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Absolute Conflicts of Law

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Absolute Conflicts of Law

ANTHONY J. COLANGELO*

A man who is habitually punished for doing what he was ordered to do can hardly be expected to respond appropriately to orders given him in the future. If our treatment of him is part of an attempt to build up a system of rules for the governance of his conduct, then we shall fail in that attempt. On the other hand if our object is to cause him to have a nervous breakdown, we may succeed.
– Lon L. Fuller¹

Hello, Dave. I think we may be on to an explanation of the trouble with the Hal 9000 computer. . . . We believe his truth programming and the instructions to lie, gradually resulted in an incompatible conflict, and faced with this dilemma, he developed, for want of a better description, neurotic symptoms.
– Stanley Kubrick & Arthur C. Clark²

This Article coins the term “absolute conflicts of law” to describe situations of overlapping laws from different states that contain simultaneous contradictory commands. It argues that absolute conflicts are a unique legal phenomenon in need of a unique doctrine. The Article extensively explores what absolute conflicts are; how they qualitatively differ from other doctrines like true conflicts of law, act of state, and comity; and classifies absolute conflicts’ myriad doctrinal manifestations through a taxonomy that categorizes absolute conflicts as procedural, substantive, mixed, horizontal, and vertical.

The Article then proposes solutions to absolute conflicts that center on the rule of law and fairness to parties—solutions that are in methodological tension with prevailing tests that preference largely, if not exclusively, state interests. The fairness test the Article advances pulls from considerations courts have been quietly developing over the past few decades and reorients absolute conflict analysis around these considerations. It concludes by showing that a fairness test generates better outcomes for parties, states, and the international legal system generally, not only by better conforming to the rule of law but also by better facilitating transnational activity beneficent to overall welfare.

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1. LON. L. FULLER, THE MORALITY OF LAW 66 (2d ed. 1969).
2. STANLEY KUBRICK & ARTHUR C. CLARK, 2001: A SPACE ODYSSEY (SCREENPLAY) 119, 121 (1965).

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INTRODUCTION

Most of us would probably consider a contradictory law a pretty bad law, let alone a legitimate "law" in the first place—for the simple reason that such a law is impossible to comply with. Imagine a law commanding people to sit and stand at the same time: not only would that law never be obeyed, its very existence would undermine the basic idea of "law." Yet this sort of thing happens with increasing frequency in the present international system of concurrent regulatory regimes. Take for example a U.S. discovery order to disclose information protected by foreign privacy law,³ an antitrust law commanding domestic businesses operating abroad to violate the laws of the countries where they are operating,⁴ an antiterrorism law compelling foreign banks to violate their home country's bank secrecy laws,⁵ or an antidiscrimination law prohibiting a certain type of discrimination in a country whose laws require that very discrimination.⁶ The list goes on.

To coin a term, this Article calls these situations "absolute conflicts of law," and seeks to identify them as their own unique legal phenomenon in need of its own unique doctrine. The Article distinguishes absolute conflicts from other doctrines that tend to subsume or blend into them, like so-called true conflicts of law, act of state, and comity. And it sets out to explain the conceptual contours, doctrinal manifestations, and huge practical implications of absolute conflicts for a rapidly shrinking world in which transnational actors are increasingly subject to multiple contradictory regulatory regimes. The Article then advances a theory of absolute conflicts rooted in fairness to parties that is at odds with prevailing analyses of these situations—analyses weighted heavily, if not exclusively, toward state interests. I argue that an approach based primarily on fairness to parties instead of state interests promises not only to bring coherence to this area of law but also to furnish good practical results for states, parties, and the international system generally by fostering transnational activity beneficent to overall welfare like trade, travel, and communication.

As the absolute conflicts listed above suggest, they come in various flavors: they may be conflicts of substantive law, or what we might call "substantive absolute conflicts"; conflicts of procedural law, or "procedural absolute conflicts"; or, quite often, conflicts involving both substantive and procedural law, or "mixed absolute conflicts." How best to resolve a particular absolute conflict may turn deeply on the type of conflict at issue—that is, whether it is substantive, procedural, or a mix of both.

3. See *infra* note 72 and accompanying text.

4. See *infra* note 76 and accompanying text.

5. See *infra* note 74 and accompanying text.

6. See *infra* notes 64, 80 and accompanying text.

Moreover, all of the conflicts mentioned so far are but one species of absolute conflict—what I will refer to as “horizontal absolute conflicts,” or conflicts between coequal states’ laws.⁷ But there also may exist “vertical absolute conflicts” between a state’s law and a purportedly supranational law, like international law. Here I say purportedly supranational because whether international law is “above” national law in the sense of trumping it the way U.S. federal law is above U.S. state law is an exceedingly complex question, and one that will be addressed in more detail below.⁸ Of initial interest, however, is that because international law is overwhelmingly enforced via national legislative and judicial apparatuses, states may claim (or try to claim) the power of vertical enforcement in horizontal absolute conflicts. That is, by incorporating international law into national law, states may try to enlist international law to argue that their laws necessarily win absolute conflicts with other states’ laws by virtue of acting as the enforcement mechanism of international law; to wit, our national law enforcing the international law against financing terrorism beats your national law protecting financial institutions alleged to have financed terrorism.⁹

The Article’s core thesis is that absolute conflicts are qualitatively different from what are conventionally referred to as “true conflicts of law” in conflict of laws parlance—that is, situations in which one state’s law prohibits or imposes liability for what another state’s law merely permits (but does not require).¹⁰ As a result, I argue that absolute conflicts demand qualitatively different analyses. Specifically, while prevailing conflict of laws analysis focuses principally if not exclusively on state interests, or what might be thought of as competing claims of state sovereignty, absolute conflict analysis instead should focus principally on fairness to parties subject to contradictory laws.

In this regard, I use as my theoretical anchor the idea of the rule of law, or “the enterprise of subjecting human conduct to the governance of rules.”¹¹ As the contradictory law hypothesized at the outset illustrates, at the heart of every rule of law criterion tends to be the rudimentary requirement that legal actors can fairly comply with the law. This is why a law commanding people to sit and stand at the same time does not conform to the rule of law: it is impossible to obey. Not only will a contradictory law thus fail to perform law’s essential task of shaping human behavior, it also calls into question the entire enterprise of law as a set of rules that can and should shape human behavior.¹² This same basic reasoning applies to other

7. I would include here conflicts between a subnational sovereign unit like a U.S. state and a foreign nation. *See, e.g.,* McGhee v. Arabian Am. Oil Co., 871 F.2d 1412, 1419 (9th Cir. 1989) (addressing the possibility of conflict between California and Saudi Arabia law).

