragmatism and the Environmental Prospect*, 87 MINN. L. REV. 851 (2003); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988) [hereinafter Farber, *Legal Pragmatism*]; CASS R. SUNSTEIN, ONE CASE AT A TIME (1999); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

[60] *See* Kennedy, *supra* note 34, at 1072.

[61] *Id.* at 1073.

has a taste for consequentialism with a mild dose of empirical study and historical context, a lukewarm dissatisfaction with legal formalism and grand theory, a preoccupation with adjudication, and a hope for apolitical decisions.

This issue of politicized decision-making is a crucial one for the eclectic pragmatist. In contrast to philosophical pragmatism and its aim to clear one's head of superstitions, fetishes, and reified ideas about truth, meaning, and knowledge, eclectics look for the status quo.[62] Following the lead of Richard Rorty, the eclectic pragmatist believes that philosophical epiphanies simply have nothing to contribute to legal reasoning.[63] The eclectic style therefore observes a very strict division between the work philosophical pragmatism does for personal metaphysics and political empowerment on the one hand, and on the other the rather conventional work that an emphasis on context and history provides in the domain of legal reasoning.[64]

Pushing against philosophy, the eclectic asks: It may very well be the case that a person will come to a pragmatist point of view on epistemological and metaphysical questions on the right and the good, but what does this have to do with the very *practical* work of legal reasoning? In making this distinction clear, Thomas Grey introduced the example of two lawyer friends: a deeply theistic Christian and a humanist atheist.[65] They wildly diverge on their views of foundationalism and truth, but both agree that legal analysis should be rooted in custom and practice, proceed instrumentally such that it serves the human good, and shy away from formal and over-inclusive legal theories in favor of experimental case-by-case trial and error.[66] There is, therefore, little connection between a person's philosophical views and their choices on whether to adopt certain styles of legal reasoning. Classical pragmatist philosophy, on this view, should have little to say about legal pragmatism.

The result for Grey is the separation of philosophy from law: freestanding legal pragmatism.[67] Many scholars appear to agree that freestanding legal pragmatism is not very exciting.[68] The exhilaration and exuberance affiliated

62 *See* Grey, *Freestanding*, *supra* note 59, at 23.

63 *Id.* at 21.

64 *See id.* at 22, 28.

65 *Id.* at 38–42.

66 *Id.* at 39–41.

67 *Id.* at 28.

68 Richard Posner, Ronald Dworkin, Richard Rorty, and Thomas Grey have all commented approvingly on the "banality" of legal pragmatism. *See, e.g.*, Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653 (1990); Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, *in* PRAGMATISM IN LAW AND SOCIETY 359 (Michael Brint & William Weaver eds., 1991); Richard Rorty, *The*

with tearing the walls of history asunder is nowhere to be found in the freestanding, eclectic style. It is, in fact, particularly banal—a middle of the road approach to legal reasoning and adjudication that mediates the pulls between competing economic and cultural approaches to the law. This characteristic, however, is not a problem for eclectics. It is rather an advantage—a mediating force between the foundational pitfalls of grand theory and the anti-intellectualism of a "business-as-usual" approach.[69] The style, as mentioned above, makes good on the basic pragmatist anti-foundational moves in the valance of contextual and instrumental argument, but it stays its hand from the philosophical muscle that renders legal decision-making a metaphysical enterprise in the Holmesian style.[70]

For more on the banality of this approach, consider the second legal scholar in this category. Along with Grey, Daniel Farber stands among those associated with eclectic pragmatism.[71] For Farber, the key idea is a critique of foundationalism and an emphasis on "context, judgment, and community."[72] This view has several advantages, including the recognition of enduring disagreement and conflict within a particular political community.[73] Since conflict will be ever-present, it is important to deal with problems incrementally and flexibly. A foundational approach based on first principles cannot do this since it will be either connected up with hard precedents established by a previous community facing different problems or universal principles assumed to answer all questions for all time.[74] This eclectic view also has the advantage of being concerned with the consequences of judicial action, where a foundational view will steer decision-making along a pre-determined course oblivious of how case-specific arrangement actually affects the lives of real people.[75] Furthermore, this type of pragmatism has the added advantages of having respect for precedent when such respect is necessary, as well as a commitment to fundamental rights.[76] Farber's pragmatism, therefore,

Banality of Pragmatism and the Poetry of Justice, 63 S. CAL. L. REV. 1811, 1811 (1990); Grey, *Holmes*, *supra* note 59, at 814.

69 Grey, *Freestanding*, *supra* note 59, at 38.

70 Grey, *Holmes*, *supra* note 59, at 798–99.

71 The following discussion is primarily focused on Farber's thinking in the context of constitutional law. In administrative contexts, it may be that he is better captured in the experimentalist vein of legal pragmatism.

72 Farber, *Legal Pragmatism*, *supra* note 59, at 1335.

73 *Id.* at 1342–43.

74 *Id.* at 1343.

75 *Id.* at 1342–43.

76 *Id.* at 1344–47.

appears to have its anti-foundational cake, and the fundamental right to eat it, too.[77]

All in all, the eclectic style brings to bear these general propositions on legal decision-making that allows for a minimalist, case-by-case balancing approach. As a jurist, wary in the shadow of "political decision," considers the various conflicts extant in the instant decision—the pull of precedent, policy consequences, the stability of the legal system, and even the advantages of "rights-talk"—she picks and chooses, in a rather eclectic way, her way to a conclusion.

II. THE LAW OF EXTRATERRITORIAL JURISDICTION

A. Pragmatism in International Law

One of the foundational questions of the international legal order has been how to make sense out of the apparent paradox of a world of multiple, sovereign authorities.[78] Two of the chief theories for explaining the nature of authority in international law, and how authority could justifiably be wielded, were naturalism and positivism.[79] Over the course of the twentieth century, naturalism and positivism gave way to a modern conceptual framework, which David Kennedy has described as a paradoxical post-war pragmatism:[80] "[t]his pragmatic sentiment distinguishes policy fashion precisely by its sophisticated attitude about the death of sovereign forms. At the same time, an often paradoxical call for a reinvigoration of international public life is also characteristic of this style."[81] Kennedy argues that Hans Kelsen, legal theorist and public international law scholar, and John Jackson, trade lawyer and economist, exemplify different ends of the pragmatic spectrum that came to dominate modern thinking about the international legal order.[82] In this story, Kelsen is a reminder of the profession's "fealty to a rejected sovereignty," but not to the actual rejection of sovereignty itself.[83] At the same time, Jackson

[77] *See id.* at 1348–49.

[78] *See, e.g.*, LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1–55 (2001); Nicholas Greenwood Onuf, *International Legal Order as an Idea*, 73 AM. J. INT'L L. 244 (1979).

[79] *See* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 40–48 (2004); ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 135 (1954). *See generally* ALFRED P. RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW (1997).

[80] David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7, 19 (1994).

[81] *Id.* at 9–10.

[82] *Id.* at 18.

[83] *Id.* at 10.

represents the technocratic, can-do attitude of the American erection of the international institutions, policy proposal, and generally dismissive attitude with respect to grand theory. As Kennedy says, "Jackson is our disappointing reality, Kelsen our failed dreams," but both are pragmatists.[84] Importantly, it is precisely with this shared vision that one can find the mainstay of the internationalist sensibility, and that concerns a shared critique of sovereignty, a shared sense that sovereignty must nevertheless live on, and a shared "commit[ment] to an image of . . . law and politics which condenses public order in the activist sovereign and projects it forward as activism on the base of commercial and civil fact."[85] More generally, Kennedy describes the pragmatist:

> All postwar international pragmatists have been rebels against form, ideology, religion, and parochialism. All have promoted a universalist respect for fact-based particularism and the "case-by-case" approach, even when their policies have repeated a sort of liberal pluralism for all seasons. They have been ethical relativists and committed pluralists, who have approached problems functionally and purposively. They have championed technocratic, administrative solutions, their institutional structures oriented only intuitively by broad principles and personal commitments. Their products are the programs, budgets, rights, treaties, doctrines and commentaries, interventions, justifications, and pedagogies we now know as the disciplines of international law, international relations, and international institutions.[86]

Kennedy does not use the language of everyday, philosophical, eclectic, economic, and experimental pragmatism.[87] Instead, he appears to refer to all

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[84] *Id.* at 11.

[85] *Id.* at 28.

[86] *Id.* at 23.

[87] David Kennedy has positioned himself in a rather interesting way with respect to the map of legal pragmatism as presented in this article. In works like *The International Style in Postwar Law and Policy*, *supra* note 80, at 19, Kennedy is clearly coming out against pragmatism as a sensibility which tends to mask the blind-spots immanent in the alliance between the Kelsens and Jacksons of the international legal world. Yet, in a recent piece, Kennedy situates himself as a pragmatist, calling on his disciplinary colleagues to be *more* pragmatic: "[W]e should redouble our efforts to be pragmatic, to disenchant our tools and ourselves, to weigh more carefully the benefits and costs of apparent successes and be guided by consequences rather than forms." DAVID KENNEDY, THE DARK SIDES OF VIRTUE 328 (2004). Kennedy is speaking in the very comfortable language of costs, benefits, and consequences—a language with which all international humanitarians are familiar. *Id.* Even more, there are echoes of Posner's emphasis on the pragmatist's need to indulge in both consequentialist and formal means when times require: "The one seems effective, the other principled, their steps elegantly coordinated by pragmatism." *Id.* at 339. It seems totally wrong to place Kennedy in either the eclectic or economic camps, however, precisely for his emphasis on the

of these varieties at one point or another in his construction of the "pragmatist sensibility": the anti-theoretical, "just do it" attitude of the everyday pragmatist; the anti-foundational, anti-formalist attitude of the classical pragmatist; the anti-ideological, accommodating dilettantism of the eclectic pragmatist; the reasonableness/efficiency fascination of the economic pragmatist; as well as the empiricism of the experimental pragmatist—these all appear in Kennedy's picture.[88] The argument that follows should therefore be read as the beginning of an illustration of Kennedy's more general references to the pragmatist sensibility in the international legal order.

B. Sovereignty/Jurisdiction and Internal/External Rules

Extraterritorial jurisdiction means what it says: the assertion of a state's legal power beyond its borders.[89] At first blush, the concept of extraterritorial jurisdiction appears to contradict one of the classic premises of international law, namely the notion of state sovereignty.[90] If, for example, a sovereign state has the unfettered right to determine for itself how its national political, social, and economic affairs will be arranged,[91] does this right not conflict with another state's exercise of extraterritorial jurisdiction? Indeed, the concept of extraterritorial jurisdiction is hotly contested, and though there have been attempts at codifying a set of international rules for the exercise of extraterritorial power, there remains a lack of consensus.[92]

"disenchant[ment] of our tools and ourselves." *Id.* at 328. Further, Kennedy's claim that the shared vocabulary of the humanitarian is undeniably political, and his emphasis on the "rulership of expertise" is out of step with the status-quo orientation of the eclectic and the welfarism of the economist. As a result, perhaps it is best to read Kennedy's praise for pragmatism in international law as little more than a pragmatic performance itself, speaking in the voice he believes will have the best chance of being heard.

[88] *See supra* note 87 and accompanying text.

[89] *See* Berman, *supra* note 40, at 317–19.

[90] *Id.*

[91] For modern accounts of state sovereignty, see The Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9); HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS 77–78 (1942). For more recent statements, see generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY 26–28 (1998); THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 3 (1995); DAVID HELD, GLOBAL COVENANT 161–62 (2004); ANNE-MARIE SLAUGHTER, NEW WORLD ORDER 12 (2004); John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782 (2003); Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 293, 295–98 (1993).

[92] *See* A. V. Lowe, *The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution*, 34 INT'L & COMP. L.Q. 724, 732 (1985). *See generally* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE (Karl Matthias Meessen ed., 1996).

As has been repeatedly explained, sovereignty is an unstable concept.[93] In contrast to the idea that states are self-contained and self-determined political entities is the counterview that states are largely subject to the global balance of power.[94] After all, the only way in which nation-states could truly exercise an unfettered right to self-determination would be to imagine a world in which the acts of one state never affected the affairs of another. Since this is not the world in which we live, this alternative view holds that the international community is not comprised of sovereign states at all, but of unequal actors, each with its own stake in maintaining a predictable society that will yield the greatest degree of sovereign prerogatives.[95] Just like the images of Kelsen and Jackson, these contradictory positions—"states are autonomous" and "states are not autonomous"—pragmatically live side by side in the international legal lexicon, where the claims of the real, concrete, and sovereign and those of the ideal, abstract, and international inevitably push back and forth on one another.[96]

The concept of extraterritorial jurisdiction sits at the center of this contradiction, mediating the back and forth between arguments for and against the sanctity of sovereign borders. The law of extraterritorial jurisdiction is similarly splintered. In the United States, jurisdiction is understood to "prescribe" (the power to apply one state's law to the residents of another), "adjudicate" (the power to hear foreign claims in the home state's courts), and "enforce" (the power to provide remedies for foreign injuries or compel

[93] For recent criticisms, see CHAYES & HANDLER CHAYES, *supra* note 91, at 26–28; FRANCK, *supra* note 91, at 3; HELD, *supra* 91, at 161–62; SLAUGHTER, *supra* note 91, at 2; Jackson, *supra* note 91, at 782; Knop, *supra* note 91, at 295–98.

[94] *See* HANS MORGENTHAU & KENNETH W. THOMPSON, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 8 (6th ed. 1985) (1948); Myres McDougal, *Law and Power*, 46 AM J. INT'L L. 102 (1952); Shirley Scott, *International Law as Ideology: Theorizing the Relationship Between International Law and International Politics*, 5 EUR. J. INT'L L. 313, 314 (1994). For discussions regarding the circular structure of international legal arguments, see MARTII KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 192–263 (1989); David Kennedy, *The Sources of International Law*, 2 AM. U. J. INT'L L. & POL'Y 1, 89 (1987); Kennedy, *supra* note 80, at 9–10.

[95] KOSKENNIEMI, *supra* note 94, at 192–93. In this way, the international order tracks the basic principles of liberal political philosophy. *See* SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY 39–40 (2000). *See generally* GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER (2004).

[96] DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 196–97 (1987); KOSKENNIEMI, *supra* note 94, at 192–263.

compliance).[97] When a state exercises these powers within its borders, it is applying what is sometimes referred to as its internal rules.[98] External rules, on the other hand, regulate those moments when states assert their jurisdictional powers beyond their territorial boundaries.[99] A nation's external rules are therefore extraterritorial in nature.[100] Predictably, much of the rub in jurisdictional discourse involves figuring out: (1) when an internal rule morphs into an external rule; and (2) when external rules apply at all.[101]

C. *The Rules of Jurisdiction*

1. *Comity*

In the United States, a court's inquiry into whether an exercise of extraterritorial power is warranted begins with the recollection that jurisdiction is fundamentally territorial,[102] giving rise to a presumption against the exercise

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[97] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 310–12 (1998). Section 401 of the Restatement (Third) of the Foreign Relations Law of the United States adopts this tri-partite division as well. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).

[98] MICHAEL BYERS, CUSTOM, POWER, AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 55 (1999).

[99] *Id.* at 65. In the *Lotus Case*, the Permanent International Court of Justice stated:

> Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules . . . .

S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7).

[100] *See* BROWNLIE, *supra* note 97, at 310–12; BYERS, *supra* note 98, at 65; ANTONIO CASSESE, INTERNATIONAL LAW 451–52 (2005). Other bases for jurisdiction include nationality and universality. CASSESE, *supra*, at 451–52. Nationality, unlike universality, has enjoyed historical consensus as a legitimate basis for the exercise of jurisdiction. *Id.* For a discussion of the nationality principle and other bases for jurisdiction, see BROWNLIE, *supra* note 97, at 301–05.

[101] The distinction between the reality and function of such external and internal rules presupposes a host of assumptions on territoriality and national membership. To do away with such assumptions highlights territoriality as a legal concept and opens the door to a socio-political analysis of extraterritoriality. Although the Conclusion hints at this issue, a full analysis is beyond the scope of this Article. For the fundamental explanation on how to look at legal concepts in this way, see Hohfeld, *supra* note 14, at 32–44.

