

# LIBERAL INTERNATIONAL RELATIONS THEORY AND INTERNATIONAL ECONOMIC LAW

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Political scientists rediscovered international law in the 1980s, under the rubric of regime theory.<sup>1</sup> International lawyers accepted this reinstatement of their discipline (from the perspective of political science, of course) with tolerable, if bemused, good grace, and set about collaborating on joint studies of environmental regimes, trade regimes, and the general subject of regime management and compliance. The world cooperated, holding out new vistas of international cooperation and law-making.

By the mid-1990s, the world is a harsher place. The horrors of the Bosnian war continue to unfold, lending a pointed edge to Henry Kissinger's reminder of the rationale for Realpolitik.<sup>2</sup> Newly heightened expectations of the United Nations now often serve principally to gauge the depths of its failure. Is the stage then set for a new divergence of the disciplines? Will regime theory give way to a new wave of Real-

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1. See Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185, 186 (1982) (defining regimes as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."). Krasner defines 'principles' as beliefs of fact, causation, and rectitude. *Id.* 'Norms' are defined as standards of behavior defined in terms of rights and obligations. *Id.* 'Rules' are specific prescriptions or proscriptions for action. *Id.*; see also, ORAN R. YOUNG, *INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT* (1989).

2. See generally HENRY KISSINGER, *DIPLOMACY* (1994).

ism? Or perhaps the traditional split between high and low politics will widen, leaving the diplomats and warriors on one side and the economists and international lawyers on the other.

This essay argues that regardless of the currents of the times, international relations theory can make an enduring contribution to international law. The three principal schools of international relations theory—Realism, Institutionalism, and Liberalism<sup>3</sup>—all shed light on the assumptions underpinning different visions of international law, and all have implications for the efficacy of specific international rules. The relevance of international relations theory does not depend on the international relations theorists' view of international law. It flows rather from the fact that international lawyers and international relations scholars study and thus must conceptualize the same phenomenon—the behavior of the principal actors in the international system. They ask different questions and seek different answers of that system. At some point, however, their understanding of what they are observing must overlap.

Part I spells out some of the precise links between international relations theory and international law. Part II offers a brief overview of Realism, Institutionalism, and Liberalism. Part II also discusses how conceptions of international law linked to these distinctive schools differ. Part III uses the broad assumptions of Liberal international relations theory to critique current United States doctrine on extraterritorial application of United States laws and proposes an alternative doctrinal approach. The application of Liberal theory in this manner, and the conclusions drawn from its application, suggest that this branch of international relations theory is particularly congruent with the self-conception of international economic law.

## I. HOW INTERNATIONAL RELATIONS THEORY CAN CONTRIBUTE TO INTERNATIONAL LAW

Scholars of international relations, a sub-discipline of political science, generate a wide range of theories to solve the problems and puzzles of state behavior.<sup>4</sup> Each theory offers a causal account of a particular outcome or pattern of behavior in inter-state relations in a form that iso-

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3. See *infra* Part II., Sections A-C (respectively discussing Realism, Institutionalism and Liberalism).

4. See, e.g., KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* 1 (1979) (discussing several theories on state behavior).

lates independent and dependent variables that are sufficiently precise to generate hypotheses (predictions) that can be empirically tested.<sup>5</sup> At a higher level of generality, these theories can be grouped into different families or approaches. This grouping is based upon their underlying analytical assumptions about the nature of states and the relative explanatory power of broad classes of causal factors, such as the distribution of power in the international system, international institutions, national ideology and domestic political structure.

This essay will summarize the three main theoretical approaches used in contemporary American political science.<sup>6</sup> Political scientists would find the versions presented here overly simplified and distilled. Yet each approach gives rise to a distinct mental map of the international system, specifying the principal actors within it, the forces driving or motivating those actors, and the constraints imposed on those actors by the nature of the system itself. Anyone who thinks about foreign policy or international relations, from either a political or a legal standpoint, must have some such map to guide her thinking, whether consciously or subconsciously.

Beyond mental geography, however, the explicit role of theory differs for political scientists and lawyers. For political scientists, the purpose of uncovering this map and explicating its underlying assumptions is to test the positive validity of those assumptions. Do states in fact behave as they are assumed to? Does the mental map correspond to what we actually see, or think we see? Does it permit accurate diagnosis of international problems and generate valid predictions and prescriptions for their resolution? Clarity about underlying premises is an indispensable foundation for accurate positive explanation.

For lawyers, the significance of underlying positive assumptions about the way the world works may be less immediately apparent, but no less important. Assume an instrumental view of international law, in which law-makers and commentators design legal rules to achieve specific ends based on positive reasoning about how those ends may be achieved. This is neither the only or even the best perspective on the discipline and practice of international law; many might prefer a deontological quest for norms of international justice. Even from this perspective, however, part of the international lawyer's task will be to determine how these norms are most effectively implemented. Thus at some stage,

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5. *Id.*

6. See *infra* Part II, Sections A-C (discussing the three major theoretical approaches used in political science).

excavating and challenging assumptions about the nature and form of the international system emerges as an essential component of legal analysis, an effort to understand the realm of the possible and to expand the realm of the probable.

To illustrate, imagine a set of agreed exogenous goals, such as peace, increasing international cooperation, resolving international conflict, preserving common resources, or advancing global prosperity. Altering positive assumptions about who the principal actors are in the international system and about the motives that drive them gives rise to different causal statements about the source of particular problems. These differing analyses will in turn suggest different political and legal strategies as to how to resolve those problems in the service of the posited affirmative goals.

The most prominent example of this type of reasoning is the differential diagnosis of the sources of war: an imbalance of power in the international system, misinformation and uncertainty, or inadequate representation of the individuals and groups most directly affected by war in the decision to go to war. The first diagnosis gives rise to legal norms seeking to restrict or constrain state use of power. The second would suggest the creation of international institutions to facilitate communication and confidence-building measures among potentially warring parties. The third would generate both rules and possibly institutions designed to expand political representation at the domestic level.

An equally important example concerns competing diagnoses of trade conflicts. Here again, the problem can be identified as a fundamental and inevitable conflict between states competing to gain relative advantage over one another; a problem of institutional design affecting the ability of states to coordinate and cooperate to reach an optimal solution; or the misrepresentation of underlying individual and group interests such that conflicting state positions reflect the capture of domestic political processes by special interests. Each of these diagnoses would give rise to different political strategies and corresponding legal regimes: the facilitation of trade alliances to neutralize competition; an international regime designed to overcome coordination and information problems (e.g., the GATT); or strategies allowing domestic litigants to invoke international rules against domestic interest groups in court. This last strategy does not exclude an international institutional framework, but it would be intermeshed with domestic politics and law.

Some international lawyers might conclude that these differential diagnoses are the preliminary steps that must be taken to determine what category of law is appropriate to the solution of a particular policy

problem—international or domestic. On this view, competing paradigms of international relations theory thus serve above all to delimit the boundaries of disciplinary jurisdiction. It is perhaps preferable, however, to define international lawyering as seeking legal solutions to international problems, regardless of the labels attached to any particular body of law. From this perspective, international relations theory is an important part of any international lawyer's toolkit.