8. *See infra* Part I.B.5.

9. *See infra* Parts I.B.4–5, which discuss how horizontal and vertical conflict dynamics open up possibilities of what are called “apparent conflicts” among laws. With horizontal absolute conflicts, if different sets of laws advance the same fundamental policy, even if the laws themselves superficially conflict, there is an apparent conflict and that underlying policy prevails. And more contentiously, with vertical absolute conflicts, because international law may trump national law in some instances, no legal conflict can exist with domestic law. *See infra* Part I.B.5.

10. *See infra* Part I.A.1.

11. FULLER, *supra* note 1, at 106.

12. In addition to undermining rule of law criteria and the beneficial implications of

rule of law criteria as well. Hence rule of law criteria like publicity, prospectivity, and intelligibility.¹³ What use would law be if it were a secret (publicity), if it came into being only after people acted (prospectivity), or if it were written in gibberish (intelligibility)? At bottom, the rule of law aims to allow legal actors to plan their activities and to act in compliance with the law; in the end, it is about being able to predict how law will treat your activity.¹⁴

These values extend in mounting and important ways to the international system that has seen dramatic increases in international travel, communication, and commerce, with transnational actors like multinational corporations now regularly doing business in many states. The more transnational actors are able to predict how law, broadly conceived, will treat their behavior, the more they will be able to comply with the law. And this enhanced predictability in turn will promote more and more activity that otherwise might be chilled by legal uncertainty—activity generally considered beneficent to people, states, and the international system, like trade, travel, and communication.¹⁵ The salient question absolute conflicts pose is how to adapt rule of law fairness and predictability values to contradictory laws emanating not from one sovereign but from multiple sovereigns with overlapping or concurrent jurisdictions.

Of course predicate to this question is the antecedent question of whether the rule of law can even apply to the international system in the first place; both the literature and our legal imaginations tend to conceive of the rule of law as operating within a single legal system and, accordingly, rule of law criteria tend to take the form of

upholding those criteria as explicated in this Article, there may be other reasons to disfavor absolute conflicts. For instance, the legal concept of absolute conflicts bears some correspondence to the psychological concept of a “double bind,” in which “a person is confronted with a series of contradictory messages from a powerful or socially significant other” from which the person cannot withdraw. PENGUIN DICTIONARY OF PSYCHOLOGY 223 (4th ed. 2009). While double binds can be employed in a positive way in structured settings (for example, in koans or lessons of Zen Buddhist masters to help students toward enlightenment), more often double binds have been theorized to cause distress or “pernicious effects on the targeted person,” THE CONCISE CORSINI ENCYCLOPEDIA OF PSYCHOLOGY AND BEHAVIORAL SCIENCE 299 (W. Edward Craighead & Charles B. Nemeroff eds., 3rd ed. 2004), whether in family, cybernetic, or other systems. This rather intuitive conclusion might further inform disfavoring absolute conflicts in the law. I am indebted to Lorelei Rowe in the SMU Psychology Department for discussing this concept with me.

13. See FULLER, *supra* note 1, at 39.

14. As explained later in the Article, see *infra* notes 293–297 and accompanying text, I therefore use the rule of law concept principally to describe those criteria that law strives toward so as to fairly and effectively govern human behavior largely without regard to whether it also encompasses the substantive morality of particular rules. Nonetheless, and this is a paper for another day, I would be amenable to certain domestic constitutional and international peremptory or *jus cogens* norms acting as a species of “side constraint,” see ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 33–35 (1974), on the disposition of absolute conflicts if the proposed methodology were to lead to application of an exceptionally odious law that contravenes widely agreed upon fundamental substantive rights—a view that would comport with the Article’s discussion of vertical absolute conflicts, see *infra* Part I.B.5.

15. See *infra* notes 295–296 and accompanying text.

directives to some single sovereign or ultimate lawmaking authority.¹⁶ Yet the international legal system is a singularly exceptional composite of multiple coequal national legal systems with no overarching or ultimate lawmaking authority to which rule of law directives may be addressed. I engage, and defend, the rule of law's applicability to the international system in the Article's transition from Part I's descriptive account of absolute conflicts to Part II's normative analysis of how they should be resolved.

In this connection, the Article's organization is as follows. Part I seeks to identify a distinct doctrine of absolute conflicts of law and describes them across various areas to cast them as a trans-substantive phenomenon. A detailed tour of the law will be helpful for a couple of reasons. First, until now the law has largely failed not only to identify absolute conflicts as such but also has proceeded to address and resolve them piecemeal, without a greater understanding of both what they are and the enormous legal and practical interests they implicate. At least in U.S. law, confusion surrounds their various doctrinal manifestations. For instance, the most prominent absolute conflict doctrine in U.S. law is called "foreign sovereign compulsion," by which courts excuse the operation of U.S. law compelling actors to violate foreign law abroad.¹⁷ But what is the difference between this doctrine and the purported separation of powers doctrine called "act of state," by which courts deem valid another sovereign's public act in its own territory,¹⁸ and good old-fashioned "comity," by which courts simply defer to foreign interests?¹⁹

And procedurally, what form should absolute conflicts arguments take? Are they merits-based objections to the reach and application of a law, jurisdictional objections to a court's power to hear a case or to subject parties before it to judicial process, or arguments about judicial discretion to refuse to entertain certain claims? Courts have failed to supply consistent and coherent answers to these questions. Yet they are of major significance not only to scholars and practitioners interested in how U.S. law treats instances of contradictory overlapping laws but also to transnational actors increasingly subject to those contradictory overlapping laws.