[102] *See* American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) ("All legislation is *prima facie* territorial."); Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999). Malley, Manas, and Nix argue that this relationship between sovereignty and land has a productive function in that it helps to constitute the ideas of national membership and national interest, which they argue to be central to the jurisdictional vocabulary:

> The identification of the state with a territorially enclosed nation has infused jurisdictional rhetoric with metaphors of space, inclusion, and exclusion. The state is thus depicted as a realm to which one belongs or from which one is banned, whose interests one serves or one injures, and

of jurisdiction by one state over the citizens of another state when the dispute takes place beyond the home state's territory.[103] Stated differently, there is a presumption of non-interference with a foreign set of internal rules through the assertion of the home state's external rules. Although the presumption against extraterritorial jurisdiction has at its core the principle that states are autonomous, it is also assisted by the concept of comity.[104]

Comity can neither be derived from treaty nor customary law, and yet it has been interpreted to mean everything from binding obligation to international etiquette.[105] This principle received its initial treatment in the work of Joseph

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> whose sovereignty should be respected but is persistently at risk. Territoriality, citizenship, and reasonableness categories all reiterate this dichotomy between what is and what is not in the nation-state's best interest.

Malley et al., *supra* note 40, at 1286. Although this Article does not focus on the effects of national membership on extraterritoriality, it is clearly an important part of the working vocabulary. Malley, Manas, and Nix seek to deconstruct the "national interest" as a legal concept, whereas I am less concerned with the illusion of territorial and national memberships than I am with the means by which courts appear to shuffle back and forth between the central terms. *See generally id.* For more on nationality in international law, see INTERNATIONAL LAW AND THE RISE OF NATIONS (Robert J. Beck & Thomas Ambrosio eds., 2002); Justin Desautels-Stein, Comment, *National Identity and Liberalism in International Law: Three Models*, 31 N.C. J. INT'L L. & COMM. REG. 463 (2005). The seminal case is S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). Ian Brownlie writes:

> Municipal courts are often reluctant to assume jurisdiction in cases concerning a foreign element and adhere to the territorial principle conditioned by the *situs* of the facts in issue, and supplemented by criteria relating to the concepts of allegiance or domicile and doctrines of prior express submission to the jurisdiction and of tacit submission, for example on the basis of the ownership of property in the state of the forum.

BROWNLIE, *supra* note 97, at 302.

[103] *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 163 (2004); *American Banana Co.*, 213 U.S. at 357. For arguments against the presumption, see Turley, *supra* note 41; Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998) (discussing extraterritoriality in the context of antitrust); Wade Estey, Note, *The Five Bases of Extraterritoriality and the Failure of the Presumption Against Extraterritoriality*, 21 HASTINGS INT'L & COMP. L. REV. 177 (1997).

[104] *See, e.g.*, *Empagran*, 542 U.S. at 164–65.

[105] Paul, *supra* note 40, at 3–4. Joel Paul writes:

> Comity has been defined variously as the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or "considerations of high international politics concerned with maintaining amicable and workable relationships between nations."

Id. (citations omitted).

Story[106] and was first instantiated in American jurisprudence by *Hilton v. Guyot*:

> Comity in the legal sense, is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[107]

At the same time, there exists a healthy counter-tendency to resist comity and the presumption against extraterritorial jurisdiction,[108] motivated in part by the common view that transnational problems call for transnational answers.[109] To be sure, sovereign interdependence and the global economy have long undermined the territorial principle.[110] Today, however, the perception is that these global constraints are greater than ever[111] and that territorial jurisdiction cannot make sense out of most situations that involve spillover effects—the impact that domestic behaviors have on foreign territories.[112]

In the context of extraterritorial antitrust litigation, discussed further below, Jonathan Turley explains that judicial hostility towards the presumption against extraterritorial jurisdiction is at its peak in "market" cases, whereas in the context of environmental or labor cases, the presumption is shored up.[113] For market cases, Turley argues, courts proceed from a territorial presumption

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106 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 33 (1834).

107 Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

108 BROWNLIE, *supra* note 97, at 301–02.

109 For representative works, see GOVERNANCE IN A GLOBALIZING WORLD (Joseph S. Nye & John D. Donahue eds., 2000); DAVID HELD, MODELS OF DEMOCRACY (1995); MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS (1998); LEGALIZATION AND WORLD POLITICS (Judith Goldstein et al. eds., 2001); DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? (1997).

110 *See* DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS, AND CULTURE 8–9 (1999).

111 *See* THE GLOBAL TRANSFORMATIONS READER (David Held & Anthony McGrew eds., 2000).

112 *See* HELD ET AL., *supra* note 110, at 8–9. Though "democratic deficit" is typically a term at home in the field of economics, it also resonates in political philosophy. For a discussion of this application, see SUSAN STRANGE, THE RETREAT OF THE STATE (1996); Richard Falk & Andrew Strauss, *Toward Global Parliament*, 80 FOREIGN AFF. 212 (Jan.–Feb. 2001); James N. Rosenau, *Governance and Democracy in a Globalizing World*, *in* RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 28 (Daniele Archibugi et al. eds., 1998); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489 (2001); Michael Zurn, *Democratic Governance Beyond the Nation-State: The EU and Other International Institutions*, 6 EUR. J. INT'L REL. 191 (2000).

113 Turley, *supra* note 41, at 634–36.

rebuttable in conventional terms as described earlier.[114] In public law or non-market cases, by contrast, courts tend to focus much more tenaciously on the other side of the presumption against external rules: Congress must have explicitly intended that the law have extraterritorial effect.[115] If there was no intent, there is no jurisdiction.[116]

Turley's analysis conforms to the view that courts are generally more oblivious to the political choices common to commercial adjudications than they are to those in public law decisions.[117] That is, if courts shy away from externalizing public law rules due to their overtly political status (thus abstaining from extraterritoriality in the absence of a clear congressional intent), courts are more audacious in the less political terrain of the global economy.

The upshot is that jurisdictional discourse will begin from the same departure point regardless of its doctrinal subject—employing a presumption against prescriptive jurisdiction, rooted in comity and in the absence of congressional intent—but proceeds quite differently as it addresses more or less political subject areas. This is one of the typical blind spots found in the disciplinary alliance between public international and international economic laws' perspectives on politics and law, characterized by Kennedy as the shared pragmatist sensibility.[118]

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[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *See id.* at 634–37. *See generally* Lan Cao, *Toward a New Sensibility for International Economic Development*, 32 TEX. INT'L L.J. 209 (1997); David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335 (2000); Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209 (2002).

[118] Kennedy writes:

> At the moment, American international lawyers on the right tend to be formalists about American sovereign prerogatives and strict interpreters of the commitments of foreign powers, particularly to respect property rights and the prerogatives of international institutions, but very expansive and policy-oriented when it comes to interpreting restrictions on U.S. power abroad. American international lawyers on the left are more likely to be rule-oriented when it comes to American obligations and far less worried about the formalities of multilateral or international institutional initiatives. Political affiliations of this type contribute to the argumentative instability of the profession's intellectual terrain and to the general sense that everyone is an eclectic or post-intellectual pragmatist.

Kennedy, *supra* note 117, at 439.

What is noteworthy for the present discussion is that the conventional picture of jurisdictional discourse generally relates to doctrinal subjects considered less political and more inevitable, such as antitrust.[119] This tendency of extraterritorial antitrust toward the seemingly apolitical is also apiece with eclectic pragmatism. As discussed above, Grey explains that pragmatism can be freestanding of its philosophical parent, cutting off the political energies available to the economists and experimentalists.[120] A court performing in the eclectic style distances itself, hoping to steer clear of the politics conventionally circumscribed by the public sphere. This is why, as Turley argues, non-market doctrines shuffle the terms of jurisdictional discourse by placing a premium on congressional intent.[121] If the doctrine is non-market, it must be political. And since the eclectic is simply ill-equipped for that kind of speech, he queasily turns away.[122] In sharp contrast, the eclectic style works best when the topic is technocratic, and the decider is able to shift back and forth between functionalism and formalism as the case demands.

2. *The Effects Test and the Rule of Reasonableness*

The "effects test," in Ian Brownlie's words, requires a "principle of substantial and genuine connection between the subject matter of jurisdiction, and the territorial base and reasonable interests of the jurisdiction sought to be exercised."[123] The effects test entered American jurisprudence in *Alcoa*, where Judge Learned Hand, adjudicating a foreign aluminum cartel case, held that a prima facie presumption in favor of territorial jurisdiction should give way when the consequences of foreign conduct are evident on American soil.[124]

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[119] The government of the United Kingdom, for example, has noted this development and argued with disapproval: "There is nothing in the nature of anti-trust proceedings which justifies a wider application of these principles than is generally accepted in other matters; on the contrary there is much which calls for a narrower application." British Aide-Memoire to the Commission of European Communities, Oct. 20, 1969, *reprinted in* BROWNLIE, *supra* note 97, at 317. For a discussion on the normative aspects of antitrust doctrine, see Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745 (2004); Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257 (2001); Michael S. Jacobs, *The Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219 (1995); Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483 (1999).

[120] Grey, *Freestanding*, *supra* note 59, at 21–22, 37–38.

[121] Turley, *supra* note 41, at 601–02.

[122] *See id.* at 601–02, 634–36.

[123] BROWNLIE, *supra* note 97, at 301.

[124] United States v. Aluminum Co. of American (*Alcoa*), 148 F.2d 416, 444–45 (2d Cir. 1945).

There has been disagreement among U.S. courts as to whether the corporation must have intended these domestic effects to trigger jurisdiction.[125]

In addition to comity and the effects test, another means for figuring out when and where external rules apply is found in the Restatement (Third) on the Foreign Relations Law of the United States,[126] which has sometimes been called a "jurisdictional rule of reason."[127] In the Restatement, the rule of reasonableness[128] is recognized as a principle of customary international law,[129] and reasonableness, according to the Restatement, should serve as a significant lever in the disposition of jurisdictional discourse.[130] Accordingly:

> Jurisdiction to prescribe with respect to transnational activity depends not on a particular link, such as minimum contacts ("use of the mails," or "crossing state lines"), which have been used to define "subject matter jurisdiction" for constitutional purposes, but on a concept of reasonableness based on a number of factors to be considered and evaluated.[131]

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[125] Roger Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 9 n.44 (1992). Alford includes the following in his short list of contrasting cases: *Sabre Shipping Corp. v. American President Lines Ltd.*, 285 F. Supp. 949, 953–54 (S.D.N.Y. 1968), *cert. denied*, 407 F.2d 173 (2d Cir. 1969), *cert. denied*, 395 U.S. 922 (1969) (omitting intent requirement); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1184 (E.D. Pa. 1980) (requiring general intent); *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221, 226–27 (S.D.N.Y. 1975) (general intent); *United States v. General Elec. Co.*, 82 F. Supp. 753, 889–91 (D.N.J. 1949) (general intent); *United States v. Nat'l Lead Co.*, 63 F. Supp. 513, 524–25 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947) (requiring specific intent). Alford, *supra*, at 9 n.44.

[126] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

[127] For a discussion of the jurisdictional rule of reason, see ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS (1996). For a discussion of the history of the idea, see KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1958); BROWNLIE, *supra* note 97, at 310–12; Eleanor M. Fox, *Extraterritoriality and Antitrust—Is "Reasonableness" the Answer?*, *in* 1986 FORDHAM CORP. L. INST. 49, 54–60 (Barry E. Hawk ed., 1987); Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750 (1995); David B. Massey, *How the American Law Institute Influences Customary International Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 YALE J. INT'L L. 419 (1997); Karl M. Meessen, *Conflicts of Jurisdiction Under the New Restatement*, 50 LAW & CONTEMP. PROBS. 47 (1987).

[128] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 403, 421, 431 (1987).

[129] *See id.* § 403 cmt. a. The Reporter's Notes cite several cases for the proposition that U.S. courts tend to refrain from principled jurisdictional discourse in favor of balancing tests, among them *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976), and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–99 (3d Cir. 1979). RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403, Reporter's Notes (6) (1987).

[130] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401, 403, cmt. d (1987).

[131] *Id.* § 401, cmt. c.

This is not to say, however, that jurisdiction may only be exercised when it is reasonable. Section 402, which outlines the bases of the jurisdiction to prescribe, embraces the traditional jurisdictional justifications based on territory, nationality, and an effects test ("conduct outside its territory that has or is intended to have substantial effect within its territory").[132] Section 402 is, however, subject to the limitations found in section 403, namely, a rule of reasonableness: "Even when one of the bases for jurisdiction under section 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."[133] Section 403 lists a number of factors that should guide a legal decision-maker when determining whether jurisdictional exercise is reasonable.[134]

The comment to section 403 explains that reasonableness should not be confused with comity.[135] Comity has at times been understood as a courtesy among states and dependent on reciprocal relationships.[136] The Restatement distances the rule of reasonableness from comity, stating that reasonableness is an actual rule of customary international law and therefore cannot be disregarded by a court, even if that court perceives a foreign court as failing to reciprocate.[137]

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[132] *Id.* § 402(1)(c).

[133] *Id.* § 403(1).

[134] *Id.* § 403(2). The factors are:

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

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

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

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

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

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

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

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

Id.

[135] *See id.* § 403 cmt. a.

[136] *Id.*

[137] *See id.* For discussion, see RYNGAERT, *supra* note 40, at 134–84.

Taken together, these three principles outline the basic terms of conventional jurisdictional discourse: (1) a threshold presumption that U.S. law is territorial in its application, rooted in principles of comity, non-intervention, and sovereign equality; (2) a possibility to rebut this presumption when a decision-maker identifies a substantial and bona fide connection between the subject-matter and source of jurisdiction; and (3) a general police provision in a jurisdictional rule of reason demanding the exercise of external rules in conformity with the balancing test.

III. EXTRATERRITORIAL ANTITRUST AND THE PRAGMATIST STYLE

Over the course of the twentieth century, the field of antitrust law dominated extraterritoriality discourse.[138] This is not to say that courts have ever characterized antitrust issues as inherently more hostile to border controls than other doctrinal areas, such as the environment, human rights, or labor regimes.[139] Rather, there exists a sense that something inevitably pushes antitrust governance against territorial restraints in ways that the others do not.[140] Comity—one of the traditional grounds that polices the assertion of

[138] Turley, *supra* note 41, at 599; BROWNLIE, *supra* note 97, at 310 ("In the field of economic regulation, and especially anti-trust legislation, controversy has arisen."). For representative discussions, see Hannah L. Buxbaum, *Jurisdictional Conflict in Global Antitrust Enforcement*, 16 LOY. CONSUMER L. REV. 365 (2004); Thomas W. Dunfee & Aryeh S. Friedman, *The Extra-Territorial Application of United States Antitrust Laws: A Proposal for an Interim Solution*, 45 OHIO ST. L.J. 883 (1984); Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159 (1999–2000); R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146 (1957); Karl M. Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783 (1984); Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627 (2001).

[139] *See* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno T. Kamminga eds., 2004); Browne C. Lewis, *It's a Small World After All: Making the Case for the Extraterritorial Application of the National Environmental Policy Act*, 25 CARDOZO L. REV. 2143 (2004) (discussing extraterritorial jurisdiction and environmental law); Stephen B. Moldof, *The Application of U.S. Labor Laws to Activities and Employees Outside the United States*, 17 LAB. LAW. 417 (2002) (discussing labor law and extraterritoriality); Jason Jarvis, Comment, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 PEPP. L. REV. 671 (2003) (discussing human rights enforcement and extraterritorial jurisdiction).