Others will argue that this approach attempts to attach political science labels to concepts and modes of analysis in which international lawyers already engage, but without fanfare. There is some merit in this claim, particularly with regard to the overlap between much of traditional international law and what political scientists call regime theory.<sup>7</sup> As demonstrated in the following section, however, explicating the connections between the two disciplines may make international lawyers more aware of the extent to which deeply entrenched international legal rules and principles reflect outmoded or discredited assumptions about the international system. It may also encourage them to follow the lead of a branch of international relations theory—Liberalism<sup>8</sup>—that challenges some of the most fundamental norms of the current system.

## II. PRINCIPAL PARADIGMS IN INTERNATIONAL RELATIONS THEORY

Each of the following subsections will present the principal assumptions of the school of scholarship under consideration and examine ways in which current and historical international legal rules reflect reliance on these assumptions.

### A. REALISM

The dominant approach in international relations theory for virtually the past two millennia, from Thucydides to Machiavelli to Morgenthau,

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7. See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L. L. 205, 220-22 (1993) [*hereinafter* Slaughter Burley, *International Law*] (outlining the contributions of regime theorists and international lawyers to the study of international norms and institutions); Stephan Haggard and Beth A. Simmons, *Theories of International Regimes*, 41 INT'L ORG. 491, 491-92 (1987) (discussing the divergence between the views of political scientists and those of international lawyers vis-à-vis state behavior).

8. See *infra* Part II, Section C.

has been Realism, also known as Political Realism.<sup>9</sup> Realists come in many forms, but all generally share the following assumptions about international relations. First, they believe that states are the primary actors in the international system, rational unitary actors who are functionally identical.<sup>10</sup> Second, they assume that the organizing principle of the international system is anarchy, which cannot be mediated by international institutions.<sup>11</sup> Without a central authority, power determines the outcomes of state interactions. Third, states can be treated as if their dominant preference were for power.<sup>12</sup>

Realists can admit the possibility of a wide range of state preferences, conditioned by factors such as geography, culture, and ideology.<sup>13</sup> They argue, however, that states must secure power as the means to achieve those ends. Neorealists, also known as structural realists,<sup>14</sup> argue further that the anarchic structure of the international system makes power a prerequisite for survival. The absence of a central coercive authority creates such a high degree of actual or potential conflict that states must at the very least acquire enough power to defend themselves.<sup>15</sup>

Although Realism is probably best known among international lawyers for rejecting any role for international legal norms in the international system, other than the short-term service of state interests, much of both the structure and substance of traditional international law appears to be built on a Realist foundation.<sup>16</sup> Realists and traditional international lawyers overlap on three core assumptions concerning actors, preferences, and the constraints imposed by the international system.<sup>17</sup> They ultimately diverge with international lawyers seeking to blunt or alter the

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9. WALTZ, *supra* note 4, at 117.

10. *Id.* at 104.

11. *Id.*

12. David Grann, *Kennan at 90: Still in Search of Mr. X*, V FLETCHER F. WORLD AFF. 151, 151 (1994).

13. See David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7, 11 (1994).

14. See JOSEPH M. GRIECO, COOPERATION AMONG NATIONS: EUROPE, AMERICA AND NON-TARIFF BARRIERS TO TRADE (1990) (noting that both neorealists and structural realists believe that international cooperation is governed by mutual rivalries and the distribution of power).

15. WALTZ, *supra* note 4, at 102.

16. See Slaughter Burley, *International Law*, *supra* note 7, at 205.

17. See generally Bardo Fassbender, *International Law and International Relations Theory: Building Bridges*, 86 AM. SOC'Y INT'L L. PROC. 167 (1992) (symposium discussing the interface between international law and international relations).

implications of a pure Realist analysis, but less than either camp might suspect.

The clearest overlap concerns the relevant criteria for identifying participants in the international system. Both Realists and traditional international lawyers agree that the primary actors are states, and define states as monolithic units identifiable only by the functional characteristics that constitute them as states. Neither would take account of domestic political ideology or structure, or of the multiplicity of sub-state actors that determine state policy at the domestic level.<sup>18</sup> Both would assume that rules governing state behavior apply to all states *qua* states, without regard to their internal identity. The first-order international legal principles of sovereign equality and exclusive domestic jurisdiction are safeguards of the identity and opacity of the sovereign sphere. International legal rules governing recognition and state succession similarly ensure a complete divorce between governments and states.

For post-Westphalian international lawyers, then, states are both the source and the subject of rules governing international relations. What motivates and constrains these states in their relations with one another? As will be discussed with regard to Institutionalism,<sup>19</sup> most international lawyers assume that states have at least some common ends and that they can arrange to achieve them by means other than power. Nevertheless, many aspects of traditional international law tacitly acknowledge the extent to which international relations are power relations.<sup>20</sup>

To take only one example, consider the centrality of the territoriality principle in both international law and politics. For Realists, territorial boundaries define the area from which resources necessary for military and economic power can be extracted, thereby circumscribing the extent of state power. It is this notion of territorially defined power that underpins Arnold Wolfers' classic Realist image of states as billiard balls: opaque, hard, clearly defined spheres colliding with one another.<sup>21</sup> The circumference of each sphere is defined by territory. For international lawyers, control over a defined territory is the first criterion of statehood, an indispensable prerequisite for participation in the interna-

18. See Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1907 (1992) (noting that the use of distinctions between different categories of sovereign states as a basis for legal analysis is taboo in traditional international law).

19. See *infra* Part II., Section B.

20. See *supra* notes 14-15 and accompanying text.

21. See generally ARNOLD WOLFERS, *DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS* (1962).

tional system. It thus appears that the ante for participation in the international game is the capacity to wield power.

More generally, consider the many international lawyers who have sought to reconcile their discipline with the primacy of state power in the international system. The great positivists were all steeped in this tradition. Michael Reisman has just reminded us of Oppenheimer's realism, his uncompromising recognition of the limits set by the balance of power.<sup>22</sup> David Kennedy has similarly depicted Hans Kelsen as the progenitor of a line of international law scholars who "hoped to remain realistic about state power without becoming political scientists," who embraced "formalism and respect for sovereignty" as a realistic recognition of the limits of law and the persistence of power.<sup>23</sup> More sweepingly, Martti Koskenniemi dichotomizes all of international legal argumentation into a debate between the apologists and the utopians<sup>24</sup>—those who accept that international law reflects whatever states do and those who would have international law transcend and constrain state behavior. The apologists are Realists.

#### B. INSTITUTIONALISM<sup>25</sup>

To the extent that Institutionalism reflects the belief that "rules, norms, principles and decision-making procedures" can mitigate the effects of anarchy and allow states to cooperate in the pursuit of com-

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22. W. Michael Reisman, *Lassa Oppenheim's Nine Lives*, 19 YALE J. INT'L L. 255 (1994) (reviewing S.R. JENNINGS and S.A. WATTS, *OPPENHEIM'S INTERNATIONAL LAW* (1992)).