Part I tries to answer these questions in terms of both substantive and procedural law. It begins by distinguishing absolute conflicts from related doctrines of true conflicts of law, act of state, and comity. It then develops a taxonomy of absolute conflicts, classifying them as substantive, procedural, mixed, horizontal, and vertical. Along the way, I argue that under current Supreme Court precedent, lower courts treating absolute conflicts as questions of judicial subject matter jurisdiction are wrong because absolute conflicts more properly go to prescriptive and enforcement jurisdiction, or the application and enforcement of the law, and consequently ought to be argued on the merits or waived. Not only does this make sense in light of recent Supreme Court precedent and the Federal Rules of Civil Procedure, it also brings coherence to the broader law of absolute conflicts because courts presently (and counterintuitively, in my view) treat absolute conflicts of procedural laws as going

16. See *infra* notes 298–299 and accompanying text.

17. See *infra* notes 58–60 and accompanying text.

18. See *infra* Part I.A.2.

19. See *infra* Part I.A.3.

to the merits and absolute conflicts of substantive laws as going to a court's subject matter jurisdiction.

Despite the doctrinal disarray, however, one common theme emerges so far: the law tends to treat absolute conflicts in a manner not dissimilar to true conflicts of laws. Prevailing absolute conflict methodologies preference balancing approaches that weight most heavily state interests and thus, in practice, marginalize party rights. Yet as I will argue, party rights should not only be included: they should hold a paramount place in the analysis and resolution of absolute conflicts. This is not to say state-focused concepts like sovereignty and comity have no place in absolute conflict analysis. Rather, by preferencing party rights in absolute conflict analyses, state interests may actually be captured in a more nuanced and accurate way in the context of particular cases and furthered in the long run and at the macro level of systemic rule of law coherence. Instead of viewing state interests solely as the blind advancement of one or another discrete substantive or procedural policy in isolation, a fairness approach recasts them as more context sensitive to a particular case. And it enhances general fairness and predictability so as to facilitate trade, travel, and communication among transnational actors and, in turn, states—thereby increasing the fitness of the international system at large.

Take for instance the most common mixed absolute conflict, if not the most common absolute conflict of all: a domestic discovery order to produce information protected by foreign privacy law. Prevailing absolute conflict analysis in the United States classifies this scenario under the “foreign sovereign compulsion”²⁰ doctrine alluded to earlier and described by courts as a situation in which defendants claim “[foreign] law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is otherwise impossible.”²¹ One could easily write an entire article on this doctrine. Yet it is but one symptom of a larger phenomenon of transnational antinomies that is on a sharp upward trajectory in terms of both frequency and importance in the cases.

To resolve this absolute conflict, the most recent version of the *Restatement of Foreign Relations Law* sets out a balancing approach that considers a number of litigation-related factors like the importance of the requested information to the proceedings, the specificity of the request, and, most decisively for courts, “the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.”²² A majority of courts follow the *Restatement*, and emphasize the competing state interests before what is often a

20. See *infra* note 58 and accompanying text.

21. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993) (citation omitted) (internal quotation marks omitted); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 403 cmt. e, 415 cmt. j (1987). It is worth pointing out that the Supreme Court in *Hartford Fire* called this type of situation a “true conflict,” which is in my view clearly wrong from a conflict of laws perspective. See Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1042 (2011). The Court also felt that because the foreign conduct was permitted but not compelled by foreign law in that case, the foreign defendant had failed to meet this threshold. *Hartford Fire*, 509 U.S. at 798–99.

22. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (1987); see *infra* Part I.B.3.a.ii.

perfunctory rehearsal of the other factors.²³ Unsurprisingly to students of conflicts of law, the forum state's interests tend to take priority and tilt the absolute conflict in favor of forum law—here U.S. law compelling discovery.²⁴

Indeed, this result is almost predetermined when one considers that, as a mixed absolute conflict, courts routinely find not one but two U.S. interests implicated: the procedural “concept of full and liberal discovery . . . [as] a means to achieve a larger goal: the just adjudication of civil disputes”²⁵ plus whatever substantive policy is at stake—whether it is antiterrorism,²⁶ antitrust,²⁷ antidiscrimination,²⁸ antifraud,²⁹ or anticorruption.³⁰ And, if the case involves some form of government enforcement, we can be triply sure U.S. law will trump because courts defer to the executive in foreign affairs.³¹ The result, in a broad and pragmatic sense, is a powerful pro-forum bias in a vast majority of cases that not only encourages forum shopping but also increases the arbitrariness and difficulty of predicting what law will apply to defendants' conduct *at the time defendants decide to act* by placing the decision of where to initiate proceedings—and thus effectively what law likely will govern—outside of defendants' control. A fairness approach, by contrast, promises more consistency across jurisdictions and predictability for transnational actors at the crucial moment when they decide whether to engage in transnational activity.

And yet, conspicuously missing from the current *Restatement's* balancing approach is fairness to parties subject to the absolute conflict of laws (though good faith in attempting to comply with the order does factor in at the sanctions stage³²). As I will explain, a previous version of the *Restatement* included party interests like the hardship parties would face as a result of complying with U.S. law,³³ and a number of courts have added their own fairness factors to the calculus, including, most notably, the hardship factor, good faith, the party or nonparty status of the person or entity subject to the absolute conflict, and the fairness inherent in bearing burdens reciprocal to the benefits that attend a degree of U.S. presence, whether business or otherwise.³⁴ Implicit and sometimes explicit in the last consideration is whether the party could have anticipated, or was fairly on notice, that it would be subject to the U.S. law in question.³⁵ I will argue that these types of fairness factors should be the touchstone of absolute conflict of laws analysis and that such an approach is more faithful to the Supreme Court decision that originated the foreign

23. See *infra* Part I.B.3.a.ii.

24. See *infra* notes 51–52, 209–214 and accompanying text.

25. *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 549 (N.D. Ill. 2004).

26. See *infra* note 75. And the substantive argument is further strengthened where foreign substantive law has the same underlying policy as the U.S. law. See *infra* Part I.B.4.

27. See *infra* note 76.

28. See *infra* note 80.

29. See *infra* note 77.

30. See *infra* note 78.

31. See *infra* Part I.B.4. Some courts have even extended a degree of deference to private suits that enforce public norms. See *infra* Part I.B.5.c.

32. See *infra* Part I.B.3.a.ii.

33. See *infra* Part I.B.3.a.i.

34. See *infra* Part I.B.3.a.i; see also *infra* Part II.

35. See *infra* Part II.B.1.a.iii.

sovereign compulsion doctrine, *Societe Internationale v. Rogers*,³⁶ than the current balancing approaches.