[140] For a discussion of the "global antitrust" movement, see COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY (Michael S. Greve & Richard A. Epstein eds., 2004); MAHER M. DABBAH, THE INTERNATIONALISATION OF ANTITRUST POLICY (2003); Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911 (2003); Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L L. 355 (2004); Clifford A. Jones, *Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market*, 16 LOY. CONSUMER L. REV. 409 (2004); Charles W. Smitherman, *The Future of Global Competition Governance: Lessons from the Transatlantic*, 13 AM. U. INT'L L. REV. 769 (2004); Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173 (2005). Antitrust coursebooks are also emphasizing the global nature of the new antitrust jurisprudence. *See, e.g.*, EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND

external rules in jurisdictional discourse—has even been declared dead when it comes to the inevitably progressive march of the antitrust regime.[141] In the *Empagran* decision, the Supreme Court reinforced this idea even as it held against extraterritorial assertion in that case:

> No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.[142]

A. *From* Alcoa *to* Empagran

1. Alcoa *and the Effects Test*

Alcoa represents the seminal pragmatist decision in the field of extraterritorial jurisdiction, highlighting the importance of purposive, functional jurisprudence.[143] Decided in 1945, *Alcoa* involved a U.S.-based aluminum company that had enjoyed a number of patents on aluminum products.[144] After a consent decree curtailed certain agreements with Alcoa's foreign competitors on the sale of aluminum in the United States, the Department of Justice brought a monopoly claim against Alcoa under the Sherman Act.[145] The court, showing a strong interest in exercising jurisdiction over activities characterized by their consequences, and not so much by their nature, explained:

> We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. On the other hand, it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance,

ECONOMICS (2007); ELEANOR M. FOX ET AL., CASES AND MATERIALS ON U.S. ANTITRUST IN GLOBAL CONTEXT (2d ed. 2004).

[141] *See generally* Waller, *supra* note 43 (arguing that the practical necessities of global competition have ushered in comity's end).

[142] F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004).

[143] *See* United States v. Aluminum Co. of America (*Alcoa*), 148 F.2d 416 (2d Cir. 1945); Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1986); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

[144] *Alcoa*, 148 F.2d at 422.

[145] *Id.* at 421.

> for conduct outside its borders that has consequences within its borders which the state reprehends . . . .[146]

Finding that the agreements were intended to, and in fact did, have an effect on the U.S. aluminum market, the court applied American antitrust law beyond U.S. borders.[147]

2. *The Consequentialism of* Timberlane

Another hefty weapon in the eclectic pragmatist's toolbox is policy balancing, eventually articulated in the Restatement.[148] Although balancing is often understood as a rival form of jurisdictional discourse, it shares the pragmatist sensibility found in the effects test. In *Timberlane Lumber Co. v. Bank of America*, the plaintiffs claimed that Bank of America officials in Honduras and the United States prevented Timberlane from entering the lumber export business controlled by the bank.[149] At the district court level, Timberlane's claim was dismissed due to a lack of subject matter jurisdiction (using the effects test, the court did not find an impact where it mattered) and the act of state doctrine.[150] After citing the rationale for the act of state doctrine—that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory"[151]—the court explained that the doctrine is based on a concern to avoid the "political branches of the government" and their foreign relations responsibilities.[152] What was important for adjudication was not adherence to some formal rule of non-interference, but an ad hoc determination of whether the foreign conduct was political enough to warrant the stay of American law.[153] The court said that if a particular practice is mandated by foreign law,

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146 *Id.* at 443 (citations omitted). The court thus upheld extraterritoriality based on "settled law," despite Justice Holmes's claim 30 years earlier that the idea of extraterritorial jurisdiction was "startling." American Banana Co. v. United Fruit Co., 213 U.S. 347, 355 (1909). Ironically, the least pragmatic of the major extraterritorial antitrust decisions came from a jurist that many claim to be the founding father of legal pragmatism—Holmes, in *American Banana*. For Holmes, the question had little to do with what made sense or whether assertions of American law onto foreign conduct were useful. There was a principle in play, that of territoriality, and it governed with an iron fist. *See id.* at 357.

147 *Alcoa*, 148 F.2d at 444.

148 See *supra* note 134 and accompanying text.

149 Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 601 (9th Cir. 1977).

150 *Id.*

151 *Id.* at 605 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

152 *Id.*

153 *Id.* at 614–15.

U.S. courts might be prevented from jurisdictional application.[154] When the conduct is merely *enabled* by foreign law, however, the conduct is necessarily less political and more susceptible to U.S. law.[155]

The court held that, on the *Timberlane* facts, the involvement of Honduran government officials did not rise to the level of politics that would implicate the act of state doctrine because:

> the allegedly "sovereign" acts of Honduras consisted of judicial proceedings which were initiated by Caminals, a private party and one of the alleged co-conspirators, not by the Honduran government itself . . . . Timberlane does not seek to name Honduras or any Honduran officer as a defendant or co-conspirator, nor does it challenge Honduran policy or sovereignty in any fashion that appears on its face to hold any threat to relations between Honduras and the United States. In fact, there is no indication that the actions of the Honduran court and authorities reflected a sovereign decision that Timberlane's efforts should be crippled or that trade with the United States should be restrained.[156]

Next, the court embarked on the balancing route later taken up in the Restatement.[157] Reflecting on the less than obvious nature of what should count as a direct and substantial effect, as well as the logic of always finding jurisdiction as long as there has been an effect,[158] the court articulated a discursive approach that would turn on the established criteria of effects and nationality, as well as comity concerns regarding the impact of jurisdiction on foreign governments.[159] Thus, the *Timberlane* test can be seen as an extension of the effects test in that it requires a more involved consequentialist

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154 *See id.* at 606.

155 *See id.*

156 *Id.* at 608.

157 *Id.* at 613–15.

158 *See id.* at 611.

159 *Id.* at 614. The full test is described as follows:

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. A court evaluating these factors should identify the potential degree of conflict if American authority is asserted.

Id. (citations omitted).

determination. The court seemed to suggest that a finding that foreign conduct affected the United States is by itself too much of a fetish.[160] The crux of jurisdictional authority should turn instead on a more thoroughly wrought understanding of the impact of the conduct, as well as the impact of jurisdictional power on a foreign state.[161] That is, jurisdictional exercise will be considered, but only so long as the conduct in question is not political—defined as the public exercise of affirmative legal obligation by a sovereign.[162]

3. *The Apolitical Attitude in* Hartford Fire

Many commentators saw the *Hartford Fire* Supreme Court decision in 1993 as a rebuke of the balancing approach articulated by the Ninth Circuit, as well as the method found in the Restatement, favoring a more principled or formalist understanding of extraterritoriality.[163] The *Hartford Fire* plaintiffs were several U.S. states, including California, which claimed that a conspiracy had emerged among London reinsurers to restrict the terms of commercial general liability insurance in the United States.[164] The defendants conceded that the impact of the agreements had been felt on U.S. soil but argued that U.S. courts should not have jurisdiction since such an application would be in conflict with the laws of Britain.[165] Because the U.K. had its own regulatory regime in place, and the conduct in question was legal under those regulations, the exercise of foreign power over that activity would present a conflict.[166] The Court did not find this argument persuasive and instead adopted the contrary view that because nothing in British law affirmatively required the reinsurers' conduct, and because the defendants presented no other argument that compliance with the laws of both countries was impossible, there could be no conflict between concurrent jurisdiction by American and British courts.[167] As for the comity analysis required by the jurisdictional rule of reason, the Court ended the conversation quickly: "We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity."[168]

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160 *See id.* at 611.

161 *Id.* at 615.

162 *See id.* at 606.

163 *See, e.g.*, Roger Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on* Hartford Fire Insurance Co. v. California, 34 VA. J. INT'L L. 213, 213–14 (1993).

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

165 *Id.* at 797–99.

166 *Id.* at 798–99.

167 *Id.* at 799.

168 *Id.*

Is *Hartford Fire* an affront to the Restatement and the jurisdictional rule of reason? Sort of. It is true that the Court was curt in its comity treatment and rejected the *Timberlane* approach. Andreas Lowenfeld, a primary author of the Restatement and counsel in *Hartford Fire*, has said that the Court's decision diverged from the intent of the Restatement.[169] It is also true that the decision appeared more formalist than *Alcoa* and *Timberlane*, with its emphasis on formulaic determinants, namely its reasoning that if there is a substantial effect, and a foreign government has not affirmatively ordered a party to act in such a way that can conflict with foreign law, U.S. courts can hear the case.[170]

What is missing from this analysis, however, is an appreciation of how politically averse the Court happened to be in the face of these facts. While *Hartford Fire* might be a step back from the thicker consequentialism and empiricism at work in *Timberlane*, it nonetheless represented an affirmation of a jurisdictional discourse interested in impact and extremely leery of political involvement. If it is thought that *Hartford Fire* seems hard to square with *Timberlane*, it is only because, in the hands of the majority, the eclecticism driving the result asked less from comity and more from effects in creating what seemed like the most useful conclusion. Indeed, more than a decade later, the *Empagran* decision underscored the eclectic preoccupation with consequences and comity.[171] What made more sense in *Hartford Fire*, where the politics of the insurance industry seemed to warrant the intervention of American courts, made less sense in *Empagran*, when there was less at stake for American commerce. Thus, comity, treated so discourteously in *Hartford Fire*, was welcomed back in *Empagran*.

4. Empagran *and the Eclectic Style*

In the past several years, state, federal, and foreign courts have decided various iterations of the historic "vitamins case."[172] Some of the claims,

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169 LOWENFELD, *supra* note 127, at 27–28.

170 *See Hartford Fire*, 509 U.S. at 795–99.

171 F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004).

172 The *Empagran* case has generated a considerable amount of scholarly commentary. *See, e.g.*, Alvin K. Klevorick & Alan O. Sykes, *United States Courts and the Optimal Deterrence of International Cartels: A Welfarist Perspective on* Empagran, *in* ANTITRUST STORIES 361 (Eleanor M. Fox & Daniel A. Crane eds., 2007); Hannah Buxbaum, *National Courts, Global Cartels:* F. Hoffman-LaRoche Ltd. v. Empagran, S.A. *(U.S. Supreme Court 2004)*, 5 GERMAN L.J. 1095 (2005); Susan E. Burnett, *U.S. Judicial Imperialism Post* Empagran v. F. Hoffmann-LaRoche*? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust*, 18 EMORY INT'L L. REV. 555 (2004); Ronald W. Davis, Empagran *and International Cartels—A Comity of Errors*, 19 ANTITRUST 58 (Fall 2004) (arguing that the Court misapplied the comity concept to the *Empagran* facts); Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International*

brought by private parties and government agencies against a number of major vitamin manufacturers, were price-fixing, market allocation, and the monitored compliance by those companies of the sales volumes of vitamins, vitamins premixes, and vitamin bulk products in the global market.[173] The major defendants—F. Hoffmann-La Roche (Switzerland), Lonza (Switzerland), BASF (Germany), Eisai (Japan), E. Takeda Chemical Industries (Japan), and Daiichi Pharmaceutical Company (Japan)—were found to have illegally affected billions of dollars worth of commerce in vitamins and were consequently held liable under the Sherman Act, heavily fined, and faced with criminal charges.[174] The vitamins case is a classic example of a worldwide price-fixing conspiracy and exactly the type of market distortion meant to be protected against by antitrust laws. As Harry First has explained, "These cases settle damages along a distribution chain that reaches from cattle feed lots down to consumers of vitamin-enriched foods . . . . The array of jurisdictions involved, the extent of the fines, and the potential magnitude of civil damages that may eventually be assessed certainly seems extraordinary."[175]

The global expanse and per se nature of the offenses caused little controversy among antitrust practitioners. In sharp contrast, one of the vitamins case variations decided by the Supreme Court in 2004 in *Empagran* has generated a great deal of debate.[176] Unlike previous adjudications of the vitamins case, it did not involve any American plaintiffs or defendants, thus calling into question whether the court could properly assert subject matter jurisdiction.[177] The plaintiffs in *Empagran* were corporations domiciled in foreign countries (Ecuador, Panama, Australia, and Ukraine) that had

Competition Law, 68 ANTITRUST L.J. 711 (2001); Calvin S. Goldman et al., *Comity after* Empagran *and* Intel, 19 ANTITRUST 6 (Summer 2005); Sam Foster Halabi, *The "Comity" of* Empagran*: The Supreme Court Decides that Foreign Competition Regulation Limits American Antitrust Jurisdiction over International Cartels*, 46 HARV. INT'L L.J. 279 (2005); Kenneth S. Reinker, *Case Comment: Roche v. Empagran*, 28 HARV. J.L. & PUB. POL'Y 297 (2004) (arguing that the Court failed to establish a workable standard for determining when U.S. courts have jurisdiction over foreign antitrust violations); Siddharth Fernandes, Note, F. Hoffman-LaRoche, Ltd. v. Empagran *and the Extraterritorial Limits of United States Antitrust Jurisdiction: Where Comity and Deterrence Collide*, 20 CONN. J. INT'L L. 267 (2005).

[173] First, *supra* note 172, at 713.

[174] *Id.* at 714–16. Another vitamin manufacturer at the center of the controversy was the French company Rhone-Poulenc. Rhone-Poulenc was not charged in the United States, however, as it had taken advantage of the Department of Justice's leniency policy for early reporting. *Id.* at 715–16.

[175] *Id.* at 719.

[176] The case had a formidable list of amicus briefs. Among them were those filed by the governments of the United Kingdom, Germany, Canada, Japan, and the United States, as well as the U.S. Chamber of Commerce, the Organization for International Investment, and scores of economists and law professors. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 157–58 (2004).

[177] *See id.* at 158–59.

purchased vitamins from foreign defendants for delivery outside the United States.[178] As in previous suits, the claim was that the defendants had engaged in price-fixing and market allocation schemes in the vitamins market, with effects both in and outside of the United States, and that the plaintiffs had suffered as a result.[179] The plaintiffs sought a remedy in the United States District Court for the District of Columbia under the Sherman Act, the Clayton Act, foreign antitrust laws, and international law.[180]

The district court explained that the plaintiffs' claim turned on whether the "allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws."[181] Consequently, the contention that there had been a price-fixing scheme was not in dispute; the matter was solely one of whether foreign harms produced and sustained by foreign parties could be adjudicated in an American court.[182] The district court held against the plaintiffs, denying jurisdiction on the rationale that the plaintiffs' injuries had not been generated by the conspiracy's anticompetitive effects on U.S. soil.[183] On appeal, the plaintiffs argued that under the FTAIA,[184] it is unnecessary for the

[178] Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d 338, 342 (D.C. Cir. 2003); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. at 159.

[179] Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d at 342.

[180] Empagran S.A. v. F. Hoffmann-La Roche, Ltd., 2001 WL 761360, at *1 (D.D.C. June 7, 2001), *rev'd*, 315 F.3d 338 (D.C. Cir. 2003).

[181] Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d at 343 (citing Empagran S.A. v. F. Hoffman-La Roche, Ltd., 2001 WL 761360, at *2).

[182] *Id.* at 357 ("There is no dispute that the foreign plaintiffs in this case have been injured by paying inflated prices for vitamins.").

[183] *Id.* at 343.

[184] 15 U.S.C. § 6a (2006). For a discussion, see Salil K. Mehra, *'A' is for Anachronism: The FTAIA Meets the World Trading System*, 107 DICK. L. REV. 763 (2003); Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?*, 38 TEX. INT'L L.J. 11 (2003). The text of the FTAIA states:

> § 6a. Conduct involving trade or commerce with foreign nations
> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

anticompetitive effects of an antitrust violation to give rise to the plaintiffs' actual claim.[185] Rather, those effects need only have given rise to any claim, and to that extent, prior adjudications of the vitamins case had made clear that such anticompetitive effects had been substantially felt within the United States.[186] In the alternative, the plaintiffs also argued that even if a more restrictive view of the FTAIA were taken, it could be shown that the foreign injuries were sustained as a result of distorted American vitamins commerce.[187]

The Court of Appeals for the District of Columbia accepted the plaintiffs' reading of the FTAIA and, in so doing, left the alternate argument unaddressed.[188] The court explained that the language of the FTAIA was itself too ambiguous to determine whether the statutorily required anticompetitive effects should give rise to any claim on U.S. soil, or only to the plaintiffs' own claim.[189] As a result, the court determined that the

> harmful effect on United States commerce must give rise to "a claim" by someone, even if not the foreign plaintiff who is before the court. Although the language of § 6a(2) does not plainly resolve this case, we believe that our holding regarding the jurisdictional reach of FTAIA is faithful to the language of the statute. We reach this conclusion not only by virtue of our literal reading of the statute, but also in light of the statute's legislative history and underlying policies of deterrence . . . .[190]

The D.C. Circuit's decision situated itself as falling "somewhere between the views" on the FTAIA that had been articulated in recent decisions by the Fifth and Second Circuits.[191] When the Supreme Court granted certiorari, it seemed that the argument over whether the FTAIA allowed a more or less restrictive understanding of "gives rise to a claim" would be settled.[192] Justice Breyer's majority opinion begins with the sense that this is precisely the issue to be resolved.[193] The difficulty with the holding, however, is that it leaves

15 U.S.C. § 6a (2006).

185 Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d at 340.