23. Kennedy, *supra* note 13, at 36.

24. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989).

25. Institutionalism as I refer to it here is frequently referred to among international relations scholars as Neoliberal Institutionalism, following Robert Keohane, who coined the term. See Robert Keohane, *INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATION THEORY* vii (1989). For those seeking to find their way through the bewildering maze of theoretical labels, the introductory essay to this volume offers a useful overview of the distinctions between Neoliberal Institutionalism, Neorealism, and Liberalism. *Id.* at 7-16. Keohane's summation of the Liberal tradition, however, differs considerably from the Liberal paradigm described in this essay. His version of Liberalism is instead heavily tilted toward the role of institutions in international politics. *Id.* at 9. It "accept[s] a version of liberal principles that . . . emphasize[] the pervasive significance of international institutions without denigrating the role of state power." *Id.* at 11. Cf. Fassbender, *supra* note 17, at 176 (emphasizing the importance of a state's self-interest in choosing whether to respect international commitments and institutions).



mon ends, all international lawyers are Institutionalists. "Rules, norms, principles and decision-making procedures" define an international regime, the much studied phenomenon that reintroduced international law to political scientists in the 1980s.<sup>26</sup> According to Robert Keohane's influential account in *After Hegemony*, because international regimes reduce transaction costs consistent with principles of the regime, regimes promote cooperation between and among states.<sup>27</sup> They "create the conditions for orderly multilateral negotiations, legitimate and delegitimate different types of state action, and facilitate linkages among issues within regimes and between regimes."<sup>28</sup> Moreover, they enhance the quality of the information that governments receive.<sup>29</sup>

International regimes also enhance compliance with international agreements in a variety of ways. They reduce incentives to cheat, enhance the value of reputation, establish "legitimate standards of behavior for states to follow," and facilitate monitoring. In this way they create "the basis for decentralized enforcement founded on the principle of reciprocity."<sup>30</sup>

This "functionalist," or, as it would later come to be known, "rationalist" view of regimes has provided a tool for the study of international cooperation that extends beyond the traditional "low politics" of international political economy, long thought a more fertile area for cooperative action than the "high politics" of security studies, where most Realists were concentrated.<sup>31</sup> As a group of international political economists and security scholars subsequently demonstrated, the approach was equally applicable to explaining cooperation under conditions of conflict.<sup>32</sup>

In its fully developed form, Institutionalism offers an alternative paradigm to Realism, albeit a related one. Institutionalists begin by recognizing "the fact that world politics at any given time is to some extent

26. See *supra* note 1 and accompanying text.

27. ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 244 (1984).

28. *Id.*

29. *Id.*

30. *Id.* at 244-45.

31. See generally Friedrich Kratochwil and John Gerard Ruggie, *International Organization: a State of the Art on an Art of the State*, 40 INT'L ORG. 753, 762 (1986).

32. See, e.g., Robert Jervis, *Security Regimes*, in INTERNATIONAL REGIMES 173 (Stephen Krasner ed., 1983); KENNETH A. OYE, *COOPERATION UNDER ANARCHY* (1986).

institutionalized, both through [f]ormal international organizations and codified rules and norms" and through less formalized patterns of behavior "recognized by participants as reflecting established rules, norms, and conventions."<sup>33</sup> Further, "conventions in world politics are as fundamental as the distribution of capabilities among states."<sup>34</sup>

Here, then, is the divergence from Realism. Whereas Institutionalists would agree that states are the primary actors in the international system and that, absent institutions, states are engaged in the pursuit of power, they would contend that the presence of institutions modifies the organizing principle of anarchy.<sup>35</sup> The uncertainty and ever-present possibility of conflict that leads states in a Realist world to expect and prepare for the worst is diffused by the information provided by and through institutions.<sup>36</sup> These institutions must thus be factored into systemic explanations of state behavior independently of structure. Further, having ameliorated the conditions of conflict that force states to concentrate on the quest for power, institutions can facilitate the achievement of common ends.

In large degree the debate between Realists and Institutionalists recapitulates the ancient debate between Hobbes and Grotius.<sup>37</sup> Not surprisingly, international lawyers typically side with Grotius. If they did not believe that international institutions could modify state behavior and in turn bring common goals within reach, they could not justify their own existence.<sup>38</sup> In the process, however, international lawyers, similar to Institutionalists, continue to accept a largely Realist foundation and framework as the point of departure for conceptualizing the international system.

To take one example, the United Nations Charter is an Institutional response to the fact of state power. Whereas Realists design political strategies to answer power with power, international lawyers search for rules to define and thus to restrain legitimate and illegitimate uses of

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33. *Keohane, supra* note 25, at vii.

34. *Id.* at 8.

35. *See* Kratochwil & Ruggie, *supra* note 31, at 756-57 (noting the role of international institutions in securing peace and security through efforts in North-South relations, nuclear safeguarding and preventive diplomacy).

36. *KEOHANE, supra* note 27, at 245 (arguing that realism should be reformulated to reflect the impact of information-providing institutions on state behavior).

37. *See generally* HEDLEY BULL, *THE ANARCHICAL SOCIETY* (1977) (discussing the influence of Grotius and Hobbes on international relations theory).

38. In this context, the term 'institution' should be understood to include all international legal rules and doctrines, as well as formal international organizations.

power. Norms of sovereign identity and equality seek to create a fictional world in which power is equalized; prohibitions on the use of force seek to shape reality to approximate this fiction. The United Nations Charter neatly blends both political and legal approaches, combining an absolute prohibition on the use of force in Art. 2(4) with a mechanism for the concentration of power by a designated group of powerful states against a transgressor against international peace.<sup>39</sup>

### C. LIBERALISM

The principal alternative to Realism and Institutionalism among international relations theorists is Liberalism.<sup>40</sup> As in the domestic realm, Liberal international relations theories are frequently characterized as normative rather than positive theories.<sup>41</sup> The best known Liberal theory in this category is Wilsonian "liberal internationalism," popularly understood as a program for world democracy.<sup>42</sup> As used here, however, Liberalism denotes a family of positive theories about how states do behave rather than how they should behave.

Efforts to reduce Liberalism to a set of positive assumptions that can be stated as succinctly as their Realist counterparts are ongoing among a growing group of contemporary political scientists.<sup>43</sup> The discussion

39. U.N. CHARTER art. 2, para. 4.

40. I use "Liberalism" here and throughout this paper as a term of art to refer to Liberal international relations theory. As Andrew Moravcsik has argued, the elements of this theory flow from the political theory and philosophy that we call "liberalism." See Andrew M. Moravcsik, *Liberalism and International Relations Theory*, Center for International Affairs Working Paper, (Harvard University (1992)). This transposition of liberal analytical assumptions from the domestic context to the international realm is complicated. For present purposes it makes more sense to try to understand Liberal international relations theory on its own terms as a self-contained alternative to Realism.