Accordingly, after describing the law of absolute conflicts in Part I, Part II develops rule of law criteria for resolving them. Two key fairness criteria that grow out of *Rogers* anchor the analysis: good faith and the hardship parties likely will face as a result of the absolute conflict. I break down each of these criteria to explain their constituent elements and the law governing those elements, and suggest that in addition to preferencing fairness and predictability for transnational actors, they may actually provide a more nuanced and accurate picture of state interests than prevailing interest methodologies themselves given the fairness approach's context-sensitive nature. Good faith comprises not courting absolute conflicts, efforts to comply with contradictory laws, and not purposefully hiding behind foreign law to avoid U.S. law. Hardship cuts both ways—both for the party subject to, or potentially subject to, the absolute conflict and for the other party to the litigation. For the party subject to the absolute conflict, important factors include the likelihood that foreign law will be enforced as evidenced by myriad subinquiries, the characteristics of the conflicting foreign law, the status of the party to the litigation, the fairness of bearing burdens reciprocal to the benefits the party enjoys under U.S. law and the U.S. legal system, advance notice of the absolute conflict, and whether the absolute conflict was in some way of the party's own making. On the flip side, hardship to the other party to the litigation asks the degree to which that party would suffer by denying it materials vital to its case and whether the materials could be obtained without triggering an absolute conflict.

Ultimately, the Article's goals are twofold: one, to identify absolute conflicts as a distinct legal phenomenon and to bring some systematic coherence to an increasingly important but messy and underscrutinized area of the law; and two, to advance a new approach to absolute conflicts oriented around the rule of law and party rights that promises better outcomes not only for parties but also for states and the international system.

I. DESCRIBING ABSOLUTE CONFLICTS

This Part provides a largely descriptive account of absolute conflicts in that it describes them as a distinct legal phenomenon and classifies the myriad forms they may take. Before we can start crafting resolutions to absolute conflicts, it is necessary to appreciate what they are and how they relate to, and differ from, other doctrines. As noted, one major objective of the Article is to define a new legal concept and give it doctrinal coherence. Only once that is accomplished can we proceed toward solving the dilemmas absolute conflicts pose for transnational actors, states, and the international system.

I therefore begin by distinguishing absolute conflicts from true conflicts of law and other doctrines courts and lawyers tend to confuse with or blur into absolute conflicts like act of state and comity. Distinguishing absolute conflicts from these other doctrines is pivotal to the Article's thesis because the other doctrines rely principally, if not exclusively, on weighing state interests to resolve conflicts

36. 357 U.S. 197 (1958).

between different states' laws or official acts and, as a result, marginalize or disregard party rights entirely. Yet as Part II argues, the best way to resolve absolute conflicts is to focus specifically on party rights and fairness. After distinguishing absolute conflicts from these other doctrines, I then develop a typology of absolute conflicts across different subject areas and describe different substantive and procedural rules that presently attend the different types of absolute conflicts I identify.

This Part accordingly seeks to describe the law in new and helpful ways for courts and litigants so as to open up novel avenues of analysis that will also set the stage for Part II's normative analysis. Along the way, it also irons out previously unidentified inconsistencies in the law—for example, whether the foreign sovereign compulsion defense is an objection to judicial subject matter jurisdiction or to prescriptive and enforcement jurisdiction—thereby promoting overall doctrinal coherence.

A. Distinguishing Absolute Conflicts from Other Doctrines

1. Versus True Conflicts

Numerous courts, including the U.S. Supreme Court, have referred to situations of overlapping contradictory laws, or what this Article calls absolute conflicts, as “true conflicts of law.”³⁷ This usage is intuitive and, in itself, unproblematic. What is problematic is that a longstanding and robust discipline of conflict of laws already and regularly uses the term “true conflicts of law,” and uses it differently.³⁸ And these semantic variances can seriously mislead courts when it comes to analyzing and resolving real absolute conflicts of law.

Most problematically, courts have deployed the term “true conflict” not only to describe directly contradictory laws (again, what this Article calls an absolute conflict) but also to distinguish absolute conflicts from situations where one state's law prohibits what another state's law permits or encourages, but does not require—misguidedly giving the former scenario the exclusive mantle of “true conflict.” The most egregious example is probably the Supreme Court's decision in *Hartford Fire Insurance Co. v. California*.³⁹ There the Court extended the Sherman Antitrust Act to prohibit entirely foreign conduct by British reinsurers inside Britain in conformity with British law.⁴⁰ The Court found that “[n]o conflict exists . . . where a person subject to regulation by two states can comply with the laws of both. Since the London reinsurers do not argue that British law requires

37. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798–799 (1993); *see also* *Diaz-Barba v. Kismet Acq., LLC*, Nos. 08cv1446 BTM (BLM), 08cv1572 BTM (BLM), 2010 WL 2079738, at *11–14 (S.D. Cal. May 20, 2010); *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 446–47 (E.D.N.Y. 2008); *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 218 (E.D.N.Y. 2007).

38. *See* *Concord v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1171 (11th Cir. 2009) (A true conflict is “when two or more states have a legitimate interest in a particular set of facts in the litigation and the laws of those states differ or would produce a different result.” (internal quotation marks omitted)); *GEICO v. Fetisoff*, 958 F.2d 1137, 1141 (D.C. Cir. 1992); *cf.* *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 187 n.15 (3d Cir. 1991).

39. 509 U.S. 764 (1993).

40. *Id.* at 798–99.

them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law."⁴¹ Consequently, the Court determined there was no "true conflict" of laws.⁴²

Within the venerable discipline of conflict of laws, this use of "true conflict" is wrong. And for parties subject to actual absolute conflicts, it may be dangerous. To begin with, the term "true conflict" originated out of Brainerd Currie's governmental interest approach to choice of law questions.⁴³ According to Currie, courts deciding choice of law questions "should first of all determine the governmental polic[ies]" expressed by the laws of the involved states and "whether the relationship of the . . . state to the case at bar . . . is such as to bring the case within the scope of the state's governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance."⁴⁴ From this governmental interest analysis, three main categories emerge: false conflicts, true conflicts, and unprovided-for cases.⁴⁵ False conflicts occur when only one involved state has an interest in applying its law.⁴⁶ Because only one state is interested in applying its law, there is no conflict of laws and the sole interested state's law applies.⁴⁷ True conflicts, by contrast, occur when more than one involved state has an interest in applying its law.⁴⁸ And unprovided-for cases occur when no involved state has an interest in applying its law.⁴⁹ Within this widely influential framework, the conflict of laws in *Hartford Fire* easily qualifies as—indeed it is a paradigmatic example of—a true conflict of laws: both the United States and Great Britain had strong interests in applying their laws to advance their respective policies.