186 *Id.* at 340–41.

187 *Id.* at 341.

188 *Id.*

189 *Id.*

190 *Id.*

191 *Id.* (citing Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 427 (5th Cir. 2001); Kruman v. Christie's Int'l PLC, 284 F.3d 384, 400 (2d Cir. 2002)).

192 *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 160, 162 (2004).

193 *See id.* at 159 ("[W]e ask whether the conduct nonetheless falls within a domestic-injury exception to the general rule, an exception that applies (and makes the Sherman Act nonetheless applicable) where the

ambiguous the question of whether a foreign plaintiff's claim will be sustained when the foreign injury is indirectly related to anticompetitive effects in the United States.[194]

The Court begins its analysis by pointing to two general considerations. The second ground, which is less interesting than the first, is the idea that the FTAIA's legislative history does not warrant an expansion of American jurisdictional power.[195] If anything, says the Court, the purpose of the statute was precisely to curb such assertions, and no court has ever construed the FTAIA in such a way when dealing with foreign parties and foreign injuries.[196] It is difficult to take this argument very seriously, however, as the legislative history of the FTAIA has been acknowledged as less than helpful.[197] Furthermore, this statement on a presumption against jurisdiction can be understood as the Court doing little more than floating an ace, as if to say that when a situation warrants a congressional trump, it can always be pulled. In selecting its first and more important ground, the Court opted to highlight comity as its favorite jurisdictional term.[198]

For the Court, comity suggests a style of statutory construction for especially ambiguous statutes (like the FTAIA) that should "avoid unreasonable interference with the sovereign authority of other nations."[199] It is also a style that assumes "that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world."[200] But the actual harmony or conflict of American and foreign law is not really what is driving the Court's comity analysis; as Justice Breyer states, the real work of determining whether a foreign set of antitrust laws track American antitrust laws is simply "too complex to prove

conduct (1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and (2) 'such effect gives rise to a [Sherman Act] claim.'").

194 *See id.* at 175.

195 *See id.* at 169–73.

196 *Id.* at 169.

197 Beckler & Kirtland, *supra* note 184, at 15.

198 *Empagran*, 542 U.S. at 164 (citing Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.")).

199 *Id.*

200 *Id.* at 164–65.

workable."[201] Instead, the comity question should be framed in jurisdictional terms, and not conflict of laws, thus giving rise to the Court's "basic question": Is it reasonable for American law to apply to foreign plaintiffs that have been injured by foreign defendants in foreign territory?[202] The problem with this, however, is that the core of the comity idea—that U.S. courts should refrain from unreasonable interference with foreign interests—is left completely open due to the Court's unwillingness to actually look at possible conflicts. As a result, the Court is essentially left with an intuition that it is best to take foreign governments at their word. After citing arguments from German, Canadian, and Japanese amicus briefs on how American jurisdiction "would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody," the Court determined that the rule of jurisdictional reason frowned upon the foreign plaintiffs.[203]

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[201] *Id.* at 168. Breyer goes on to ask: "How could a court seriously interested in resolving so empirical a matter—a matter potentially related to impact on foreign interests—do so simply and expeditiously?" *Id.* at 169.

[202] *Id.* at 166.

[203] *Id.* at 167–69. This note summarizes the primary thrusts of the foreign briefs. Japan:

> Giving foreign purchasers the right to damages for purely foreign market transactions undermines the important principle of comity, respect due to a sovereign nation to regulate conduct within its national territory. Such an interpretation of the FTAIA has international public policy implications which would adversely affect the ability of the Government of Japan to regulate its own economy and govern its own society.

Brief of the Government of Japan as Amicus Curiae in Support of Petitioners, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004), 2004 WL 226390 at *2 [hereinafter Brief of Japan]. Canada:

> The Government of Canada and Canadian citizens have a particular interest in how principles of comity and international law that are recognized in both the United States and Canada are brought to bear on the resolution of this case. Canada has an equally strong interest in the practical consequences of this Court's decision both because of the interdependence of the economies of Canada and the United States, which enjoy the largest bilateral trading relationship in the world, and because of the significant effects the extraterritorial application of U.S. antitrust law is likely to have on the administration of Canada's own competition laws and policies.

Brief for the Government of Canada as Amicus Curiae Supporting Reversal, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004), 2004 WL 226389 at *1 [hereinafter Brief for Canada]. Germany and Belgium:

> The court of appeals' decision incorrectly interprets the FTAIA in a manner that will do grave harm to the antitrust enforcement efforts of the international community. The court's interpretation drastically expands the extraterritorial reach of the United States' antitrust laws to situations in which the conduct and the alleged anticompetitive effects suffered by foreign plaintiffs occur only in foreign countries. Yet, in those situations, other nations have a significant interest in the transaction and its effects and have jurisdiction to regulate or prohibit that conduct. The court's holding thus directly conflicts with the well-established principle that United States

But this was not the end of the story. Although the Court had clearly decided the hypothetical question of whether a foreign plaintiff suffering injuries generated by purely foreign effects could find refuge in American courts (the answer was that comity counseled against such an assertion in the absence of clear statutory language),[204] the actual question of whether the *Empagran* plaintiffs' injuries were independent of anticompetitive effects in the United States was left open and, consequently, remanded back to the D.C. Circuit.[205] Thus, while political nausea (in the face of active governmental interest) and comity were ostensibly doing much of the work in the decision, the Court also wanted to leave some bread crumbs behind in the name of functionalism.

On remand, the plaintiffs again asserted their alternate theory that it was impossible in a global market of fungible vitamin products to separate out the foreign injuries from the anticompetitive effects in the United States.[206] The court rejected this argument, explaining that while the plaintiffs may not have suffered their injuries but for the anticompetitive U.S. effects, the comity principle suggested a more demanding proximate causation test.[207] Thus, because the plaintiffs could not argue that the U.S. effects directly caused their injuries, and because a but-for test is somehow less congruous with comity, the court held the plaintiff to be barred from American courts.[208] Whether this

> statutes are to be construed to avoid conflict with other nations' laws and to avoid unreasonableness in the exercise of U.S. courts' jurisdiction.

Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004), 2004 WL 226388 at *4 [hereinafter Brief of Germany and Belgium]. The United Kingdom and the Netherlands also submitted an amicus brief, presenting a similar argument:

> [T]he Governments in general are opposed to assertions of extraterritorial jurisdiction in private antitrust cases where foreign claimants seek to recover from foreign defendants solely for foreign injuries not incurred in the country in which the private suit is filed. Such litigation contravenes basic principles of international law and may impede trade and investment as well as undermine public enforcement by the Governments of their competition laws. It also would interfere with a sovereign nation's right to regulate conduct within its territory.

Brief of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004), 2004 WL 226597 at *2 [hereinafter Brief of the U.K. and the Netherlands].

[204] *Empagran*, 542 U.S. at 156.

[205] *Id.* at 175.

[206] Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 417 F.3d 1267, 1270 (D.C. Cir. 2005).

[207] *Id.* at 1270–71.

[208] *Id.* As Hanno Kaiser has noted, this is an odd result considering that the vitamins case "is probably *the* textbook case for dependent effects, a truly global cartel that could never have worked profitably in the rest of the world without allocating and sustaining higher prices in the U.S. market." Hanno F. Kaiser, *Application of*

idea that but-for causation arguments do not adequately capture the comity analysis will catch on in other circuits, or is a fair reflection of what the Supreme Court intended with its decision, are questions for the future.[209]

IV. PRAGMATISM FIGHTS BACK: WHAT ECONOMICS AND EXPERIMENTALISM MIGHT OFFER EXTRATERRITORIAL ANTITRUST

To recap, *Empagran* involved a worldwide conspiracy among vitamins manufacturers for price-fixing on their sales to local distributors.[210] The facts of this per se violation of the Sherman Act were not disputed.[211] What was under scrutiny was whether foreign plaintiffs complaining of injury sustained outside the territorial borders of the United States could justifiably bring suit in American courts.[212] On this point, the Supreme Court eclectically drew on a comity analysis, reasonableness considerations, and the possibility of an effects test in order to reach its conclusion: the plaintiffs could not be heard in a U.S. court unless it could be proved that their injury was in direct connection with adverse effects to the American vitamins market.[213] Comity served as a tool for limiting jurisdiction and provided a presumptive argument against extraterritorial assertions.[214] The rationale for this presumption was described pragmatically as a device that provides "a harmony particularly needed in today's highly interdependent commercial world."[215] Harmony, for the Court as well as the foreign governments that submitted amicus briefs, meant isolation and the ability for a state to go about setting and following its own internal rules to the best of its ability.[216]

The *Empagran* decision is in step with a line of extraterritoriality cases that have been pragmatically decided with an eclecticism at once comfortable with any one of the three primary types of jurisdictional discourse (comity,

U.S. Antitrust Laws to Wholly Foreign Conduct: The Door is Shut. Isn't It?, GERMAN AM. TRADE, Jan.–Feb. 2005, at 26, 29.

[209] Since the Supreme Court's decision, lower court holdings have included: *Sniado v. Bank Austria AG*, 378 F.3d 210 (2d Cir. 2004); *MM Global Services v. The Dow Chemical Co.*, 329 F. Supp. 2d 337 (D. Conn. 2004); In re *Monosodium Glutamate Antitrust Litigation*, No. Civ.00MDL1328(PAM), 2005 WL 1080790 (D. Minn. May 2, 2005).

[210] F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 159 (2004).

[211] *Id.*

[212] *Id.* at 159–60.

[213] *Id.* at 155–56, 164–65, 169.

[214] *Id.* at 169.

[215] *Id.* at 164–65.

[216] *Id.*

reasonableness, and effects).[217] The *Empagran* Court, after all, based its decision on all three.

Legal pragmatism, however, is more than just eclecticism, and as the following discussion shows, it is possible to hear the *Empagran* facts in the economic and experimental registers as well. To be clear though, there is nothing determinative about the economic and experimental modes that would guarantee a particular outcome in this case. The following views, as a consequence, are necessarily idiosyncratic. The bottom line, however, which comes through in the Conclusion, is that these styles, due to their clarity of purpose and politics, are superior to the eclectic style of pragmatist legal reasoning.

A. An Economic Pragmatist View

In addition to his well-known role as one of the founders of the law and economics movement, Richard Posner has taken it upon himself in the last decade to make the case for legal pragmatism.[218] Posner's fullest explanation of the theory of "pragmatic adjudication" is in his book, *Law, Pragmatism, and Democracy*, in which he describes it as "a disposition to ground policy judgments in facts and consequences"—consequences that are not ad hoc but understood in light of their systemic implications for the legal system.[219] Posner explains, however, that the focus on systemic consequences should not be treated as a rule in itself, as this would turn into a kind of formalism with which his pragmatism, naturally, would find disfavor.[220] Rather, a pragmatic judge should adopt the "pragmatic mood" that will sometimes find it advantageous to focus only on the parties before him and on the need to follow precedent.[221] Eschewing formalism as a point of departure, Posner argues that like the eclectic, formalist decision-making should be one of many tools the pragmatic judge will have at his disposal.[222] Pragmatic adjudication will

[217] *Id.* at 165.

[218] Posner's best summation is in LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 35. For an earlier iteration, see Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 1 (1997). For perspectives on Posner's pragmatism, see David Luban, *The Posner Variations (Twenty-Seven Variations on a Theme by Holmes)*, 48 STAN. L. REV. 1001 (1996); William E. Scheuerman, *Free-Market Anti-Formalism: The Case of Richard Posner*, 12 RATIO JURIS 80 (1999); Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687 (2003); Jeremy Waldron, *Ego-Bloated Hovel*, 94 NW. U. L. REV. 597 (2000).

[219] POSNER, *supra* note 35, at 59.

[220] *Id.* at 59–61.

[221] *Id.* at 28, 59–61.

[222] *Id.* at 64.

consequently be spotted with "formalist pockets," which stand for the values in stability and predictability served by only slowly adjusting the status quo and the expectations that underlie it.[223] Furthermore, since judges can hardly be expected to always take an "all-things-considered" account in decision-making, they will sometimes have to dispense with moods and rely on rules.[224] This reliance will not be due to any requirement of precedent per se, but will be attractive because it is the most reasonable course of action in that particular context.[225] This formalism also takes shape in the form of judicial limits or boundaries. These limits include the rare times when a dispute will have such a clear answer that to decide against precedent will have untoward effects on the legal system and the separation of powers doctrine, which forbids judges from deciding questions in ways that exceed their jurisdiction.[226] Even if the best consequences demand a decision that would override, say, the political question doctrine, or blatantly flout precedent, the *reasonable* judge will be bound to refrain from making what appears to be the *best* decision.[227]

Posner's pragmatic method does not end here, however. If it did, it would be difficult to distinguish from the mode of eclectic pragmatism. Where eclectics leave reasonableness and policy balancing up to the judge, however,

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223 *Id.* at 60, 65–71.

224 *Id.* at 64.

225 *Id.* at 65.

226 *Id.* at 65–66.

227 *Id.* Posner has recognized the similarities his program shares with consequentialism and has attempted to separate the two with reference to his emphasis on the ultimate criterion of reason. Posner says, "If a consequentialist is someone who believes that an act, such as a judicial decision, should be judged by whether it produces the best overall consequences, pragmatic adjudication is not consequentialist, at least not consistently so." *Id.* at 65. It is hard to see the sense of this. Posner's legal pragmatism can be defined as a decision-making process whereby the best judicial act will be the one with the most reasonable consequences. Consequentialists, in contrast, would replace "reasonable" with "best." The consequentialist requires a normative theory to inform her actions on what will be counted as best and what will not. *Id.* Best in this sense does not have any independent meaning exogenous of the normative content provided by her theory of the good. When Posner distances legal pragmatism from consequentialism because it substitutes what appears to be the more flexible standard of "reasonable" for "best," he makes the mistake of ignoring the difference between act- and rule-consequentialism. To be fair, Posner does discuss rule-consequentialism, but he dismisses it for reasons that are not all together clear. *See id.* at 49. The account provided thus far has been one of act-consequentialism, but rule-consequentialism, in contrast, holds that an act will be right to the extent that it conforms to a particular rule—a rule that is assumed to produce the best consequences when it is obeyed. SHELLY KAGAN, NORMATIVE ETHICS 212 (1998). Posner gives examples of pragmatic decisions that will not have the best consequences in the short run but, due to values in predictability, stability, or separation of powers, will serve the good in the long term. POSNER, *supra* note 35, at 65–69. This is precisely the formulation of rule-consequentialism, in which, for Posner, the rule being served in the long term is the rule of reason. *Id.* at 74–75. The set-up is relatively simple: under pragmatic adjudication, a judicial act is the right one when it has the best consequences, subject to the rule of reason. *Id.* As rule-consequentialists understand, however, this form of the theory is no less held hostage to a theory of the good than is act-consequentialism.

Posner argues that reasonableness determinations should be assisted by the social sciences: "Pragmatic reasoning is empiricist, and so theories that seek to guide empirical inquiry are welcomed in pragmatic adjudication . . . ."[228] The approach to legal problems that best gives content to reasonable decision-making guided by empirical inquiry, in Posner's view, is law and economics.[229]

It is not coincidental that Posner looks to law and economics for help in unpacking the rule of reason in the pragmatic method. In his reading of the classic pragmatists, Posner sees a rejection of deductive logic and universal moral truths, the desire to understand propositions by their consequences and not by their formal elements (if such things could ever be found), and a "radical empiricism" that advocated an "extension of the scientific method into all areas on inquiry."[230] This extension opens the door to economic analysis, but as Posner explains, economics should not become a normative base for judicial action.[231] Thus, economics plays a very large role in the method here, merging the methods of legal pragmatism and law and economics in a way that is difficult to distinguish.[232]

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228 POSNER, *supra* note 35, at 77.

229 *Id.* at 78.