41. *Id.*

42. See Slaughter Burley, *International Law*, *supra* note 7, at 208. (Realists viewed Wilson as the founder of the "legal-moralist" tradition in foreign policy).

43. See, e.g., Daniel Deudney, *Binding Powers, Bound States: The Logic and Geopolitics of Negarchy*, Paper presented at the *International Studies Association*, (Washington, D.C.; March 28-April 2, 1994); Mark W. Zacher and Richard A. Matthew, *Liberal International Theory: Common Threads, Divergent Strands*, Paper presented at *American Political Science Association*, (Chicago, IL; Sept. 3-6 1992); Robert O. Keohane, *International Liberalism Reconsidered*, in *THE ECONOMIC LIMITS TO MODERN POLITICS* 155 (J. Dunn, ed., 1990); Joseph S. Nye, *Neorealism and Neoliberalism*, 40 *WORLD POLITICS* 235 (1988).

here draws primarily on one particular version developed by Andrew Moravcsik.<sup>44</sup> Where Realists view states as "opaque single units," Liberals begin with individuals and groups operating in both domestic and transnational civil society.<sup>45</sup> These are the primary actors in the international system. State behavior is in turn determined not by the international balance of power, whether or not mediated by institutions, but by the relationship between these social actors and the governments representing their interests, in varying degrees of completeness.<sup>46</sup> State preferences are derivative of individual and groups preferences, but depend crucially on which individuals and groups are represented.<sup>47</sup> Finally, the outcome of state interactions is a function, at least in the first instance, not of relative power capabilities, but of the configuration and intensity of state preferences.<sup>48</sup>

To dichotomize Realism and Liberalism in more concrete terms, where Realists look for concentrations of state power, Liberals focus on the ways in which interdependence encourages and allows individuals and groups to exert different pressures on national governments.<sup>49</sup> Where Realists assume "autonomous" national decision-makers, Liberals examine the "nature of domestic representation . . . [as] the decisive link between societal demands and state policy."<sup>50</sup> Where Realists model patterns of strategic interaction based on fixed state preferences, Liberals seek first to establish the nature and strength of those preferences as a function of the interests and purposes of domestic and transnational actors.<sup>51</sup>

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There is some debate about the nature of this project. Zacher and Matthew, for instance, argue that Liberalism's propositions cannot be simply deduced from its assumptions. Moravcsik, however, undertakes to identify core Liberal assumptions that will permit precisely such deduction or hypotheses.

44. Moravcsik, *supra* note 40, at 6.

45. See Slaughter Burley, *International Law*, *supra* note 7, at 227-28 (explaining the core assumptions of liberal theory).

46. Moravcsik, *supra* note 40, at 6.

47. *Id.* at 9.

48. *Id.* at 10.

49. The phenomenon of "interdependence,"—defined as a situation in which two or more nations each depend on the other, whether symmetrically or not, by virtue of trade and investment patterns, population flows, or even cultural and other social exchanges—can be analyzed from either a Realist or a Liberal perspective. Realists focus only on the impact of interdependence on the power differential between the nations concerned, whereas Liberals analyze it as an international social phenomenon.

50. Moravcsik, *supra* note 40, at 11.

51. See Slaughter Burley, *supra* note 7, at 228.

An international legal system seeking to accomplish instrumental goals such as the reduction of conflict and the increase of cooperation through laws grounded on Liberal assumptions looks very different from traditional international law. To begin with, it assumes that the primary source of conflict among states is not the struggle for power, but rather than conflict of state interests. Further, it assumes that these interests vary from state to state as a function of the preferences of individuals and groups operating in society; of the distribution of different preferences within a particular society; and of the degree to which a particular government is representative of individuals and groups in its own society and in transnational society.

Based on these assumptions, the best way to resolve conflict and to promote cooperation in the service of common ends is to find ways to align these underlying state interests, either by changing individual and group preferences or by ensuring that they are accurately represented. In the military context, prescriptive Liberal international relations theories thus seek to ensure that all sectors of a given society that are likely to be directly affected by a war are represented in the decision to go to war. In the economic context, Liberal international relations theorists seek to avoid trade wars by ensuring that special interest groups with trading interests that are not representative of the population as a whole do not capture the decision-making process.

Second, a Liberal conception of international law focuses on states as the agents of individual and group interests.<sup>52</sup> This means that the law designed to achieve specific international outcomes does not have states as its subjects, but rather the individuals and groups that states are assumed to represent.<sup>53</sup> It does not mean, however, that international legal rules and institutions would no longer have states as subjects. Traditional international law, after all, imposes a duty of domestic implementation, requiring states to make whatever domestic legal changes are necessary

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52. *Id.*

53. Note that the concept of state representation of individual and group interests need not imply fair, equal, or accurate representation. For example, a military dictatorship may represent the interests of only a very small portion of the state's population; nevertheless, it represents a particular "interest." A Liberal theory of international law need not accept this state of affairs; indeed, Fernando Teson has pioneered a set of normative prescriptions that link state legitimacy exclusively to the nature and extent of representation of domestic interest. He derives these prescriptions, and the accompanying normative framework, from his reading of a Kantian theory of international law, the source for many Liberal international relations theorists. Fernando Teson, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 53 (1992).

to conform with its international obligation.<sup>54</sup> The decision whether to achieve a particular policy solution by laws binding on states alone or by laws and institutions aimed directly at individuals and groups would depend on an empirical determination as to which strategy would be more effective in altering either the behavior of individual and groups as represented by states, or the mode and scope of state representation.

A conception of international law informed by international relations theory thus subsumes most of what is now defined as private international law or conflicts of law. The choice of law governing individuals and groups in transnational society is an important factor shaping the predictability and facility of transnational social relations. It would also include many elements of what is currently defined as public international law, focusing on treaties and customary international law that can be brought directly to bear on individuals and groups in domestic and transnational society.

Turning from structure and sources to substance, a Liberal conception of international law focuses on state interests rather than state power.<sup>55</sup> It conceptualizes threats to international order, or obstacles to international cooperation, in terms of conflicts of state interests. The law designed to combat such threats would accordingly focus on ways to resolve these conflicts: by distinguishing "true conflicts" from false ones,<sup>56</sup> by establishing principles of deference,<sup>57</sup> or by identifying and classifying common interests that might serve as the basis for harmonization.<sup>58</sup> This focus on interests rather than power in turn shifts

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54. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 38 (3d ed. 1979) ("Arising from the nature of treaty obligations and from customary international law, there is a general duty to bring internal law into conformity with obligations under international law.").

55. See *supra* note 53 and accompanying text (describing the outcome of state interactions as a result of state preferences rather than of relative power capabilities).