Already one might start to see that limiting the label "true conflict" to directly contradictory laws and refusing to attach it where—according to the Supreme Court—a state has a strong interest promoting but not necessarily requiring certain

41. *Id.* at 799 (citations omitted) (internal quotation marks omitted).

42. *Id.* at 798–99.

43. See, e.g., Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 259 (1958); Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 230 n.82, 245 (1958). See generally Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958).

44. Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 9–10 (1958).

45. See *id.* at 9–10, 10 n.3. Also, "[i]n his later work, Currie recognized a fourth category, what he called an 'apparent conflict,' which is something between a false and a true conflict." Symeon C. Symeonides, *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow*, in 298 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 44 (2002) (emphasis omitted).

46. See Currie, *supra* note 44, at 10 ("When one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, there is no real problem; clearly the law of the interested state should be applied.").

47. See *id.*

48. See EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 28 (4th ed. 2004).

49. See *id.*

conduct,⁵⁰ is incorrect. Not only that, it can be dangerous for parties subject to actual contradictory laws. As the conventional moniker of Currie's approach self-evidently demonstrates, it is all about "governmental interest[s]"⁵¹ and has, according to Currie himself, nothing to do with party rights.⁵² In fact, Currie unabashedly promoted subverting party rights, as well as interests of other states, to vindicate the forum state's policies.⁵³ Currie's approach has been criticized on these and other grounds,⁵⁴ but it also has been greatly influential and acceptable to courts.⁵⁵

Herein lies the huge difference between *true* "true conflicts" and "absolute conflicts" of law. With the vast majority of true conflicts of law, parties are able to comply with both laws simultaneously. Whatever one thinks about how best to resolve that choice of law, it is not inherently unfair to parties to look to the competing state interests at stake in choosing one state's law over the other. With absolute conflicts of law, however, it is *impossible* to comply with both laws simultaneously. This impossibility renders absolute conflicts qualitatively different from true conflicts and instantly imports powerful rule of law considerations that disfavor subjecting parties to contradictory legal commands in arbitrary fashion.

Although limiting the "true conflict" label to what I am calling absolute conflicts is wrong because it does not capture the vast majority of choice of law cases involving differing state interests, Currie's label could, on its own terms, potentially cover absolute conflicts since the states have conflicting interests. But the whole point of this Article is to carve out a separate category of conflicts that is qualitatively different, and to name that category. Let me also reiterate that this Part does not seek to explain how best to resolve absolute conflicts; for that, see Part II. All I want to do here is show that absolute conflicts are qualitatively different from what conventionally are understood as true conflicts and, accordingly, demand a qualitatively different analysis—one that, entirely unlike conventional true conflict approaches, preferences fairness to parties over raw state interests.

2. Versus Act of State

Absolute conflicts are also sometimes confused with or blurred into related foreign affairs doctrines involving conflicts between U.S. and foreign law like the

50. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798–99 (1993).

51. Currie, *supra* note 44, at 10.

52. *See id.*

53. *See id.*

54. *See, e.g.,* Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 460 (1985) ("[Governmental] interest[s] have no clear meanings any more. The foundations of interest analysis, which Currie strived so hard to develop, are in complete disarray."); Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 9–14 (1984).

55. *See, e.g.,* *Sandefer Oil & Gas, Inc. v. AIG Oil Rig of Tex. Inc.*, 846 F.2d 319, 322 (5th Cir. 1988) (applying the Currie governmental analysis); *Reich v. Purcell*, 432 P.2d 727, 729 (Cal. 1967) (same); *Mellk v. Sarahson*, 229 A.2d 625, 629 (N.J. 1967) (same).

act of state doctrine⁵⁶ and comity.⁵⁷ This blurring is understandable; in a very general sense, all of these doctrines ask what happens when an act of the U.S. sovereign comes up against an act of a foreign sovereign. But like true conflicts, these other doctrines deal principally with competing interests of different states or sovereigns. However, because this Article argues that absolute conflicts are, and should be treated as, dealing principally with fairness to parties, blurring absolute conflicts with state-centered foreign affairs doctrines can produce doctrinally wrong and normatively undesirable outcomes within the Article's argument.

As noted earlier, the most prominent absolute conflict doctrine in U.S. law is called "foreign sovereign compulsion."⁵⁸ It is basically a defense to the application of U.S. law abroad and "recognizes that a defendant trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's."⁵⁹ Under this doctrine, courts will (sometimes) not apply U.S. law prohibiting a party's foreign activity if the party shows that the conduct was actually compelled by foreign law and not just encouraged or approved.⁶⁰ Yet things start to get messy where courts consider foreign sovereign compulsion alongside and sometimes in tandem with the

56. The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). "[T]he doctrine requires American courts to reject private claims based on the contention that the damaging act of another nation violates either American or international law." *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292-93 (3d Cir. 1979); see also *In re Vitamin C Antitrust Litig. (In re Vitamin C II)*, 810 F. Supp. 2d 522, 524 (E.D.N.Y. 2011); *Trugman-Nash, Inc. v. N.Z. Dairy Bd., Milk Prods. Holdings (N. Am.) Inc.*, 954 F. Supp. 733, 735 (S.D.N.Y. 1997); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970).

57. International comity is "neither a matter of absolute obligation . . . nor of mere courtesy and good will," but of conscious legislative, executive, or judicial deference given consideration of international duty and convenience. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Courts split international comity into two distinct categories: "comity of the courts" and the "comity of nations." See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting in part). Comity of the courts, otherwise known as adjudicative comity, is the doctrine "whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere." *Id.* Comity of nations or prescriptive comity on the other hand is "the respect sovereign nations afford each other by limiting the reach of their laws." *Id.* (citing J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 38 (1834)) (defining comity of nations as "the true foundation and extent of the obligation of the laws of one nation within the territories of another"); see also *In re Vitamin C II*, 810 F. Supp. 2d at 542-43.