230 Richard A. Posner, *Legal Pragmatism*, 35 METAPHILOSOPHY 147, 148 (2004).

231 *Id.* at 152. Posner writes:

> But economics, and therefore economic analysis of law, come in both formalist and pragmatic versions, and it is important to distinguish them. In the formalist version, legal decisions are deemed sound insofar as they conform to a given economic norm, such as Pareto superiority or wealth maximization. In effect, economic logic is substituted for legal logic, but the structure of law remains logical. In the pragmatic version of economic analysis of law, economic analysis identifies the consequences of legal decisions but leaves it up to the judge or other policy maker to decide how much weight to give to those consequences in the decision-making process. Economics so understood is an empirical social science, not a body of normative doctrine.

Id. This account seems to draw on Thomas Cotter's review of legal pragmatism's relationship with law and economics—at the prima facie level, there is a genuine collision between legal pragmatism's alleged anti-foundationalism and the foundational emphasis on wealth maximization over distributional equity in law and economics. Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2098 (1996). The pragmatist decision-maker that is wedded to a law and economics approach will therefore be caught up in a series of normative views privileging particular types of criteria—an especially non-pragmatic approach. If the decision-maker retreats from this type of methodological exclusivity, however, and maintains Posner's reasonableness as the ultimate criterion, economic approaches can often be useful for predicting the consequences of certain rules. *Id.* The bottom line for Cotter is that the law and economics model, taken alone, is a foundational and non-pragmatic legal theory, but once its user disenchants the method—understanding its biases and presumptions—the economic approach can assist the pragmatic decision-maker in her search for predictable results. *Id.* at 2136–40.

232 Scheuerman, *supra* note 218, at 86–87.

By complementing Posner's pragmatism with a law and economics approach to jurisdictional discourse, we should have an adequate picture of economic pragmatism: it begins with the consequentialist notion that a decision should be made that will have the most reasonable effects.[233] In determining reasonableness,[234] the court will first distinguish itself as anti-foundational (it will not follow rules that have as their basis little more than the pull of first moral principles such as fairness or justice), contextual (it will not follow rules that have as their basis little more than the pull of precedent), and economic (it will argue for the feasibility and usefulness of making assumptions about how actors characterize their self-interest, as well as the superiority of cost-benefit analysis in gauging the transactions between such actors).[235]

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[233] POSNER, *supra* note 35, at 74–75.

[234] Of course, this type of "reasonableness" determination is very different than the kind typically used in jurisdiction discourse. For writers like Andreas Lowenfeld and Kingman Brewster, reasonableness does not depend on philosophical ideas like anti-foundationalism, nor economic assumptions on self-interest and utility-maximization. *See* LOWENFELD, *supra* note 127, at 78–80, 230–32; BREWSTER, *supra* note 127, at 446. Brewster's list of factors that should influence a reasonableness determination include:

> (a) the relative significance to the violations charged of conduct within the United States as compared with conduct abroad; (b) the extent to which there is explicit purpose to harm or affect American consumers or American business opportunity; (c) the relative seriousness of effects on the United States as compared with those abroad; (d) the nationality or allegiance of the parties or in the case of business associations, their corporate location, and the fairness of applying our law to them; (e) the degree of conflict with foreign laws and policies; and (f) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country.

Id. It is not likely that a rational pragmatist like Posner would necessarily believe that this list is "unreasonable." Rather, the fact that the list is inevitably general and open-ended, and as a result more likely to produce eclectic results, would conflict with the more empirical demands that Posner places on the rationality concept.

[235] In the opening page of Posner's *Economic Analysis of Law*, he states that "[t]he task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his 'self-interest.'" RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (1986). Similarly, the first page of Steven Shavell's *Foundations of Economic Analysis of Law* states that "the view taken will generally be that actors are 'rational.' That is, they are forward looking and behave so as to maximize their expected utility." STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 1 (2004). Robert Ellickson likewise explains that this central task "consists of methodological individualism (the assumption that individuals are the only agents of human action) and the assumption that individuals are self-regarding and rational." Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 539 (1998). These assumptions on the importance of rationality and self-interest maximization pivot around "the central norm in law and economics," that of allocative and productive efficiency. Russell Hardin, *Magic on the Frontier: The Norm of Efficiency*, 144 U. PA. L. REV. 1987, 1987 (1995). Economic efficiency obtains when goods in a society are allocated through voluntary exchange into the hands of the people that value those goods the most. *Id.* at 1998. The value of a good is therefore a measure of how much a person is

It is becoming more and more common for economic theory to be applied to international legal questions.[236] One recent example is the work of William Dodge on the economic efficiency of jurisdictional rules.[237] Dodge begins his analysis by categorizing territorial and balancing techniques as "exclusive" jurisdictional styles, and the effects test as a "concurrent" style.[238] The first two techniques are exclusive because they result in only one state being able to exercise jurisdiction over the case in question, while the effects test produces concurrent jurisdiction since it allows for any state that is significantly impacted to exercise jurisdiction.[239] Arguing against scholars that have associated the effects test and concurrent jurisdiction with over-regulation, and consequently, inefficient jurisdictional allocations,[240] Dodge has explained that such a social welfare concept erroneously assumes Kaldor-Hicks efficiency instead of the Pareto principle.[241]

willing to pay for it, as this is what rational behavior recommends for social welfare. *See* POSNER, *supra*, at 11; SHAVELL, *supra*, at 1; Hardin, *supra*, at 1987–98.

[236] For an application of economic analysis to the *Empagran* case, see Klevorick & Sykes, *supra* note 172, at 361. For general discussions, see *Rational Choice and International Law: A Conference Sponsored by the University of Chicago Law School*, 31 J. LEGAL STUD. S1 (2002); Salil K. Mehra, *More is Less: A Law-and-Economics Approach to the International Scope of Private Antitrust Enforcement*, 77 TEMP. L. REV. 47 (2004); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005); Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. J. INT'L L. 333 (1999); Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999); Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33 (1996); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 8, 27 (2005).

[237] William S. Dodge, *An Economic Defense of Concurrent Antitrust Jurisdiction*, 38 TEX. INT'L L.J. 27 (2003).

[238] *Id.* at 28. Dodge notes that in conflict of laws, this distinction is more generally used in terms of unilateralism and multilateralism. Dodge, *supra* note 40, at 104.

[239] Dodge, *supra* note 237, at 28.

[240] *Id.* (citing Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002); Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1510–21 (1998)).

[241] *Id.* at 35–36. One problem that has long attended economic theory involves how to adequately compare the utility that one person experiences against the utility of another, in terms of their relative degrees of happiness. Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488 (1980). On the battle's frontier was Vilfredo Pareto, who developed an efficiency concept predicated on the value an item would garner as it moved through the market: Pareto efficiency became a theoretical model that claimed scenario A to be superior to scenario B when no one in B loses anything by moving to A, and at least one person has gained. *Id.* at 488. As Posner has admitted, however, Pareto efficiency is often too demanding a criterion for economic analysis of law because of the impact transactions necessarily have on third parties. *Id.* at 489. Consequently, the more widely-used criterion is the Kaldor-Hicks concept, sometimes called "Potential Pareto Superiority," which holds that an outcome will be efficient when the winners in a transaction are capable of compensating the loser such that no actors are worse off. *Id.* at 491. The big caveat in Kaldor-Hicks is that the winners, while they should be capable of compensating the losers, are not obligated to do so. GUIDO CALABRESI & PHILLIP BOBBIT, TRAGIC CHOICES 83–85 (1978); Posner, *supra*, at 491.

The idea here is that the gains associated with jurisdictional exercise are outweighed by the costs of too many states flexing their muscles at the same time.[242] The effects test, which promotes such a waste, is therefore inefficient from a global welfare perspective that defines welfare as a state in which the total social costs of performance are less than its value. Once the costs outweigh the value of jurisdictional exercise, there is an inefficient allocation of global resources. Dodge's response is that this perspective fails first, by the fact that exclusive jurisdictional techniques tend to under-regulate and second, because the efficiency definition in question is blind to distributional concerns—concerns that the Pareto principle, but not Kaldor-Hicks, is meant to take into account.[243] For Dodge, this distinction makes a difference in the international realm because the distributional effects that follow Kaldor-Hicks policy decisions in the national context are offset by tax-and-transfer programs.[244] At the international level, no such offsets exist that might discipline distributional effects.[245] Consequently, total social costs are optimal when jurisdictional resources are spent in the presence of anticompetitive domestic effects, since the efficiency measure in play is one in which a situation is superior when at least some parties are better off, and none are worse off.[246]

Joel Trachtman's work provides another example of economic analysis of jurisdictional discourse.[247] His argument begins with an analogy between individual property rights and states' rights to exercise jurisdiction, where one aspect of a property regime is to structure rights such that they best minimize externalities.[248] Analogously, a "primary function of jurisdictional rules is similarly that of shaping governmental incentives to achieve a greater internalization of externalities among political units."[249] Jurisdiction will be at its most efficient, therefore, when its exercise has the least impact on third parties. This does not mean, however, that Trachtman comes out against an

242 Dodge, *supra* note 237, at 30–31.

243 *Id.* at 32–38.

244 *Id.* at 37.

245 *Id.*

246 *Id.* at 36–38.

247 Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 2, 3–4 (2001). *See generally* MICHAEL J. WHINCOP & MARY KEYES, POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS (2000); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000).

248 Trachtman, *supra* note 247, at 6–7.

249 *Id.* at 6–7.

effects test, though he does not take it as an unqualified good either.[250] For Trachtman, the total social welfare is maximized, in the context of jurisdictional discourse, when the gains from intergovernmental transactions in prescriptive jurisdiction are greater than the sum of costs borne by third parties and intergovernmental transactions.[251] In the property context, this would track as a measure of social welfare when the gains associated with the use and transfer of property rights were greater than the losses felt by third parties and transaction costs.[252]

Trachtman's analysis, while it does bring to bear this rationally formulated cost-benefit strategy on jurisdictional questions, is basically pragmatic in its house-cleaning ambition: "this article debunks simplistic responses to the prescriptive jurisdiction and choice of law problem both from more traditional perspectives, and from law and economics."[253] For example, Trachtman argues against fetishizing the benefits associated with "clear rules," a jurisdictional regime that gravitates toward the most substantively efficient laws in any particular state, and presumptions against extraterritoriality, or anything else for that matter.[254] To be sure, Trachtman's analysis is mainstream inasmuch as it does not do away with all the usual benefits.

[250] *Id.* at 7.

[251] Trachtman, *supra* note 247, at 8–9. Trachtman writes:

> The underlying assumption of this article is rationalist: that states use and design international institutions, including regimes for prescriptive jurisdiction and choice of law, to maximize the members' net gains (NG), which equals the excess of transaction gains from engaging in intergovernmental transactions in prescriptive jurisdiction (TG), over the sum of transaction losses (such as loss of autonomy) from engaging in intergovernmental transactions (TL), and transaction costs of intergovernmental transactions (including those occasioned by strategic and information asymmetry problems, TC).

Id. at 8–9 (emphasis omitted).

[252] *Id.* at 11–14.

[253] *Id.* at 10. Trachtman includes a hit-list:

> As to more traditional perspectives, for example, this article shows the weakness of broad assertions (i) that the effects test is improper, (ii) that rules of prescriptive jurisdiction should always be clear, (iii) that courts should exercise little discretion in determining prescriptive jurisdiction, (iv) that unilateralism and multilateralism cannot coexist, (v) that there should be a presumption against "extraterritoriality," and (vi) that in cases of "true conflicts," forum courts should simply apply their own law. As to law and economics-based analyses, this article refutes the arguments (i) that jurisdiction should generally be allocated in accordance with "regulatory competence," (ii) that private choice should generally be determinative of governing law, (iii) that clear rules of prescriptive jurisdiction are best, and even (iv) that the most efficient law should govern.

Id. at 10–11.

[254] *Id.*

Examples of these advantages include: the idea that because property rights will move to those who value them the most, the states that deem jurisdictional exercise to be most valuable should have it; the recognition of territoriality as a "touchstone" of prescriptive jurisdiction;[255] and that "all other things being equal, the state with the greatest absolute advantage in regulation should be allocated prescriptive jurisdiction."[256]

Taking this baseline as our cue, an analysis of *Empagran* from the point of view of the economic pragmatist has three parts. The first part asks what consequences would follow from a reading of the FTAIA to allow for the plaintiffs to bring their claims in U.S. courts. The second asks how reasonable such policy considerations appear in light of the current context. The third asks how economic analysis might assist in such a reasonableness determination.

1. Policy Analysis

Due to the ambiguous state of the FTAIA, the first issue to be resolved is whether there are meaningful policy arguments for allowing plaintiffs to be heard in American courts. In particular, this discussion looks to the consequences of such an allowance, and whether it could cause turbulence among U.S. actors as well as members of the international community in terms of settled expectations on where and how antitrust remedies are made available in various jurisdictions. As made clear in the amicus briefs offered by the governments of the United Kingdom, the Netherlands, Belgium, Germany, Canada, and Japan, turbulence would be a big problem.[257] For these governments, the trouble is located in two basic areas: forum-shopping and sovereign prerogative.[258]

The forum-shopping argument, as made in the brief for the United Kingdom and the Netherlands, is something like this.[259] The United States

[255] *Id.* at 44.

[256] *Id.* at 77–78.

[257] Brief of the U.K. and the Netherlands, *supra* note 203, at 7–8; Brief of Germany and Belgium, *supra* note 203, at 7–8; Brief for Canada, *supra* note 203, at 17–21; Brief of Japan, *supra* note 203, at 8–11.

[258] Brief of the U.K. and the Netherlands, *supra* note 203, at 6; Brief of Germany and Belgium, *supra* note 203, at 4–6, 14–15; Brief for Canada, *supra* note 203, at 14–15; Brief of Japan, *supra* note 203, at 9.

[259] The following language is especially pertinent to this argument:

> This decision would provide substantial encouragement for widespread forum shopping, might impede competition law enforcement programs in the United Kingdom, Ireland and the Netherlands as well as the European Community, and would undermine respect for national

antitrust regime is the only one in the world that has adopted a "bounty hunter" approach that allows private plaintiffs to recover treble damages.[260] Consequently, the U.S. rules favorable to private plaintiffs and which are foreign to the known world will, when enlarged through a process of extraterritorial jurisdiction, evoke an international flight to U.S. courts.[261] Quoting Lord Denning in their brief, the governments argue, "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."[262] The prospects for this kind of forum-shopping would cause problems both for foreign governments, as well as the United States itself. On the foreign side, there is the worry that as plaintiffs are attracted to U.S. courts, domestic policies geared towards immunity for whistle-blowers will be undermined.[263] In the United Kingdom, Ireland, and the Netherlands, leniency programs allow for the first member of a cartel to come forward in order to avoid criminal persecution.[264] This immunity, however, does not apply to civil actions, and so to the extent that forum-shopping is more likely, there will be less incentive for cartel members to come forward and expose themselves to civil liability.[265] As for U.S. interests, there will be an obvious jump in the number of litigants coming to U.S. courts,[266] thus posing a severe problem of judicial economy.

The other major problem with this interpretation of the FTAIA allowing for any claim under the Sherman Act to get a plaintiff into U.S. courts, as explained in the *Empagran* decision, is that such an action would violate the comity principle in international law.[267] The policy implications of such a move, also as described in the amici briefs, would be to destabilize an

> sovereignty. The court of appeals' ruling has the potential for generating needless friction between foreign and United States legal systems and could lead to less, not more, cooperation and coordination of competition laws by all nations. It would wrongly expand the extraterritorial reach of the United States antitrust laws beyond this Court's or, to our knowledge, any foreign court's exercise of jurisdiction. International law principles recognize that a nation may prescribe laws and adjudicate claims beyond its own territory only where its assertion of jurisdiction does not infringe the rights of other nations to determine the law applicable to conduct within their own territories.

Brief of the U.K. and the Netherlands, *supra* note 203, at 6.

260 *Id.* at 13.

261 *Id.*

262 *Id.* at 14 (quoting Smith Kline & French Labs. Ltd. v. Bloch, 1 W.L.R. 730, 737 (C.A. 1982)).

263 *Id.* at 12–13.

264 *Id.* at 11.

265 *Id.* at 12–13.

266 *Id.* at 14.

267 F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004).

assumption common to the international community, namely, the right of a state to govern its nationals and territory in accordance with its own norms and customs.[268] An expansion of U.S. extraterritoriality would threaten the pattern of interdependence upon which the international community is predicated.[269] Ultimately, settled expectations on the part of foreign governments would come under serious pressure as to whether the U.S. policy of extraterritoriality over matters of private international law was still party to that central, if unspoken, contract.