56. See Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 211-13 (1991) (describing a false conflict as one where conduct occurring in the United States creates no interest in applying American law, or where conduct occurring abroad creates no interest in applying the foreign law). Professor Kramer further argues that if a court applies domestic law during a false conflict, it would needlessly subordinate and interfere with the law and policy of the other nation. *Id.*

57. See *id.* at 213-15 (arguing that a nation should apply its laws extraterritorially when this advances the policies that led the legislature to pass a law for wholly domestic cases).

58. See *id.* at 220-21 (noting that the best way to resolve "true conflicts" is thus to determine which type of cases nations care about most, and subsequently arrange

attention from territory (or other sources of state power) to the modes and accuracy of representation of social interests. Finally, emphasizing representative structures permits the differentiation of different categories of states based on domestic regime-type, such as drawing a distinction between "liberal" and "non-liberal" states.<sup>59</sup> Such a distinction may not be necessary, however, with regard to many areas of the law.

The actual international system naturally contains Realist, Institutional, and Liberal elements. State behavior is the product of a complex web of factors. The above analysis is thus inevitably artificial. It can nevertheless be justified on heuristic grounds; it is important for political scientists and lawyers to be able to distinguish the three strands and to understand their differential implications before weaving them together. In this spirit, Part III will present a purely Liberal approach to the extraterritoriality doctrine in United States law.

### III. FROM POWER TO INTERESTS: REVERSING THE PRESUMPTION OF TERRITORIALITY

The doctrine of extraterritoriality regulates the question of when a nation may apply its laws to individuals or conduct outside its physical territory.<sup>60</sup> It is a subset of the broader question of legislative jurisdiction—the geographical scope of a lawmaking body's power to regulate.<sup>61</sup> Ideally, all nations should be able to regulate a core zone or range of individuals and conduct of concern to them without undue friction with other nations. An instrumental view of extraterritoriality

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trade-offs that secure the application of each nation's law in as many of these as possible). This would, in effect, allow each nation to achieve its objectives or preferences. *Id.* at 221.

59. A subset of Liberal international relations theory focuses on the relations among "liberal states," defined as states with some form of representative government, a market economy based on property rights, juridical equality, and constitutional protections of basic civil and political rights. See Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205, 230 (1983). The most publicized aspect of this theory has been empirical evidence of the "democratic peace"—evidence that liberal states are far less likely to go to war with one another than they are with nonliberal states. See BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* (1993). In other work I have sought to extend this theory to build a model of *legal* relations among liberal states. See Burley, *supra* note 18 at 1907.

60. See *infra* notes 67-68 and accompanying text.

61. See *Restatement (Third) of American Foreign Relations Law* § 402 (setting forth the bases of a state's jurisdiction to make law).

doctrine would design a doctrine to achieve this goal. A Liberal analysis of the underlying problem would focus on reconciling the social and economic interests represented by the states involved in a particular conflict over extraterritoriality.<sup>62</sup> After briefly reviewing the trajectory of U.S. caselaw in this area since 1945, this section applies these principles to critique existing doctrine and offer a potential alternative.

Since 1945, U.S. doctrines of extraterritoriality have varied depending on the nature of the statute, but have all expanded considerably. The point of departure for this expansion was the pioneering of the "effects doctrine." As stated in its original formulation by Judge Learned Hand, the effects doctrine permitted the application of U.S. legislation in any case in which foreign conduct was intended to and did in fact have "an effect on U.S. commerce."<sup>63</sup> At its high point, the effects doctrine permitted the application of U.S. antitrust laws to an alleged conspiracy in restraint of trade between a Japanese parent company and its U.S. subsidiary operating in Indonesia with regard to an agreement to ship logs to Japan.<sup>64</sup>

Various circuit courts tempered the effects doctrine by adopting versions of a jurisdictional "rule of reason,"<sup>65</sup> ultimately enshrined in the Third Restatement of American Foreign Relations Law.<sup>66</sup> The test for

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62. See Kramer, *supra* note 56, at 221-222 (noting that an alternative to the traditional territoriality doctrine would be for states to identify generally shared policies or preferences and construct rules that systematically advance these preferences).

63. *United States v. Alcoa*, 148 F.2d 416, 443-44 (2d Cir. 1945).

64. *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir. 1982), *reh'g denied*, 677 F.2d 113, *vacated and remanded*, 460 U.S. 1007 (1983), *on remand*, 704 F.2d 785 (5th Cir. 1983), *reh'g denied* 709 F.2d 712, *cert. denied*, 464 U.S. 961 (1983), *appeal after remand*, 855 F.2d 222 (5th Cir. 1988), *reh'g denied*, 860 F.2d 437 (5th Cir. 1988) (en banc).

65. See *Timberlane v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (Subject matter jurisdiction is not present unless the alleged illegal act was intended to affect U.S. concerns; the alleged act was of such a type and magnitude so as to be cognizable as a violation of U.S. laws; and whether, after considering issues of international comity and fairness, the extraterritorial jurisdiction of the U.S. should be asserted to cover the act); *Mannington Mills Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); see also KINGMAN BREWSTER, *Antitrust and American Business Abroad* (1958) (formulating an early version of the "rule of reason" approach").

66. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 403(h) (1994) [*hereinafter* RESTATEMENT (THIRD)]. Factors to use in the test include:"(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the per-



extraterritorial application of a particular statute thus evolved into a two-prong test. Under the first prong, the court canvasses the evidence in support of one of several bases of jurisdiction: territoriality, nationality, and effects being the most frequent.<sup>67</sup> Before deciding whether jurisdiction in fact exists, however, a court is to conduct a reasonableness analysis, which essentially involves balancing the interests of the two states involved with regard to the activity under consideration.<sup>68</sup>

If the rule of reason was designed to moderate the overly aggressive assertion of U.S. extraterritorial jurisdiction,<sup>69</sup> the Supreme Court took a much more drastic step in this direction in 1991. In *EEOC v. Arabian Am. Oil Co. (Aramco)*,<sup>70</sup> a case in which the Court was asked to extend Title VII to the activities of an American corporation that had allegedly discriminated against an American citizen dismissed from employment in Saudi Arabia, the Court reestablished a strong "presumption of territoriality" in determining whether to give U.S. legislation extraterritorial effect.<sup>71</sup> The presumption may only be overcome by a "clear

son 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; (h) the likelihood of conflict with regulation by another state." *Id.*

67. See, e.g., *Rivendell Forest Products v. Canadian Forest Products*, 810 F.Supp. 1116, 1118 (D.C. Colo. 1993) (addressing whether plaintiff made a showing of a direct, substantial and reasonably foreseeable effect on import, commerce, or trade before conducting a reasonableness analysis); *Transnor (Bermuda) Ltd. v. B.P. North Am. Petrol.*, 738 F. Supp. 1472, 1476-77 (S.D.N.Y. 1990) (upholding jurisdiction based on the direct, significant and foreseeable effect defendant's conduct allegedly had on U.S. commerce).