58. See *Societe Internationale v. Rogers*, 357 U.S. 197, 211 (1958) (originating the doctrine); see also *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 606 (9th Cir. 1976) (explaining the doctrine).

59. *In re Vitamin C Antitrust Litig. (In re Vitamin C I)*, 584 F. Supp. 2d 546, 551 (E.D.N.Y. 2008); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 441, 442 (1987).

60. See, e.g., *Trugman-Nash*, 954 F. Supp. at 736 (finding "an actual and material conflict between American antitrust law and New Zealand law" entitling defendants to invoke "foreign sovereign compulsion" and dismissing claims); *Interamerican*, 307 F. Supp. at 1298-99.

act of state doctrine, which bars U.S. courts from sitting in judgment of public acts of another sovereign in its own borders.⁶¹

Which is not to say that the doctrinal connection between foreign sovereign compulsion and act of state makes no sense. It does: if foreign law compels the foreign activity, then overriding the application of that law in the foreign territory would be tantamount to U.S. courts invalidating the public act of another sovereign in its own territory.⁶² Yet at least in line with this Article's thesis, the two doctrines serve different purposes. As one court so far has put it, "The act of state doctrine derives from both separation of powers and respect for the sovereignty of other nations,"⁶³ while foreign sovereign compulsion stems from fairness to parties subject to conflicting legal obligations. Thus "[r]ather than being concerned with the diplomatic implications of condemning another country's official acts," foreign sovereign compulsion "focuses on the plight of a defendant who is subject to conflicting legal obligations under two sovereign states."⁶⁴ On this view, foreign sovereign compulsion's doctrinal root is fairness to parties, not state interests.

We will return to foreign sovereign compulsion in the taxonomy below and in Part II.⁶⁵ For now, suffice it to say that not all courts view it as a fairness doctrine. Indeed, many courts following the lead of the most recent *Restatement* have erased or minimized the doctrine's original fairness kernel in the Supreme Court decision *Societe Internationale v. Rogers*,⁶⁶ which birthed the doctrine, and have elevated in its stead competing state sovereignty concerns as the doctrine's chief focus. Part II argues that this doctrinal adulteration both contradicts *Rogers* and produces bad outcomes.

61. See *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004); *Banco Nacional de Cuba*, 376 U.S. at 401; *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

62. See *Timberlane Lumber Co.*, 549 F.2d at 606 ("A corollary to the act of state doctrine in the foreign trade antitrust field is the often-recognized principle that corporate conduct which is compelled by a foreign sovereign is also protected from antitrust liability, as if it were an act of the state itself."); *In re Vitamin C II*, 810 F. Supp. 2d at 544; *Interamerican*, 307 F. Supp. at 1299. But consider that U.S. courts defer to foreign governments and may not review foreign law due to an act of state, yet may not defer to foreign government interpretations of its own law for foreign sovereign compulsion purposes. See, e.g., *In re Vitamin C II*, 810 F. Supp. 2d at 552.

63. *In re Vitamin C I*, 584 F. Supp. 2d at 550.

64. *Id.* at 551; accord *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447, 450 (D.C. Cir. 1995) (describing the conflicting foreign laws defense in employment law) ("§ 623(f)(1)'s evident purpose [is] to avoid placing overseas employers in the impossible position of having to conform to two inconsistent legal regimes, one imposed from the United States and the other imposed by the country in which the company operates.").

65. See *infra* Part I.B; *infra* Part II.

66. See 357 U.S. 197, 211 (1958) ("It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign."). I should note that the cases in this area also require good faith. Thus if the party attempts to use foreign law to evade U.S. law, the defense will not apply. See *id.*; see also Don Wallace, Jr. & Joseph P. Griffin, *The Restatement and Foreign Sovereign Compulsion: A Plea for Due Process*, 23 INT'L LAW. 593, 599-600 (1989).

3. Versus Comity

A final doctrine that is sometimes confused with or substituted for absolute conflict analysis is the hoary concept of "comity," which presumes a certain degree of respect for foreign nations and their acts.⁶⁷ A curious doctrine in that it doesn't actually purport to be law, "Comity," to quote the Supreme Court, "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."⁶⁸ And yet, despite its repeated disavowal of legal status, comity tattoos and often stars in judicial opinions dealing with foreign affairs.⁶⁹

When it comes to choosing whether to apply U.S. law in ways that might interfere with foreign nations' interests, prevailing comity tests invite courts to consider a scopious list of factors geared toward the relative strengths of different states' claims to regulate the activity in question.⁷⁰ William Dodge has recently tried to correct this approach with a characteristically insightful analysis,⁷¹ but until courts come around, we are left with a very open-ended judicial inquiry subject to massage and manipulation that tends to favor state interests.

Comity is flexible, and conceivably could comprehend fairness to parties as part of the respect due foreign nations. But like true conflicts and act of state, comity is really focused on state interests, not party rights. And thus just as absolute conflicts are qualitatively different from those other doctrines, so too are they qualitatively different from comity. Simply put, unlike true conflicts, act of state, and comity, the key question presented by absolute conflicts is this: What is the fairest outcome for parties subject to directly contradictory laws, not for the states whose laws those parties are trapped between?

B. Taxonomy

Absolute conflicts are trans-substantive. That is to say, although they pop up in different areas of law and manifest in myriad ways, they all present the same basic dilemma of how best to resolve directly contradictory overlapping legal commands. U.S. law has seen absolute conflicts of law involving, among other areas, discovery

67. See *infra* notes 68–69; see also *Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962); *Diaz-Barba v. Kismet Acq., L.L.C.*, Nos. 08cv1446 BTM (BLM), 08cv1572 BTM (BLM), 2010 WL 2079738, at *11–14 (S.D. Cal. May 20, 2010); *In re Rubber Chems. Antitrust Litig.*, 486 F. Supp. 2d 1078, 1082 (N.D. Cal. 2007); *Trugman-Nash, Inc. v. N.Z. Dairy Bd., Milk Prods. Holdings (N. Am.) Inc.*, 954 F. Supp. 733, 735 (S.D.N.Y. 1997).

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

69. An interesting move by courts is effectively translating international comity into a legal doctrine by using common law analyses to incorporate comity as a principle of customary international law. See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 585–86 (1953) (incorporating comity into maritime common law analysis).