At the same time, of course, policy arguments are marshaled in favor of extraterritorial exercise as well, including the notion that a narrow effects-test interpretation of the FTAIA could lead to under-regulation.[270] Borrowing from the Supreme Court's *Pfizer* decision, Ralf Michaels, Hannah Buxbaum, and Horatia Muir Watt recall:

> If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.[271]

This argument has more or less currency as a matter of how many jurisdictions are able to claim and sustain comparable antitrust regimes. Because many developing countries have enforcement regimes that take different views on the topic of market regulation, U.S. notions of market regulation would be jeopardized.[272] Michaels, Buxbaum, and Watt do not go on to conclude, however, that the prospects of under-regulation necessitate U.S. extraterritoriality. Rather, the way forward first demands a consideration of

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[268] Brief of the U.K. and the Netherlands, *supra* note 203, at 18–19. *But see* Brief of Amici Curiae Law Professors Ralf Michaels, Hannah Buxbaum and Horatia Muir Watt in Support of Respondents at 9–10, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724) [hereinafter Brief in Support of Respondents] (arguing that allowing private actions brought by plaintiffs for foreign conduct that has a substantial effect in the United States would not be inconsistent with international norms).

[269] Brief for Canada, *supra* note 203, 17–23.

[270] Brief in Support of Respondents, *supra* note 268, at 14.

[271] *Id.* (quoting Pfizer Inc. v. Gov't of India, 434 U.S. 308, 315 (1978)).

[272] Brief in Support of Respondents, *supra* note 268, at 14–16.

judicial restraint in the face of reasonableness and comity, thus bringing the analysis full circle.[273]

2. *Reasonableness*

For the economic pragmatist, it would be important to begin the analysis with something like this rough canvass of the relevant policy considerations and the consequences such considerations would have on the stability and propriety of the legal system and American interests. The answer, however, is not for the judge to simply choose the "best" conclusion and end it there. Rather, the judge must find the most reasonable solution, though the reasonableness determination is not synonymous with the one spelled out in the Restatement. To be sure, an economic pragmatist judge need not ignore the Restatement; after all, in her survey of the relevant policy considerations the judge will look to a great many, if not all, of the Restatement's factors. Links between the conduct and the territory, the nature of the conduct and the nationality of the actor, the likelihood of conflicts, and the stability of the international system will all be on the table.[274] For the economic pragmatist, the question of whether it is reasonable to allow the doors of U.S. courts to open for plaintiffs like those in *Empagran* also would be subject to economic analysis.

3. *The Turn to Economic Analysis*

As it stands, there seems little in the way of a clear point of decision in the clash between the policy problems of forum-shopping and the erosion of national sovereignty, on the one hand, and on the other, the upkeep of a particular ideological view of the market that demands a degree of regulation best kept from the unreliable hands of nascent antitrust regimes in the developing world. How should the judge decide in this policy debate? Perhaps, as the Court did in *Empagran*, the judge will be able to intuit a particular argument as the most reasonable and command a course of action entailing a special deference to the comity principle, and as a consequence, to the foreign amicus briefs.[275] Just as likely, however, an economic pragmatist judge would not settle so easily on what appears to be a rather arbitrary move, and look instead for help. As discussed above, Dodge and Trachtman both

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273 *Id.* at 2–3.

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

275 *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 174 (2004).

offer particular routes out of what might be an especially uncomfortable judicial predicament.[276] Fortuitously, an economic pragmatist's decision leaves the ambiguous realm of reasonableness and enters the more precise domain of efficiency.

If our economic pragmatist judge turned to Dodge for an economic analysis of jurisdictional discourse, she would likely receive some type of advice favoring a decision for the plaintiffs. As will be recalled, Dodge argues in favor of concurrent jurisdictional schemes where possible.[277] A concurrent scheme would be one in which each jurisdiction that has been able to erect an argument with respect to felt effects would be able to justifiably adjudicate the conduct in its courts.[278] Of course, the rationale here has little directly to do with a sovereignty claim; rather the issue turns on an argument made by Michaels, Buxbaum, and Watts concerning the relationship between "exclusive" jurisdictional schemes and the specter of under-regulation.[279] For some, as Dodge argues, a concurrent scheme is problematic in that it will be inefficient due to an excessive degree of over-regulation.[280] As the foreign amicus briefs argue, for example, firms will not only be less willing to cooperate in national enforcement programs, but in the face of panoramic plaintiffs' claims, business will also experience a chilling effect.[281]

A ready reply at this point would be to say that a mistake has been made, and that an argument for a concurrent jurisdiction scheme is misapplied in the *Empagran* context. After all, the point of the litigation was not to establish the legitimacy of the effects test. The question was whether a foreign plaintiff injured by a foreign defendant on foreign soil could file a claim in a U.S. court.[282] As the *Empagran* court explained, the door was left ajar for the plaintiffs if they could in fact show that their injury was not independent of domestic connection.[283] The economic pragmatist may reply, at least in the vein of Dodge or Buxbaum, that it is correct to say that the issue is not whether

276 *See supra* notes 237–56 and accompanying text.

277 Dodge, *supra* note 237, at 28.

278 *Id.*

279 Brief in Support of Respondents, *supra* note 268, at 14.

280 Dodge, *supra* note 237, at 28.

281 *See* Brief of the U.K. and the Netherlands, *supra* note 203, at 12–13; Brief of Germany and Belgium, *supra* note 203, at 10–15; Brief for Canada, *supra* note 203, at 13–15; Brief of Japan, *supra* note 203, at 9.

282 F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 159 (2004).

283 *Id.* at 165–68 (2004).

the effects test is legitimate. The problem is how to understand "effects."[284] If effects are understood not as the "transactions" that occur between the relevant parties but instead as the anti-competitive conduct itself—in this case a worldwide price-fixing scheme—a particular state will want to adjudicate that conduct even when it has not been a direct target of the conspiracy:

> If the vitamins cartel had been directed solely at the U.S. market, U.S. market participants would have been able to acquire vitamins from other markets at lower prices. A global cartel is effective only if it covers all, or at least all significant, markets. As a consequence, a country detrimentally affected by the cartel has an interest in regulating that cartel globally.[285]

With this more nuanced understanding of "effects," the economic pragmatist asks whether concurrent jurisdiction is nonetheless inefficient as a matter of wasting global resources. For Dodge, the answer would be that it is not a waste because an efficiency concept that assumed individual states to be working on a Kaldor-Hicks model inappropriately assumes the existence of a supra-national political authority able to adjust for distributional problems.[286] Since no such authority exists, and since individual states cannot be expected to take social welfare perspectives into account in their jurisdictional decision-making, regulatory benefits will be higher than the costs when states concurrently exercise their jurisdictional powers. For Trachtman, who has a more complicated view of the benefits associated with an effects test, the jurisdictional question would be a bit tougher.[287] In Trachtman's analysis, the efficient holding would be the one less concerned with distributional outcomes as much as it properly balanced the wide array of externalities attending the exercise of U.S. jurisdiction over the plaintiffs.[288]

4. Conclusion

For the economic pragmatist, the conclusion could cut in a couple of different ways. For some judges of this stripe, the interest in stability and the maintenance of a historicist jurisdictional design might preclude the analysis

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[284] Brief in Support of Respondents, *supra* note 268, at 11 ("What remains disputed is the proper content of the effects doctrine. As the court below correctly observed, the relevant activity for purposes of the effects doctrine is the conduct of the cartel in fixing prices, not the individual market transactions in which petitioners suffered resulting overcharges.").

[285] *Id.* at 12.

[286] Dodge, *supra* note 237, at 35–36.

[287] Trachtman, *supra* note 247, at 34–41.

[288] *Id.* at 34–35.

from ever reaching the stage of economic analysis. In all likelihood, the threat of exploding the U.S. legal system with a frenzy of forum-shoppers would be, to say the least, a bit of a worry for the economic pragmatist. After all, Posner nowhere says that this style of adjudication *requires* a descent into economic analysis; it is only something to turn to when a decision on reasonableness is in need of assistance (although it must be said that Posner thinks that economics will quite often be helpful).[289] To be sure, the *Empagran* facts may indeed bring a pragmatist to just such an impasse. Considering the relevant policy considerations of an ambiguous statute and a murky pedigree in international law, the pragmatist judge could justifiably—on Posner's view—make the transition from reasonableness to efficiency and enter the debate among scholars like Dodge, Trachtman, and Buxbaum. Whatever the case may be, it hardly seems correct to argue that, insofar as a holding on the *Empagran* facts might go, economic pragmatism would admit a single view. It also seems highly likely that the economic pragmatist, unlike the eclectic, would not tear off in the direction of comity analysis frightened by the increasingly political nature of the jurisdictional question. Clearly, there are significant signposts for the judge along the way—interests in consequences, reasonableness, stability, and efficiency—which will greatly limit the possible routes to conclusion. But whether that would mean a concurrence with the majority's eclecticism, or a dissent in favor of concurrent jurisdiction, is impossible to say.

B. An Experimental Pragmatist View

Thus far we have seen that eclectic pragmatists view themselves as apolitical—they share little more than a general orientation against formalism and foundations and a penchant for slow, steady changes (if any) in the legal fabric.[290] The second group, that of the economic pragmatists, aspires on its face to the same type of freestanding, apolitical relationship with the law.[291] On examination, however, the tight relationship between economic theory and pragmatism becomes clear, revealing a particularly normative decision-making procedure.[292]

289 Posner, *supra* note 230, at 152.

290 Grey, *Freestanding*, *supra* note 59, at 21–22.

291 POSNER, *supra* note 35, at 59–60.

292 *See* Desautels-Stein, *supra* note 35, at 599–604.

This third category of legal pragmatists, which I hitch to the term "experimental," is quite different.[293] First, it makes no mistake about the distinction between personal philosophy and public politics: it is flatly rejected.[294] Where Rorty, Grey, and Posner (in a failed attempt) argue for a separation of pragmatist philosophy from the world of law and politics, experimental pragmatists instead draw on Dewey's reconstructive philosophy, and more recently, Roberto Unger's democratic experimentalism.[295] In order to get a sense for what this means for experimentalists, consider Menand's view that pragmatism provides a person with "the sense that a pressing but vaguely understood obligation has suddenly been lifted from their shoulders."[296] One imagines a sweeping, swooning feeling where the newly-baptized pragmatist who had once seen life as a constrained set of choices and dogmas is now opened up to the limitless vistas in his possible alternative

[293] The primary texts used in this article are Sabel & Simon, *supra* note 46, at 1019–21; William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 174–75 (2004); and Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 270 (1998). Much of the literature that constitutes the experimental approach has a critical lineage and goes under the name of some or another anti-status-quo nom de guerre. In an article surveying this literature, Orly Lobel lists a number of the labels: "reflexive law," "collaborative governance," "democratic experimentalism," "responsive regulation," "outsourcing regulation," "reconstitutive law," "post-regulatory law," "revitalizing regulation," "regulatory pluralism," "decentering regulation," "meta-regulation," "contractarian law," "communicative governance," "negotiated governance," "destabilization rights," "cooperative implementation," "interactive compliance," "public laboratories," "deepened democracy and empowered participatory governance," "pragmatic lawyering," "nonrival partnership," and "a daring legal system." Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 346–47 (2004). Among the citations she includes are: IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION (2002); Dara O'Rourke, *Outsourcing Regulation: Analyzing Non-Governmental Systems of Labor Standards and Monitoring*, 31 POL'Y STUD. J. 1 (2003). For other representatives of the experimental approach, see Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development*, *in* THE HANDBOOK OF ECONOMIC SOCIOLOGY 138 (Neil J. Smelser & Richard Swedberg eds., 1994); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 829, 831, 852 (2000); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 33–40 (1997); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 259–63 (2001); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 266–68, 278–83 (2002); Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1, 8–15 (2002); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 479–91 (2001); Louise G. Trubek & Maya Das, *Achieving Equality: Healthcare Governance in Transition*, 29 AM. J. L. & MED. 395, 418–21 (2003).

[294] Dorf & Sabel, *A Constitution of Democratic Experimentalism*, *supra* note 293, at 388–95.

[295] *See generally* JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY (1948); ROBERTO UNGER, DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE (1998); ROBERTO UNGER, POLITICS: THE CENTRAL TEXTS (1997).

[296] MENAND, *supra* note 56, at xi.

futures. The experimental pragmatist takes this excitement, pulls it from the private space, pushes it into the public, and arrives, quite dramatically, in the world of an unbound pragmatism which contributes, in Unger's words, to a person's "raising up to godlike power and freedom—and the deepening of democracy—that is to say, the creation of forms of social life that recognize and nourish the godlike powers of ordinary humanity, however bound by decaying bodies and social chains."[297] At least, that is the idea.

The significance for legal pragmatism when the public-private distinction is relaxed can, quite apparently, be substantial. The persistence of the distinction enables eclectic pragmatism in its characterization of public discourse as immune from the destabilizing effects of philosophical deconstruction.[298] Once the private-public partition is lowered, these effects spill into the public realm. This is the maneuver of experimental pragmatists, who argue for the application of pragmatic rejuvenation to the public mind, just as philosophers have favored it in the contexts of truth-seeking and belief formation for private individuals.[299]

For William Simon, a representative of the experimental strain, legal pragmatism has a number of ingredients. First is a perspective that emphasizes the responsibilities of citizens to take active and deliberative roles in participatory government.[300] Immediately, we can see how this version moves away from Rorty's public-private distinction, pushing pragmatic reform into the levers of governance.[301] Second, this reliance on individual initiative moves legal pragmatism away from dependence on the judiciary and toward involvement in civic associations and non-governmental organizations.[302] This kind of strategy is conducive to a third ingredient, which is governance that it is decentralized, flexible, and open to rolling rule regimes.[303] Fourth, legal pragmatism is consequentialist such that solutions take priority over rights-claims; in contrast to the other legal pragmatisms, experimentalism does not have "formalist pockets."[304] To some degree, this factor is based on the pragmatic argument against foundations and first principles; i.e., if we cannot

297 UNGER, *supra* note 47, at 28.

298 Desautels-Stein, *supra* note 35, at 590–91.

299 *Id.* at 612.

300 Simon, *supra* note 293, at 175.

301 *Id.*

302 *Id.*

303 *Id.*

304 POSNER, *supra* note 35, at 60 (discussing the presence of "formalist pockets" in a pragmatic system of adjudication); *see also* Simon, *supra* note 293, at 177–78.

accept as a deontological rule the morality of individual rights, why should they have a trumping power over other forms of problem-solving?[305] Simon's account provides a second way of differentiating experimentalists from the eclectic and economic versions of legal pragmatism: the method is more than a preoccupation with context, consequence, and adjudication; it is interested in new governance strategies, public deliberation, and the experimentalism inherent in a destruction of the means-end dualism.[306]

A second distinguishing characteristic of the experimentalists is the normative underpinning, which generates the move to ignore the public-private distinction in the first place.[307] That is, it is not an arbitrary move to say, as experimentalists do, that the philosophical power of the pragmatist method should be transposed onto public discourse.[308] The motivation appears to be rooted in a basic disposition lacking among eclectics and economists: a disposition toward reform.[309] Experimentalists are discontent with liberal social arrangements and the attendant distributional effects in a way that the other camps are not: they see something wrong with the world and they want to fix it.[310]

The experimental method, as explained by Michael Dorf and Charles Sabel, relies on two key premises. First, democratic "governance," and not adjudication, is the key interest.[311] That is, experimentalists take a more holistic view of legal pragmatism and its scope, emphasizing the disability of courts to maintain their gate-keeping functions in what is a crisis of governance facing the entire constitutional system in the United States.[312] For the promise of democracy to be realized, pragmatism must reach well beyond the judiciary. Latent in this first assumption is the second: there is a

[305] Simon, *supra* note 293, at 178–79. Simon writes:

> [The Pragmatist] assumes, first, that any given set of issues is likely to involve shared as well as conflicting interests and values, and second, that it is often a mistake to try to determine in advance of the dispute resolution process which type of values and interests predominate . . . . Thus, Pragmatism declines to single out a particular category of interests as categorical of interests as categorical or trump-like.