68. The Restatement approach conducts the reasonableness inquiry as part of the jurisdictional analysis itself. *Supra* note 66 and accompanying text. The test adopted by various circuits, on the other hand instead, uses the test as a discretionary inquiry to determine whether jurisdiction, once established, should be exercised. See cases cited *supra* note 66.

69. See Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982) (documenting foreign protest of U.S. assertions of jurisdiction over conduct by foreign corporations).

70. 499 U.S. 244 (1991).

71. *Id.* at 248-58.

statement" of Congressional intent to apply the statute in question beyond U.S. borders.<sup>72</sup>

The *Aramco* decision generated widespread criticism, and was ultimately overturned by Congress with respect to the specific provision of Title VII in question.<sup>73</sup> The broader presumption of territoriality, however, remained in place.<sup>74</sup> In *Hartford Fire Insurance Co. v. California*,<sup>75</sup> the Court upheld the extraterritorial application of U.S. antitrust laws.<sup>76</sup> The Court also fragmented in ways that suggested that its overall approach to extraterritoriality continues to evolve.<sup>77</sup> The majority relied on the effects doctrine, without the tempering effects of the rule of reason.<sup>78</sup> The four dissenters, on the other hand, including many of the same Justices who had sided with the majority in *Aramco*,<sup>79</sup> essen-

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72. *Id.* at 248. *But see* *Kollias v. D & G Marine Maintenance*, 29 F.3d 67 (2d Cir. 1994) (noting that while the *Aramco* dissent and some commentators interpret *Aramco* as establishing a "clear statement" rule, the Supreme Court has made clear that references to non-textual sources is permissible).

73. 42 U.S.C. sec. 2000(e) (Supp. V 1993) (adding: "[w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States); *see* *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1376 (8th Cir. 1992) (noting that *Aramco* is specifically overruled by 42 U.S.C. 2000(e)).

74. *Sale v. Haitian Centers Council*, 113 S.Ct. 2549, 2567 (1993) (reiterating that acts of Congress ordinarily do not have extraterritorial application unless such intent is clearly manifested).

75. 113 S.Ct. 2891 (1993).

76. *Id.* at 2909 (holding that the Sherman Act applies to foreign conduct that is meant to produce and does in fact produce some substantial effect in the United States).

77. *See infra* notes 78-81 and accompanying text.

78. Justice Souter, writing for the five-to-four majority, held that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire*, 113 S.Ct. 2909. Moreover, the majority affirmed the court of appeals' decision that the district court should not have declined to exercise jurisdiction by reason of the principle of international comity. "International comity would not counsel against exercising jurisdiction." *Id.* at 2910. The Court noted that the only "substantial question" was whether "there is in fact a true conflict between domestic and foreign law." *See id.* (quoting *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 555 (1987)). Notwithstanding the amicus brief of the British Government and the defendant's contention that the United Kingdom had established a comprehensive regulatory regime over the London reinsurance market, the Court found no conflict "where a person subject to regulation by two states can comply with the laws of both." *See id.* (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 403 comment (e) (1987)).

79. Chief Justice Rehnquist wrote the majority opinion in which Justices White,

tially adopted the Restatement's analysis in any case in which the initial presumption of territoriality could be overcome<sup>80</sup> (in this case by the weight of accumulated precedent applying the Sherman Act extraterritorially).<sup>81</sup>

To a Liberal international relations theorist, the Court's trajectory from 1945 until *Aramco* is striking precisely because it suggests a shift from a focus on power to a focus on interests. The starting point is Justice Holmes' 1909 dictum in *American Banana Co. v. United Fruit Co.*<sup>82</sup> "[t]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."<sup>83</sup> This dictum reflected a world of strictly bounded national territories, in which legislative power was co-extensive with physical power over a defined territory. *Alcoa* was a legal extension of this territorial zone through the equation of activity having an effect on national territory with activity happening on that territory. The rule of reason, by contrast, explicitly introduces interest calculations, seeking to condition the determination of jurisdiction on a determination of which state has a greater interest in regulating the conduct in question. From a Liberal perspective, this focus on interests is likely to be more fruitful than a straightforward assertion of power at resolving the underlying conflict.

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O'Connor, Kennedy and Souter joined. *Aramco*, 499 U.S. at 244. Justice White concurred in this opinion.

80. Justice Scalia, joined by Justices O'Connor, Kennedy and Thomas, dissented from the majority on the significance of comity. Scalia noted that "the practice of using international law to limit the extraterritorial reach of statutes is firmly established" and explained that he had relied on the RESTATEMENT (THIRD) for the relevant international law. *Hartford Fire*, 113 S.Ct. at 2920. The dissent noted that, though the U.S. undoubtedly had legislative jurisdiction over the action, "under the Restatement, a nation having some basis for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." *Id.* at 2921.

81. The best explanation for this outcome may be that some Justices in the majority were in fact prepared to temper their holding in *Aramco* to restore the rule of reason, but would have applied the reasonableness analysis on the facts of this case to find jurisdiction. This prevented them from voting with the dissent, notwithstanding agreement on the appropriate test, because the dissent applied the reasonableness analysis to find against jurisdiction. Respondents' "admission" of jurisdiction may thus have helped forge a narrow coalition.

82. 213 U.S. 347 (1909).

83. *Id.* at 356.

A Liberal analysis would further argue that the return to the presumption of territoriality makes no sense, unless a convincing case can be made that a nation's interests are in fact limited to its territory or that such a limitation is most likely to reduce the prospect of conflict with foreign nations. The *Aramco* case itself challenges both propositions. First, the United States clearly has an interest in the conduct of corporations regarding U.S. nationals. That time and technology have combined to make it increasingly likely that such conduct may take place outside the territory of the United States does not diminish this interest. Second, it is not clear that Saudi Arabia has a particularly strong interest in the conduct of United States corporations regarding United States nationals on its territory, at least where such conduct would not generate clear externalities such as potential disturbances of the peace or violations of Saudi law.

Thus far, the application of Liberal international relations theory yields little more than a concurrence with mainstream criticism of *Aramco*. Many commentators denounced the renewed presumption of territoriality as a giant step backwards to a rigid and out-moded principle that would handicap U.S. law-enforcement efforts in an era of instant communication and webs of multinational ownership.<sup>84</sup> A Liberal analysis would go considerably further, however, in its criticism of the rule of reason, on several grounds.

First, the rule of reason remains closely tied to territory, and with it, to lurking notions of physical power. The answer to this conflict is not to delineate abstract zones of power. Rather, it is to determine what the underlying interests are and determine the extent to which they can be harmonized.<sup>85</sup> Second, it is important to push beyond a posited or even asserted concept of state interest to examine the actual interests of individuals and groups as represented by the state. These interests are those that will actually determine state behavior, and thus allow us to assess the likelihood of conflict or cooperation on any particular issue.<sup>86</sup> The

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84. See, e.g., Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992) (arguing that the rationale for the renewed presumption of territoriality is obsolete and thus should be abandoned as it constrains the United States in the extraterritorial application of its laws); Kramer, *supra* note 56 (arguing that the *Aramco* decision was wrongly decided and that a federal choice of law system is necessary).