70. See, e.g., *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 606 (9th Cir. 1976) (factor balancing test); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 403(2), 442(1)(c) (1987) (same).

71. William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015).

orders,⁷² privacy⁷³ and secrecy laws,⁷⁴ antiterrorism laws,⁷⁵ antitrust laws,⁷⁶ antifraud laws,⁷⁷ anticorruption laws,⁷⁸ securities laws,⁷⁹ employment and antidiscrimination laws,⁸⁰ bankruptcy laws,⁸¹ and in some ways even human rights laws,⁸² to name a few.

It is not my intention here to describe every absolute conflict that has ever arisen in U.S. law. Instead, I want to develop and illustrate a sort of taxonomy for classifying different *kinds* of absolute conflicts. For example, an absolute conflict

72. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 (1987); see also *United States v. First Nat'l City Bank*, 396 F.2d 897, 899 (2d Cir. 1968) (production under U.S. discovery order might have subjected defendant to criminal penalties under German bank-secrecy laws); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 (1987).

73. See *Trade Dev. Bank v. Cont'l Ins. Co.*, 469 F.2d 35, 41 n.3 (2d Cir. 1972); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 118 (S.D.N.Y. 1981).

74. See *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1471 (9th Cir. 1992) (Chinese secrecy law); *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat (Admin. of State Ins.)*, 902 F.2d 1275, 1282 (7th Cir. 1990) (Romanian secrecy law); *In re Grand Jury Proceedings*, 691 F.2d 1384, 1386 (11th Cir. 1982) (Bahamian secrecy law).

75. See *Linde v. Arab Bank, PLC*, 706 F.3d 92, 99 (2d Cir. 2013); *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 432 (E.D.N.Y. 2008).

76. See *In re Vitamin C II*, 810 F. Supp. 2d 522, 524 (E.D.N.Y. 2011); cf. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993) (addressing but not finding contradictory antitrust regulation).

77. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1296 (3d Cir. 1979).

78. See *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 550 (S.D.N.Y. 2002) (Foreign Corrupt Practices Act).

79. See *In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 291–95 (E.D.N.Y. 2002).

80. See *Abrams v. Baylor Coll. of Med.*, 805 F.2d 528, 530 (5th Cir. 1986); *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554, 557–58 (7th Cir. 1985). Title VII also applies extraterritorially. See *Civil Rights Act of 1991*, Pub. L. No. 102-166, § 109, 105 Stat. 1077, 1077–78 (repudiating *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991)).

81. See *Gitlin v. Societe Generale (In re Maxwell Comm'n Corp.)*, 93 F.3d 1036, 1049–50 (2d Cir. 1996).

82. See Anthony J. Colangelo & Kristina A. Kiik, *Spatial Legality, Due Process, and Choice of Law in Human Rights Litigation Under U.S. State Law*, 3 U.C. IRVINE L. REV. 63, 78 (2013) (discussing various stages of the litigation in *Doe v. Exxon Mobil*, 654 F.3d 11 (D.C. Cir. 2011), and explaining that “[a] variant of the foreign sovereign compulsion issue arose in the district court proceedings while the non-federal tort claims were still purportedly governed by District of Columbia and Delaware law. In its motion for summary judgment, Exxon argued that it could not be held liable for the actions of Indonesian government forces that allegedly harmed the plaintiffs because Exxon was actually required to employ the forces under Indonesian law. More specifically, Exxon argued that it could not be directly liable for negligent hiring and supervision of the Indonesian forces or vicariously liable for their activities because Exxon was ‘required by Indonesian law to have military security personnel on site.’ The district court rejected these arguments, finding that a genuine issue of material fact existed as to whether, under U.S. tort principles of employer liability for independent contractors and master-servant relationships, Exxon could be found liable. Had the court concluded that Exxon was actually and legally forced to employ the government forces and had no control over them under Indonesian law, foreign sovereign compulsion could have kicked in to block the application of U.S. law.” (citations omitted)).

involving two states' procedural rules relating to the disposition of litigation would present a "procedural absolute conflict of laws." Similarly, contradictory substantive laws regulating primary conduct unrelated to litigation would be a "substantive absolute conflict of laws." And especially common are absolute conflicts involving both procedural and substantive laws, or "mixed absolute conflicts of laws." While the line between procedure and substance is of course difficult, if not impossible, to draw with complete precision,⁸³ it remains a doctrinally and heuristically useful distinction that can aid thinking about absolute conflicts, especially because it is so deeply embedded in the areas of law this Article treats.⁸⁴

Another significant distinction exists between what I refer to as "horizontal absolute conflicts of law," or conflicts involving coequal states' domestic laws, and "vertical absolute conflicts of law," or conflicts involving domestic and international law. As the Introduction noted, I use the term "vertical" because international law may purport to trump national law. This distinction between horizontal and vertical absolute conflicts is becoming more and more important for two reasons: First, international law is mostly enforced via states' domestic laws. And second, states are increasingly implementing or purporting to implement international law via their domestic laws. Consequently, where one state purports to implement international law in its domestic law and that law absolutely conflicts with another state's domestic law, the first state can claim its law "wins" the absolute conflict by virtue of implementing international law. I explore the potential for, and limitations to, this type of argumentation.

1. Procedural Absolute Conflicts of Law

a. What They Look Like

A procedural absolute conflict of laws occurs where two states' laws relating to the disposition of litigation are incompatible.⁸⁵ Say one state's litigation-oriented

83. See Walter W. Cook, *Substance and Procedure in the Conflict of Laws*, 42 YALE L.J. 333, 345-46 (1933).

84. When dealing with conflicts of laws, the general rule is that substantive matters may be governed by foreign law but that procedural matters must be governed by forum law. See, e.g., *Grant v. McAuliffe*, 264 P.2d 944, 946 (Cal. 1953) (en banc). The reason behind this distinction is that procedural rules generally do not have direct extraterritorial effect. Of course because the procedural rules we are addressing here—for example, domestic discovery orders to foreigners to produce materials located abroad—do have extraterritorial effect, we are confronted with procedural absolute conflicts of law.