Id. at 179.

[306] Simon, *supra* note 293, at 127, 181–98; *see also* John Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17, 19 (1924).

[307] *See* Desautels-Stein, *supra* note 35, at 590–91.

[308] *Id.* at 613.

[309] *Id.*

[310] *Id.*

[311] *See* Dorf & Sabel, *A Constitution of Democratic Experimentalism*, *supra* note 293, at 270–72, 293.

[312] *Id.* at 270.

governance crisis that is badly in need of attention.[313] By highlighting the rise of the fourth arm of government (the administrative state) and criticisms on the degree to which the realities of democratic life actually track its foundational principles (separation of powers, federalism, and individual rights),[314] Dorf and Sabel make it clear that theirs is a reformist agenda.[315]

As for the method itself, it draws on an analogy to the private firm, where innovations in the marketplace

> suggest institutional devices for applying the basic principles of pragmatism to the master problem of organizing decentralized, collaborative design and development under conditions of volatility and diversity . . . . To determine what to make and how, firms in this new economy must therefore resort to a collaborative exploration of disruptive possibilities that has more in common with pragmatist ideas of social inquiry than familiar ideas of market exchange.[316]

Dorf and Sabel apply these ideas to governmental action at the local level and argue that since problem-solving is inevitably at its most potent and relevant at the local level, it is essential that the products of local governance initiatives be broadcast through information-pooling techniques.[317] That is, regional and federal institutions are necessary to insure the availability of inter-local cross-linking, such that the fruits of deliberative call-and-response might enable localities to learn from one another's successes and failures.[318] The result of such an increase in deliberation and local initiative would have two structural effects—the "privatization" on the one hand of opening up governance strategy to the innovative style of a public marketplace, and on the other hand the "re-politicization" of our democratic institutions through the introduction of "a novel form of deliberation based on the diversity of practical activity, not the dispassionate homogeneity of those insulated from everyday experience."[319] Together, it is argued, these effects will restructure American democracy in a way that will at once track the traditional interests in republican government and the evolving demands of the administrative state.[320]

313 *Id.*
314 *Id.*
315 *See id.*
316 *Id.* at 286.
317 *Id.* at 287–88.
318 *Id.*
319 *Id.* at 313–14.
320 *Id.*

Despite the experimentalist emphasis on the legislative responsibility to ensure deliberative fora and local participation,[321] there remains a role for courts to play. One of the fundamental problems identified by Dorf and Sabel is the incapacity of courts to justifiably maneuver through political questions.[322] When the courts defer to the legislature, it is often the case that such deference is inappropriate, due to a lack of legislative intent regarding the relationship between the means employed and the ends sought by the statute.[323] At the same time, when courts intervene and displace congressional will, it typically represents an assertion of balancing techniques that betray little more than the courts' preferences for particular ends.[324] The common problem here, according to Dorf and Sabel, is an indeterminate relation between means and ends—an indeterminacy that inevitably leads courts either to the extremes of deference or ad hoc value judgment.[325] Of course, eclectic and economic pragmatists know this just as well as the experimentalists do. The key difference here is that, while the former simply make do, whether in bad faith or not, experimentalists are not willing to play along. Their way out is for the court to adopt, along with the other branches of government, a program of democratic experimentalism.[326]

In its holistic view of democratic governance, experimentalism posits a role for the judiciary that avoids the indeterminacy dilemma by shifting much of the work away from courts and into the hands of agencies and private parties.[327] In an environmental law context, Dorf and Sabel illustrate how this can work.[328] In adjudicating a dispute over the reasonableness of the Reagan Administration's interpretation of "stationary source" as treating all emissions from a plant as a single source, the Supreme Court deferred to the agency definition in light of the statute's ambiguous language.[329] An experimentalist court would not have been faced with this sort of Hobson's choice—defer or balance.[330] Instead, various localities would be empowered with what was

321 *Id.* at 318.

322 *Id.* at 390–91.

323 *Id.* at 391–95.

324 *Id.* Duncan Kennedy writes, "In contemporary legal theory, policy is always a potential Trojan horse for ideology, just because of the patently weak rationality of choosing policies by universalizability and then merely 'balancing' them." Kennedy, *supra* note 34, at 1076.

325 Dorf & Sabel, *A Constitution of Democratic Experimentalism*, *supra* note 293, at 390–95.

326 *Id.* at 395.

327 *Id.* at 442.

328 *Id.* at 395–98.

329 *Id.* at 395–96.

330 *Id.* at 393, 395–96.

known as the "bubble" approach to the statute, and after enough time had elapsed and enough information had been gathered, parties could offer reasons as to why bubble approaches were superior or inferior to the traditional reading of "stationary source."[331] Of course, this adjudicative style would be greatly assisted by an experimentalist statute that allowed for such an approach. But even in the absence of such legislation, Dorf and Sabel argue for experimentalist judgment that takes as its baseline the need for parties to

> define the range of alternatives to be considered in an evaluation of the appropriateness of ends to means, further publicizing the variety of possibilities in the process; and in deciding whether due consideration has been given to these alternatives, the court refers to standards of care and attentiveness—the ability to learn and learn to learn—that emerge from the practice of the relevant parties themselves.[332]

In terms of its substance, experimentalist judgment focuses on the deliberative responsibility of the parties, as well as the care-taking of fundamental legal norms.[333] Procedurally, its focus is on participation and the degree to which parties have referenced best practices in other jurisdictions.[334]

Experimental pragmatism is like eclectic pragmatism, and unlike economic pragmatism, in that there does not appear to be a basic normative foundation that steers pragmatic decision-making.[335] Where eclectics pick and choose as the situation demands, experimentalists, in contrast, maintain a more rigorous orientation in favor of the "new" and the "different."[336] There is, after all, a program here: (1) experiment locally, (2) adopt provisional goals, (3) pool

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[331] *Id.* at 396.

[332] *Id.* at 401.

[333] *Id.* at 403.

[334] *Id.*

[335] *See* Desautels-Stein, *supra* note 35, at 611–17 (discussing experimental pragmatism and Ungerian pragmatism).

[336] For example, Siegfried Schieder writes:

> It has also been objected that the creative act itself is being declared the highest trading value. A pragmatist legal theory would indeed be too narrowly cast as long as it took as its theme only the production of new solutions to problems and not also the new criteria for evaluating them.

Siegfried Schieder, *Pragmatism as a Path Towards a Discursive and Open Theory of International Law*, 11 EUR. J. INT'L L. 663, 689 (2000).

information across jurisdictions, and (4) repeat.[337] Experimentalism therefore places a premium on locality, reform, and multi-jurisdictional dialectics.[338]

The experimental pragmatist would take a rather different route in what would likely be a dissent to, and not a concurrence with, the *Empagran* opinion. As a matter of general disposition, the experimentalist, in contrast with both the eclectic and the economic pragmatist, will tend to destabilize the judicial discourse when such an opportunity exists.[339] Here, the harvest is bountiful; few clear limits stand in the way of the court to experiment with the way judges talk to each other about jurisdictional questions, considering the vacuous state of the FTAIA.

1. Globalization, Deliberation, Experimentalism

Before articulating an experimental view of extraterritorial antitrust, it will first be helpful to briefly mention an attitude with respect to deliberation at the international level that might be attractive to experimental pragmatists. James Bohman has argued, along with scholars like Jürgen Habermas and Seyla Benhabib, that the persistence of global interdependence and democratic deficits require new discursive processes to be elaborated in the global public sphere.[340] Bohman envisions this sphere as a highly politicized space where "world citizens"

> debate, discuss, and deliberate in such a way as to produce public agreements that would be acceptable from "the point of view of everyone" affected by decisions made within any legitimate political institutions. They must produce "pluralistic consensus" or plural agreements of the sort that would be consistent with the integrity of

[337] *See generally* Dorf & Sabel, *A Constitution of Democratic Experimentalism*, *supra* note 293 (discussing experimental pragmatism).

[338] *See* Desautels-Stein, *supra* note 35, at 611–12.

[339] Sabel and Simon write:

> Destabilization usefully describes both the remedy and the process by which the meaning of the background substantive right is articulated in these cases. In the new public law, the judge does not exercise discretion in each case to choose among an infinite array of potential responses to the particular problem. Rather, having found a violation of some broad norm—the right to an adequate education, the right to access to justice—she imposes the single remedy that the liability phase has shown to be appropriate: institutional destabilization.

Sabel & Simon, *supra* note 46, at 1056.

[340] James Bohman, *The Globalization of the Public Sphere*, 75 MODERN SCHOOLMAN 101 (Jan. 1998). *See generally* JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION (Max Pensky ed., trans., MIT Press 2001) (1998); SEYLA BENHABIB, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA (2002).

> various political communities, cultures, and forms of life which the institutions of federalism not only permit but also seem to foster.[341]

Bohman believes that in such a vital and vigorous domain lies the transformative potential for the elaboration of new democratic institutions.[342] This first depends, however, on the existence of robust civil society not only at the international level, but within nations as well.[343] Ideally, citizens in civil society have the opportunity to articulate experimental forms and deliberate on political disagreements. Bolstered by these discourses, Bohman suggests that citizens take their arguments to the cosmopolitan sphere, effecting change in boomerang style back on the level of nation-states.[344] For Bohman, as well as other writers of this stripe, the European Union (EU) provides a good template for such a renewed deliberative field.[345] Contemporary international institutions are not up to the task because they improperly discount the interests of citizens for the benefit of states and their representatives, making them, as a result, only minimally democratic.[346] In the EU, however,

> it is possible to see how a cosmopolitan public can begin to be organized by, and in turn reorganize, a deliberative institution. International civil society is not enough; it is too punctual and too divided spatially and temporally to effect decisions. Only the cosmopolitan public sphere can become the location for the public use of reason by international civil society.[347]

With this international orientation in the background, this idiosyncratic version of an experimentalist dissent will follow three steps: an interrogation of the comity analysis so hard at work in *Empagran*; a push toward deliberation (among governments, firms, and judges) and information pooling; and the instantiation of a rolling rule regime.

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[341] James Bohman, *The Public Spheres of World Citizens*, *in* PERPETUAL PEACE 187 (James Bohman & Matthias Lutz-Bachmann eds., 1997).

[342] *Id.*

[343] *Id.*

[344] *Id.* at 192–93.

[345] *Id.* at 195.

[346] *Id.*

[347] *Id.* at 195–96. Sabel, Simon, and Joshua Cohen cover related territory in their work on the EU and the "global democracy." *See, e.g.*, Charles F. Sabel & William H. Simon, *Epilogue: Accountability Without Sovereignty*, *in* NEW GOVERNANCE AND CONSTITUTIONALISM IN THE EU AND THE US 395 (Gráinne de Búrca & Joanne Scott eds., 2006); Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. INT'L L. & POL. 763 (2005); Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271 (May 2008).

2. *Comity Recast*

The *Empagran* Court's interpretation of the FTAIA was heavily influenced by its comity analysis, such that the claim under the Sherman Act, required by § 6, should be dependent on domestic anticompetitive harms.[348] An experimental point of departure would be to take a different look at the comity analysis, which was so important to the *Empagran* Court. To begin, the perspective on interstate relations would invoke the rejected (but not really rejected) sovereign model rather than the traditional one at work in the *Empagran* decision.[349] Instead of interpreting § 6(a) as requiring a domestic injury relation out of concern for the integrity of the Westphalian system, in which various states attempting isolated maneuvers aimed at keeping hold of their own sets of internal rules, the experimentalist would come to emphasize the disaggregated, networked, technocratic world of "new governance." Anne-Marie Slaughter offers one example of this view:

> A new world order is emerging . . . . The state is not disappearing, it is disaggregating into its separate, functionally distinct parts. These parts—courts, regulatory agencies, executives, and even legislatures—are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order.[350]

Rather than looking out at the world and finding individual sovereigns with individualized sets of independent competition regimes, each with their own rights to autonomy and their own sets of dependencies on their respective domestic publics, this experimentalist sees global administration in the making and remaking.[351] Transgovernmentalism, for example, is viewed as a chief means of refurbishing domestic control through the horizontal disaggregation

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[348] *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165–67 (2004).

[349] *See id.* at 164.

[350] Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997). Slaughter suggests that transgovernmental networks operate in three ways. The first type emerges within international institutions. Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347, 355 (2001). Probably the most well-known, these networks include groups of ministers and regulators working with organizations like the United Nations and the World Trade Organization. *Id.* at 356. The second type of network is created through executive agreements that do not have the advantage of a grounding in legislative treaty, and emerge outside the framework of international institutions. *Id.* at 357. These networks often form out of informal presidential agreements that require attendant work and cooperation. *Id.* at 358. The third type arises independently of formal intergovernmental agreements and includes both networks that eventually institutionalize themselves as transgovernmental regulatory institutions and those that comprise more informal agreements between the domestic regulators of two or more countries. *Id.* at 359.

[351] *See* Slaughter, *The Real New World Order*, *supra* note 350, at 184–86.

of unitary states into state units that cooperate and coordinate with like-minded units across borders.[352] The erosion of national power is not stemmed by supranational efforts, but through transnational outreach and the enlargement of liberal democratic arrangements.[353] As a consequence, the comity discussion, with its rooting in the traditional model of internal/external rules, loses its grip. After all, if the point of raising comity considerations is to protect states from externalities, and an experimentalist dismisses the very premise upon which externalities are based—that of the independent sovereign model—then comity must mean something else.

Here, comity *would* mean something else: a judicial inclination towards multi-jurisdictional information pooling.[354] This inclination would be such that comity—that nebulous principle geared toward the smooth operation of the international system—would transform into a means for helping individual nation-states communicate with one another on the changing shape of the global administrative order.[355] In contrast to the *Empagran* Court, therefore, the experimentalist judge would begin by looking to the FTAIA, find the statutory language especially ambiguous, and set to work on unpacking the phrase, "gives rise to a claim," against the backdrop of a presumption in favor of a highly interconnected and interdependent world system.[356] The incantation of "a plaintiff's claim will only be viable as long as the injury is shown to be dependent on domestic anticompetitive harm" thus moves to its reverse: "in order to avoid application of the FTAIA exception in favor of extraterritorial jurisdiction, the defendant must show that the plaintiff's injury was independent of domestic harm." In the vitamins case, such a presumption would be nearly impossible to rebut. Unless it could be shown that a but-for formulation could excuse the defendant's role in the injury, the presumption would work in favor of the plaintiff.

At the same time, however, this presumption in favor of extraterritorial jurisdiction would be offset by another apple of the experimentalist eye: the emphasis on local production and planning.[357] While judging in the shadow of a highly interdependent international order would be of certain importance, it would also be true for the experimentalist that working out particular antitrust

352 *Id.* at 195.

353 *Id.* at 185–86.

354 Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 206 (2003).

355 *Id.*

356 *See* Slaughter, *The Real New World Order*, *supra* note 350, at 189.

357 Slaughter, *supra* note 354, at 206.

and jurisdictional questions is a project best undertaken by specific localities, and not some international architecture.[358] The reasoning here is that, as it is impossible to simply construct an optimal system by way of rational deduction—either on the score of global antitrust cartel issues or multi-jurisdictional problems—the best practices of particular nations and sub-national entities will have the highest likelihood of actually finding improvised solutions.[359] With this set of considerations in hand, the experimentalist would move on to the substantive question of who is actually doing what.

3. Deliberation and Information Pooling

As suggested by the introduction of the locality caveat, the comity reversal would not be the end of the line for the opinion. Although the orientation towards a disaggregated society of interdependent states would push the court toward a presumption in favor of jurisdiction, the brunt of the opinion would focus less on the FTAIA and more on the goals of antitrust and competition laws more generally.[360] This would carry the court directly into the "hard look" territory of comparative examination that the *Empagran* Court found rather intimidating.[361] This comparative work would not be done, however, in the spirit of looking for the "best" or most efficient set of laws. Rather, the purpose would be one of eliciting party responses on how various localities attempt to regulate price-fixing violations of the type found in the vitamins case.[362] To some extent, this is what happened with the foreign amicius briefs, in which governments argued how their respective antitrust regimes were up to the task.[363] While the experimental judge would have appreciated the amicus briefs, the nature of the deliberation would have been lacking due to the purpose of these interventions. Instead of showing how local programs relate the means of market regulation to the end of distributional fairness or free competition, the amici were instead focused on the destabilizing danger posed by plaintiffs being able to forum shop with an eye towards U.S.-styled treble

358 *See, e.g.*, Sabel & Simon, *supra* note 46, at 1068 (describing how experimentalists support stakeholder negotiation—a principle by which the interested parties that claim significant interests take part in the negotiations).