85. Cf. Kramer, *supra* note 56, at 211-12 (arguing that conflict of laws should not be based on territory or where the conduct occurred, when that country or state has no legitimate interest in applying its laws). Professor Kramer thus calls for the elimination of "false conflicts." *Id.*

86. See *supra* notes 43-48 (discussing assumptions which are crucial to a Liberal

following paragraphs spell out a five-step test designed to maximize the potential for substantive regulation while minimizing the prospect of inter-state conflict by assessing and taking account of the true configuration of state interests.

*1) Step One*

The rule of reason attempts to measure the magnitude and intensity of a constructed state interest based on contact with territory, or else the "importance of the regulation to the regulating state."<sup>87</sup> Alternatively, the state itself can assert its interest directly by way of a diplomatic transmission or an amicus brief. From a Liberal perspective, however, the real measure of a "state" interest is the interest of whatever segment of society the state represents.<sup>88</sup> Interest, defined in this manner, cannot be measured by contacts with territory *per se*. Moreover, interests cannot be defined by what a state claims in the context of a particular case, as state institutions have little to lose by identifying their interest with that of the individual litigant.

The most effective manner by which to establish whether the United States has an interest in asserting jurisdiction is to determine whether it has a substantive interest in regulating the conduct in question. This test is met by determining whether the suit states a claim on which relief may be granted under federal law.<sup>89</sup> If the plaintiff passes this test she will have demonstrated a U.S. interest in the subject of the suit. The fit between the law and the complaint testifies to an interest asserted and confirmed by a legislative process open to influence by a wide range of political, economic and social groups. Step one should thus be a threshold determination of subject matter jurisdiction, as distinct from the issue of legislative jurisdiction. This is the analytical division that Justice Scalia recommends in *Hartford Fire*.<sup>90</sup>

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outlook on transnational affairs).

87. See Born, *supra* note 84, at 34-35 (addressing the use of international law and principles of comity to establish an adequate test for the extraterritorial application of United States laws to foreign conduct).

88. See *supra* notes 43-48 and accompanying text (discussing essential assumptions of a Liberal perspective on transnational relations).

89. See FED. R. CIV. P. 12(b)(6).

90. Justice Scalia argues that courts will be more inclined to interpret a statute restrictively if their interpretation is not connected to the question whether they have power over the case in the first place. Whether or not a restrictive interpretation is desirable, threshold considerations of judicial power should not distort the process of statutory interpretation. See *Hartford Fire*, 113 S.Ct. at 2920 (Scalia, J., dissenting)

### 2) *Step Two*

The second step is the legislative jurisdiction analysis. The first question here, accepting that the United States government does have a substantive interest in regulating this kind or type of conduct, is how far its interest extends. Presumably, for instance, no matter how committed Congress may be to fighting restraints of trade, it would not concern itself with a German monopoly on goods sold exclusively in Korea. The result of viewing the state as the agent of some or all individuals and groups in society is that the state's interests will vary to the extent that those individuals are affected. They are likely to be affected by each other's behavior, by behavior that takes place in the territory in which they live and by behavior that has an impact on the territory in which they live. The state's substantive interest, evidenced by the demonstration that the case raises a question under existing substantive law, can thus be limited by the principles of nationality, territoriality, and some version of the effects doctrine. These principles have simply been recast from statements of *a priori* sovereign power to statements about the scope of sovereign interests as a function of the interests of the individuals and groups that the sovereign represents.<sup>91</sup>

### 3) *Step Three*

Having established the interest of the forum government, the court must now assess the interest of the foreign government. As suggested, reliance on a foreign sovereign's claim of interest in a specific case may reflect nothing more than an individual litigant's ability to pressure the Foreign Office, a relatively costless benefit a government can provide to its citizens on a case by case basis. Applying the Liberal model, friction will arise only if there is a conflict with the economic and social interests that the government actually represents over the long term. Thus the real question is whether the foreign government has a substantive regu-

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(arguing that "comity" refers not to the comity of courts, "whereby judges decline to exercise jurisdiction," but rather to comity exercised by legislatures when they enact laws).

91. The link between territoriality, nationality, and effects and the interests of individuals and groups represented by the government in question, however, is not automatic. For instance, if one transmits financial data through the U.S. payments system to Japan, and the claim is made that the United States should assert jurisdiction, the party asserting jurisdiction must show that the fact of transmission gives rise to a specific regulatory interest *other* than a generic (and outdated) interest in controlling all activity "in or on" a government's physical territory. Thus a more refined version of this step of the test would require a demonstration of the asserted link.

latory interest in the subject at issue and the nature and direction of that interest.

As with the forum state, the best way to answer this question is to look to the foreign state's *law*. That law will reflect the balance of social, economic and political interests in that society.<sup>92</sup> Looking to the law ensures that the actual balance of internal interests and the asserted balance of external interests is the same. Stated in other terms, a government cannot pander to special interests in a specific case involving the extension of foreign regulatory jurisdiction unless it is equally responsive to or bound by those interests at home. More generally, as in the case of the forum state, the existence of a law is the best evidence of a substantive interest in the subject at hand. Thus the forum court should apply a version of the federal question test to the foreign law: does the case present a question arising under the foreign law? If the answer is yes, then the scope of that interest should similarly be determined according to the principles of territoriality, nationality or effects.

This was, in fact, the test applied by the majority in *Hartford Fire*, in which the Court determined that no conflict existed between the United States and Britain because Britain did not have a law on point.<sup>93</sup> At first glance, this requirement looks like a simple device to extend the reach of the U.S. regulatory arm. But a Liberal analysis would conclude that the full range of British economic, social and political interests normally represented in the legislative process had not actually reached an outcome opposed to regulation of the insurance industry. It is possible, of course, that the British polity does not perceive the existence of a problem so as to require regulation, or that the British insurance industry has carved out a cozy nook for itself. In either case, however, it is

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92. Once again, this view does not assume democratic forms of government leading to maximum representation, although empirical research within the family of Liberal theory suggests that maximum representation will minimize international conflict by preventing special interest groups from skewing the interests of society as a whole. A particular government might represent only a minority of wealthy interests, or a military elite, or a family or tribal clique. Nevertheless, the procedures established by those interests for internal law-making will be a better reflection of the government's actual interest in a particular case than a post-hoc determination by the government itself. To acknowledge this interest is not necessarily to endorse such a power structure. Indeed, there may be cases in which the international community deems the interests that the government represents as illegitimate: consider the case of *apartheid*. Within the context of extraterritoriality doctrine itself, however, the goal is not to achieve international justice, but rather to allow states to assert their legitimate regulatory interests with minimum international friction.

93. *Hartford Fire*, 113 S.Ct. at 2910.

reasonable to assert that the British government does not have a substantive regulatory interest in the conduct at issue in the case.

*4) Step Four*

Assuming that there are two laws on point, the forum court now confronts evidence of overlapping state interests in the subject at hand. The question now is to determine whether the two laws actually conflict. If they do not, then the forum court is free to apply the law of the forum state, on the assumption that the underlying interests of the individuals and groups represented by their respective governments are sufficiently harmonized to minimize the prospect of long-term conflict between these two governments. In the antitrust context consumers and small business might be perfectly content to allow foreign antitrust regulation to pick up wherever domestic regulation leaves off.

If the two laws do conflict, the forum court should adopt a presumption of comity accompanied by a clear statement rule—refusing to apply United States law unless Congress delineates precisely the geographical scope or intended subjects of the law.<sup>94</sup> The presence of a relevant but conflicting foreign law reveals that the economic, social and political interests of whatever segment of the foreign society is represented are engaged; a court cannot assume that the relevant interests in this country would in fact apply the law abroad under those circumstances.

*5) Step Five*

Subsequently, if Congress responds with a clear statement of intent, the court must then apply the law and invite conflict with the foreign government. At this point the court can be sure that an underlying conflict of interests exists on the part of the individuals and groups that each government represents. Moreover, the court can be confident that both sides are determined to assert their interests even in the face of potential conflict. Over the long term, however, bringing the conflict to this kind of a head is likely to invite Executive intervention to reach an agreement harmonizing the laws in question or establishing mutually agreed principles for interpretation and application of those laws. If such an agreement is reached and ratified, it will reflect a change in the composition of the underlying interests brought about by the fact of the conflict itself. The uncertainty in the law or the prospect of double liability, for instance, might lead the businesses subject to antitrust regu-

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94. See *supra* note 72 and accompanying text.



lation to approve an agreement accepting the extension of foreign jurisdiction further than they might previously have considered.

To summarize, this proposal combines an initial determination of substantive government interest—itsself based on an application of the federal question test combined with the traditional principles of nationality, territoriality, and effects<sup>95</sup>—with a conflicts approach designed to ferret out true conflicts.<sup>96</sup> The practical effect is likely to be closer to a presumption of extraterritoriality than a presumption of territoriality. In other words, courts would apply foreign law unless there is evidence of a direct conflict between two laws regulating the same issue area. The *Aramco* clear statement rule<sup>97</sup> would be used only in the event of a determination of such a conflict. Thus, the test is designed to focus attention on a particular point of conflict with a foreign nation and to ensure that the interests represented by a particular government do in fact conflict.<sup>98</sup>

The test advanced here is considerably simpler and more determinate than the multi-factor rule of reason test, a test that according to Judge Easterbrook, invites judges to “throw a heap of factors on the table and . . . slice and dice to taste.”<sup>99</sup> The chief ambiguity in the test will arise in deciding whether or not a foreign law on point does or does not conflict with the U.S. law, but this should be a relatively familiar task.

It is certainly easy enough to apply to recently decided cases. It would have led to the contrary result in *Aramco*, for instance. The court would have readily determined the existence of a U.S. interest, but would have been unlikely to find a Saudi law requiring United States companies to discriminate against United States nationals. The underlying economic, social and political interests, taken as a whole in the two nations, are easily reconciled.

In *Hartford Fire Insurance*, on the other hand, this approach would yield the same result as the actual case, although by a more streamlined and systematic route. Yet if the British government were now to pass a

95. RESTATEMENT (THIRD), *supra* note 66, sec. 402. There are yet other principles, such as passive personality and universal jurisdiction, but they are raised sufficiently infrequently as not to merit attention here.

96. *Supra* notes 56-58 and accompanying text.

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

98. *See id.* at 251 (arguing that the clear statement rule is used to ensure that broadly worded statutory language is not used as proof of the intent to apply the statute extraterritorially).

99. *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1283 (1990) (Easterbrook, J., concurring).

law directly exempting British insurance companies from antitrust regulation, a United States court would necessarily defer to British law unless Congress countered in kind. Finally, in *Sale v. Haitian Centers Council*, this test would have again produced a contrary result, as no other nation's law nor international law would have conflicted with congressional efforts to require the Attorney General to comply with United States obligations under the U.N. protocol on refugees.

Overall, however, the best argument for this test rests on the soundness of the Liberal model of the international system. The Liberal approach analyzes extraterritoriality as a regulatory problem rather than a power problem. The issue is not a clash of power, an exercise of international judicial or legislative strength, but rather a question of the compatibility of interests on the part of individuals and groups represented by the two or more governments involved. The existence of national legislation is the best indicator of those interests. Although the national legislative process can certainly be distorted or captured, it is likely to be a more accurate reflection of the interests that will in fact determine government behavior than either an unconstrained government assertion of interest in a single case or a highly discretionary balancing of a wide range of factors. Further, to the extent that adoption of this approach by national courts encourages foreign governments to express their disagreements with the regulatory policies of other nations in legislation, the passage of such legislation will ensure that a true conflict of underlying interests exists. The two clearly conflicting laws will also help crystallize the dispute beyond normal diplomatic wrangling, such that progress is more likely to be made at the international level.

### CONCLUSION

International relations theory can illuminate and challenge the assumptions about the international system that international lawyers consciously or unconsciously rely on to shape their mental map of the international system. Moreover, it facilitates assessments of the efficacy of particular legal rules. Liberal international relations theory creates analytical space for both individuals and groups operating in domestic and transnational society and states, and conceptualizes them *in relation* to one another. The operationalization of these assumptions in international law elevates the significance of transnational and national law, as well as international norms enforced by domestic courts.

More specifically, a Liberal analysis of extraterritoriality doctrine — as shaped and applied by the U.S. Supreme Court — sets up a dichotomy between conceptions of territorial power and the underlying interests

of the individuals and groups represented by the governments involved. A focus on these interests leads to an emphasis on their expression in national legislation, and concludes that as long as the forum government has a legitimate substantive interest in the subject to be regulated on behalf of whatever subset of individuals and groups it represents, then a court should apply forum law unless it directly conflicts with foreign law. In the event of such a conflict, the forum court should apply a clear statement rule designed to ensure that the forum legislature is willing to brook this conflict for the sake of extending the regulation at stake.

In many ways, then, a Liberal analysis collapses extraterritoriality doctrine into conflicts analysis. Indeed, Larry Kramer's analysis of *Aramco* from a conflicts perspective urged a similar approach of rooting out false conflicts.<sup>100</sup> This essay, however, is not the place to explore the similarities and differences between Liberal international relations theory and conflicts of law. To the extent, however, that the influence of Liberal theory is to push international economic law in the direction of a transnational judicial-legislative dialogue about common regulatory problems and solutions, it reinforces existing trends. As David Kennedy argues in his contribution to this volume, the emergence of international economic law has been pushed by a "double movement . . . from public to private [law] and beyond the sovereign forms which mark the distinction between public and private."<sup>101</sup> Liberal international relations theory provides the political science foundation for that movement, and a view of the world to match.

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100. See Kramer, *supra* note 56.

101. Kennedy, *supra* note 13, at 63.