359 *Id.* at 1094.

360 Slaughter, *supra* note 354, at 210.

361 F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 168–69 (2004).

362 *See id.* at 167.

363 *Id. See generally* Brief of the U.K. and the Netherlands, *supra* note 203; Brief of Japan, *supra* note 203; Brief for Canada, *supra* note 203; Brief of Germany and Belgium, *supra* note 203 (discussing national regulations structures).

damages.[364] The experimentalist, after all, is not all that worried about destabilization and the unsettling of expectations. Therefore, deliberation in this case would instead be fashioned toward a survey of how different regions have attempted various solutions to market regulation problems. This is precisely a route rejected by the *Empagran* Court for its alleged unworkability.[365]

As should be clear, the experimental judge follows the force of the better argument and not reified ideas like Westphalian sovereignty and "judicial economy."[366] The type of deliberation expected by the experimental judge, as a result, would demand arguments as to why the means sought in a particular locality best capture that locality's ends.[367] This deliberation, moreover, would extend not just to governments in their amicus briefs, but also to private parties, as well as to other courts.[368] Ultimately, the purpose of the judge, after having first established her inverted orientation of the international order and the role of comity in contemporary international relations, is to seek a deliberative environment in which the best information is considered.[369]

4. Rolling-Rule Regimes

Once the judge's data had been sufficiently pooled, and to the degree that many jurisdictions share common goals, the judge would then be in a better position to arrange provisional plans for adjudication that would take into account the diversity of interests. This account would also be on the lookout

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364 *Empagran*, 542 U.S. at 168.

365 *Id.* at 168–69. The Court wrote:

> In our view, however, this approach is too complex to prove workable. The Sherman Act covers many different kinds of anticompetitive agreements. Courts would have to examine how foreign law, compared with American law, treats not only price fixing but also, say, information-sharing agreements, patent-licensing price conditions, territorial product resale limitations, and various forms of joint venture, in respect to both primary conduct and remedy. The legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more proceedings—to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system . . . . How could a court seriously interested in resolving so empirical a matter—a matter potentially related to impact on foreign interests—do so simply and expeditiously?

Id.

366 *See* Sabel & Simon, *supra* note 46, at 1093–94.

367 *Id.* at 1069–70.

368 *See id.*; Slaughter, *supra* note 354, at 209.

369 Slaughter, *supra* note 354, at 210.

for the ways in which deliberation may have altered the threshold interests in favor of consensus. Most importantly, however, would be the fact that the judge would view any goals established by the parties in response to the various antitrust provisions as provisional in nature.[370] Since there cannot be a right answer in such a case, the very best that can be done is to consider, as best we can, the actual state of the international order, recognize its demands, take local participation as a key ingredient in the search for a better extraterritoriality regime, talk about it, and come up with a rule that is self-conscious of its temporality and open to revision as better information becomes available. A likely consequence would be a dissent from the *Empagran* majority in favor of jurisdiction over the foreign defendants on the strength of, if nothing else, the destabilization effect that would probably ensue.

At a glance, one can see how the experimentalist judge would shuffle the terms of jurisdictional discourse. Still relying on the same basic vocabulary, comity would continue to play a large role, though in a way very different from that in *Empagran*. The language of balancing and effects would be almost wholly absent in terms of its traditional doctrinal usage, though it is easy enough to imagine the concepts working their way—quite heavily—into the deliberative phase of information-pooling. After all, what would such a conversation look like if it was not concerned with how particular practices affected particular communities, and how the judge might come to balance such effects in his final proclamation? To be sure, the experimentalist decision looks quite different from either its eclectic or economic siblings, but the basic points of departure still seem beholden to the same linguistic paradigm of internal and external sovereign rules.

CONCLUSION

This short conclusion will end with a few parting shots, directed mostly at the eclectics. To begin, eclectic pragmatism is a conservative, incoherent, and ultimately hypocritical style of legal reasoning. The purveyor of the eclectic style, despite its consequentialist, action-oriented veneer, hopelessly fails to make good on the promise of what is essentially at the bottom of philosophical pragmatism: a promise that is meant, at its most basic level, to clear the

[370] Sabel & Simon, *supra* note 46, at 1096.

juridical slate clean of what the well-known legal realist Felix Cohen called "transcendental nonsense."[371]

In Cohen's work, a juridical question like "where is a corporation?" was a kind of this nonsense.[372] As he explained, there are necessarily sociological issues that attend such a question, such as when a corporation incorporated in one state should be sued in another, or when the demands on a plaintiff to bring his claim in the state of incorporation are greater than the costs of a defendant corporation to defend actions in many states.[373] But "where is a corporation?" asked by itself, with no attempt at sociological study, "is a question identical in metaphysical status with the question which scholastic theologians are supposed to have argued at great length, 'How many angels can stand on the point of a needle?'"[374]

In a similar way, one might criticize the notion of territorial/extraterritorial jurisdiction at work in contemporary discourse. Think of the threshold question in *Empagran* as an example: could the United States assert its jurisdiction over foreign nationals injured by foreign parties on foreign soil?[375] In its descent into the reasonableness of its answer, the Court engaged in a bit of Cohen's nonsense. It seems fairly obvious that the answer to the *Empagran* question is an emphatic "yes." Can the United States assert its jurisdiction (its authority to apply its variously prescriptive, adjudicative, and remedial powers) over completely foreign phenomena? When jurisdiction is viewed in its sociopolitical light, and not in its legal construction, one is hard-pressed to understand how anyone could argue that American extraterritoriality is not commonplace. For some scholars, in fact, globalization is just a synonym for Americanization.[376] Americanization refers to, among other things, economic trends that are specifically rooted in the United States; it refers to the direct effects of the neo-liberal "Washington Consensus" economic policies on the developing world; it refers to the propagation of property and contract rules by development NGOs and American think tanks; it refers to comparative constitutionalism that actively exports U.S.-styled ideas of federalism, separation of powers, and judicial review; it refers to the imposition of

[371] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935).

[372] *Id.* at 810.

[373] *Id.*

[374] *Id.*

[375] *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004).

[376] *See, e.g.*, Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383, 408 (2003).

governmental sanctions; it refers to war; it refers to MTV, McDonald's, and Madonna.

"But surely," one might respond, "these are not instances of 'extraterritoriality' in the way the *Empagran* Court has in mind, and a mistake has been made in confusing adjudication for legislation and the political for the market. These are the facts of globalization and interdependence, and if anything, just the sort of considerations the Court had in mind when it used comity as a deciding factor against the plaintiffs. Also, these facts have nothing to do with American courts and foreign people coming to use those courts. In contrast, extraterritorial jurisdiction, as the term is understood by the courts, involves the very different set of questions that asks when a state may legally, reasonably, or justifiably assert its power over foreigners."

Obviously, there is a useful distinction between legal and sociological events, and this imagined response is focused on it. Indeed, there is a legal concept called extraterritorial jurisdiction that has a particular valence when presented in the context of "plaintiffs" and "defendants" and "courts." At the same time, one can easily examine the concept of extraterritorial jurisdiction from a sociopolitical perspective and quickly find that the United States asserts its authority extraterritorially all over the place and all of the time, regardless of the Restatement on Foreign Relations Law.[377] As a consequence, the conventional language of extraterritoriality tells a legal story about how and when state authority is exercised, but only at the expense of another, much bigger sociological story about the very same thing.

The question at issue in this Article, however, is not whether extraterritorial jurisdiction is "transcendental nonsense." Rather, the issue is this: the question of whether the legal story is *better* than the sociopolitical one is a question meant to be asked by the pragmatist, and yet this is precisely the question the eclectic forbids. It is political and, as a result, out of bounds. Furthermore, in its eclectic guise the legal pragmatist constantly assists in the production of a legal language of territorial jurisdiction that, intentionally or not, mystifies its sociopolitical dimensions. This seems to be a flaw in the method of the eclectic pragmatist, hiding the very real jurisdictional decisions that happen beneath the radar of conventional discourse, and which are ultimately necessary for a coherent consequentialism.

[377] *Id.* at 408–10.

As for the economic and experimental pragmatist, these methods appear at first glance to avoid this eclectic nonsense. These styles both appear to take the political question head-on, speaking jurisdiction either in the normative register of efficiency terms, or in the normative register of destabilization, disaggregation, and deliberation. The pragmatic problem for each, however, is the denial of the deconstructive power so terrifying to the eclectic.

The pragmatism of the economic pragmatist, it must be admitted, is hardly pragmatism at all. On the surface, as evidenced in the writings of Richard Posner, there is agreement with the eclectic that legal pragmatism should in no way be dependent on philosophical pragmatism.[378] In fact, however, this brand of legal pragmatism simply avoids one philosophy in exchange for another: the normative base of welfare economics and utilitarianism.[379] While welfare economics surely has its advantages, as well as a disciplinary diversity that goes beyond the version as understood in the hands of someone like Posner, it is just not pragmatism. As a consequence, the pragmatic power that would open the judge up to the sociological facets of extraterritorial jurisdiction, and the artificial limits of jurisdictional discourse, is unavailable to the economic pragmatist.

As for the experimentalist view, at least in the idiosyncratic way that it has been portrayed in this Article, it seems to fail the "nonsense test" in much the same way as the eclectic. It has been argued that one of the major factors distinguishing the experimentalist from the eclectic has been a rejection of Richard Rorty's philosophy-politics distinction.[380] This is certainly correct in the sense that eclectics find it difficult to navigate the legal terrain when it becomes too heavily associated with political questions. For the eclectic, the deconstructive power immanent in pragmatic philosophy just runs out when the jurist is faced with legal decisions. The experimentalist, in contrast, evades this worry by arguing for a transformed public sphere where the inertia of rational deliberation will inevitably produce subversive effects on the status-quo.[381] The apparent upshot is the appearance of an experimentalist highly cognizant of political consequences in a way that the eclectic is not.

This portrayal is probably correct, but also a little misleading. While the experimental style is undeniably truer to pragmatist philosophy and the

[378] POSNER, *supra* note 35, at 11.
[379] *See* Desautels-Stein, *supra* note 35, at 595–610.
[380] Grey, *Freestanding*, *supra* note 59, at 27.
[381] Sabel & Simon, *supra* note 46, at 1068.

subversive themes of legal realism, the nature of the experimental method may be susceptible to political blind-spots. For example, imagine an experimentalist sitting on the *Empagran* Court, interested as she is in fostering the discursive possibilities among a wide spectrum of public and private actors on the question of extraterritorial jurisdiction. This judge does not know where this method is going, and will probably not be focused on the distributional consequences of the subsequent provisional jurisdictional arrangement.[382] Of course, the experimental judge will look quite closely at the various arguments on who is expected to benefit and who is expected to lose. But the key point here is that the actual winners and losers—the knowledge of how the structure of jurisdictional discourse hurts some parties and favors others—cannot be a primary factor in the judge's decisional matrix. If it were, the experimental judge would leave behind her emphasis on innovation and subversion in favor of a particular norm, such as a predisposition toward anti-subordination.[383] This kind of formula does not describe the work of the experimental

[382] Fernanda Nicola has made this criticism in the context of European Union law, in which "proceduralists" (who are similar in vein to what I am calling experimentalists) are out to lunch in their political blind-spots. *See* Fernanda G. Nicola, *Another View on European Integration: Distributive Stakes in the Harmonization of European Law*, *in* PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS: RETHINKING IDEOLOGY AND STRATEGY 256 (Clare Dalton ed., 2007) ("[I]n aiming to reconcile and normalize colliding interests through the further elaboration of legal justifications before deliberative fora, these jurists leave in the background the political stakes and the distributive consequences of multi-level governance alliances.").

[383] There was a fashion of imagining pragmatism in just this way in the 1990s by scholars affiliated with critical race theory and feminism. *See, e.g.*, Richard Ford, *Facts and Values in Pragmatism and Personhood*, 48 STAN. L. REV. 217 (1995); Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990); Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. Rev. 1597, 1633 (1990); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990). The project has been heavily criticized by pragmatist philosophers like Richard Rorty and Stanley Fish. *See* Richard Rorty, *The Professor and the Prophet*, 52 TRANSITION 70, 75 (1992) (reviewing CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM); STANLEY E. FISH, THE TROUBLE WITH PRINCIPLE 305 (1999). On the proposed relationship between the pragmatic method and critical theory, Rorty disapprovingly writes: "Pragmatism is . . . like a corridor off which innumerable rooms open [which provides space for] getting rid of some Platonic and Cartesian rubbish . . .[;] it is neutral between alternative prophecies, and thus neutral between democrats and fascists." Rorty, *supra*, at 75. Similarly, Fish counsels against coupling pragmatism with a normative principle:

> Turning into just another would-be foundation—into another theory that would then have consequences—is always the danger pragmatism courts when it becomes too ambitious . . . . [W]hatever form it takes, the [ambitious] project is an instance of what I call the critical self-consciousness fallacy or antifoundationalist theory hope, the fallacy of thinking that there is a mental space you can occupy to the side of your convictions and commitments, and the hope that you can use the lesson that no transcendent standpoint is available as a way of bootstrapping yourself to transcendence . . . .

FISH, *supra*, at 305.

pragmatist; rather, it veers closer to the territory of the left-leaning economist who is willing to take a political stand on the distributional consequences of highlighting one set of jurisdictional rules over another. To be sure, the experimental judge may be familiar with the *fact* of these distributional consequences, but when it comes to the point of decision, those facts are not ultimately determinative. Instead, as we have seen, the decision is guided first by an interest in subversive dialogue among as many available participants as possible, hinging the possibilities of a better world on the promise of rational talk, and little else.[384]

Why, then, does the experimentalist suffer from transcendental nonsense? Despite the political muscle the experimental judge brings to bear on the point of decision, she nevertheless leaves vacant the question of who should win and who should lose. Leaving this question in abeyance is all the stranger for the experimentalist, since part of her method brings into question exactly these distributional issues. But instead of bringing some norm to bear on how a decision should undermine the power structure, the experimentalist is forced, after having brought the distributional question into focus, *to push it into the background once again*. If she does not, and takes the question head-on with a normative point of departure other than simply vying for more deliberation and more innovation, she ceases to be an experimental pragmatist. The conundrum for this position, as a consequence, is to disenchant transcendental questions like "does the United States have extraterritorial jurisdiction over the foreign parties?" only to re-enchant them by blinding itself to the consequences of that very work.

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The ostensible triumph of legal pragmatism is unfortunate. As has been seen in this review of extraterritorial antitrust jurisprudence, the eclectic style perpetually backgrounds its political dimensions by seeking decision-making procedures that appear "reasonable," "moderate," and "balanced." The eclectic's enchantment of reason, however, often turns out to be "little more than a pleasant name for faith, dogma, prejudice, and company. This rather sinister development comes from precisely the partisans of reason—those who

[384] There is a resemblance here between the somewhat "post-political" move of the experimentalist to background distributional consequences and those economists who privilege Kaldor-Hicks over the Pareto Principle. In both cases, there is a particular norm that is privileged over the facts of who is actually winning and who is losing. For the experimentalist, it is innovative deliberation and for the economist, it is efficiency.

claim to be its champions."[385] The economic style, in contrast, either suffers the same fate or simply ceases to be pragmatist at all. As for experimental pragmatism, hopes remain high for a no-nonsense approach to the distributional consequences of the doctrine of extraterritorial jurisdiction. It's hard to see much daylight here, however, as long as experimentalists are wedded to the notion of a "post-political" technocracy. Whether we look ahead with anticipation to Roberto Unger's new pragmatism,[386] or reach back nostalgically to the potent pragmatism of the early twentieth century, the legal pragmatism of today seems determined to disappoint.

[385] PIERRE SCHLAG, THE ENCHANTMENT OF REASON 144–45 (1998).

[386] *See* Desautels-Stein, *supra* note 35, at 614–17 (discussing Unger's *The Self Awakened*).