85. I would not count courts themselves feeling stuck between conflicting procedural laws. For instance, in *In re Maxwell Communication Corp.*, the Second Circuit appeared to find an absolute conflict, which it labeled a "true conflict" under *Hartford Fire*, because it could not resolve a bankruptcy dispute in line with differing U.S. and British bankruptcy rules to which the debtor was subject. 93 F.3d at 1049-50. At issue were the two nations' so-called avoidance rules, which "generally allow the estate to recover certain pre-petition transfers of property to creditors occurring within a defined period of time." *Id.* at 1043. Avoidance rules "require courts to scrutinize a debtor's actions prior to its bankruptcy filing and, under certain circumstances, to nullify those actions." *Id.* at 1050. They are procedural in the sense that they do not regulate primary conduct outside of the litigation context; rather, "[l]iability . . . is

discovery order compels production of information and another state's litigation-oriented law prevents the production of that information. The latter laws are often referred to as "blocking statutes."⁸⁶ An illustration is Article 1A of French Penal Code Law No. 80-538, which provides:

Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.⁸⁷

U.S. courts have been critical of these statutes because of their distinctly procedural (read: litigation) focus, suggesting for instance that the French blocking statute was disingenuously "never expected nor intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts."⁸⁸ U.S. courts accordingly have afforded the statute little weight, calling it "obviously . . . a manifestation of French displeasure with American pre-trial discovery procedures."⁸⁹ By contrast, U.S. courts have looked more favorably on foreign statutes that, although they may have similar nonproduction effects, are motivated by genuine substantive regulatory concerns within the foreign state.⁹⁰

contingent on the subsequent commencement of insolvency proceedings." *Id.* The court found that where a debtor is subject to the jurisdiction of multiple courts' bankruptcy proceedings, "a conflict between two avoidance rules exists if it is impossible to distribute the debtor's assets in a manner consistent with both rules." *Id.* The court thus appeared to be using the term "true conflict" to describe the legal impossibility that the court itself faced in not being able to apply both nations' bankruptcy rules simultaneously. It's worth noting that if the court had been using the term "true conflict" in a traditional conflict of laws manner, however, the use would probably have been correct—the United States and England had differing laws reflecting different state interests and that did not put the parties in a legally impossible position.

86. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 526 n.6 (1987). Though some courts have also used the term to describe more substantive laws. See *United States v. Brodie*, 174 F. Supp. 2d 294, 298 (E.D. Pa. 2001) ("Underpinning the defendants' foreign sovereign compulsion and comity arguments is the existence of so-called 'blocking statutes' passed by Canada, the United Kingdom, and the European Union" prohibiting corporations and individuals from not trading with Cuba so as to comply with U.S. law.).

87. *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 526 n.6.

88. *Compagnie Francaise D'Assurance Pour Le Commerce Extérieur v. Phillips Petrol. Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984) (citing *Adidas Ltd. v. S.S. Seatrain Bennington*, 1984 WL 423 (S.D.N.Y. May 30, 1984)).

89. *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 508 (N.D. Ill. 1984). This also suggests that absolute conflict analysis should take into account not just fairness to the party subject to the absolute conflict but also fairness to the other party to the litigation, a point picked up and elaborated on in Part II's discussion of hardship. See *infra* Part II.B.2.

90. See *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat (Admin. of State Ins.)*, 902 F.2d 1275, 1280 (7th Cir. 1990) ("Unlike a blocking statute, Romania's law

The most recent *Restatement* takes this view, noting that "when a state has jurisdiction to prescribe and its courts have jurisdiction to adjudicate, adjudication should (subject to generally applicable rules of evidence) take place on the basis of the best information available," and "[blocking] statutes that frustrate this goal need not be given the same deference by courts of the United States as substantive rules of law at variance with the law of the United States."⁹¹ To be sure, while section 441 of the *Restatement* "[i]n general" commands that "a state may not require a person to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national,"⁹² procedural absolute conflicts get their own distinct section—one that explicitly allows courts to require "disclosure of information located outside the United States" even if that disclosure "is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located."⁹³ The test, which appears in section 442 and has been widely adopted by courts, is as follows:

In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.⁹⁴

The *Restatement* justifies the different treatment by distinguishing between substantive and procedural laws:

§ 441 is concerned with conflicts in substantive law between two or more states in connection with activities or transactions in situations where both states have jurisdiction to prescribe; this section, in contrast, deals with the litigation process, and in particular with pretrial procedures, in situations where the forum state by definition has jurisdiction over the parties and the proceedings, and foreign substantive law would not

appears to be directed at domestic affairs rather than merely protecting Romanian corporations from foreign discovery requests."); *SEC v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 339–40 (N.D. Tex. 2011) ("In the absence of any evidence suggesting that Switzerland crafted its laws specifically to impede United States courts' discovery orders, the Court finds that the interests of comity counsel in favor of taking the duly enacted laws of Switzerland at face value.") (citations omitted); *id.* at 341 ("Additionally, the Swiss laws relied upon by SG Suisse have been on the books for decades, suggesting that this case does not present 'a situation in which the party resisting discovery has relied on a sham law such as a blocking statute to refuse disclosure.'") (citations omitted).

91. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 437 reporter's note 5 at 41–42 (Tentative Draft No. 7, 1986) (approved May 14, 1986).

92. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 441(1)(a) (1987).

93. *Id.* § 442(2).

94. *Id.* § 442(1)(c).

ordinarily be involved. Accordingly, somewhat less deference to the law of the other state may be called for.⁹⁵

In sum, U.S. courts and the *Restatement* view skeptically foreign laws that create procedural absolute conflicts with U.S. law and that appear devoid of genuine substantive regulatory concerns. As a result, U.S. courts are less likely to defer to these foreign laws and more likely to effectuate U.S. law compelling production.

b. How To Argue Them

The *Restatement* language also raises interesting and potentially serious questions about what *type* of jurisdiction is at play when it comes to procedural absolute conflicts and, indeed, absolute conflicts of law generally. Is it the jurisdiction to prescribe rules regulating conduct, or “prescriptive jurisdiction”⁹⁶ (sometimes imprecisely called “legislative jurisdiction”⁹⁷); the jurisdiction to enforce those rules, or “enforcement jurisdiction,”; the jurisdiction of a court to adjudicate a dispute, or “subject matter jurisdiction,” or the court’s jurisdiction over a party, or “personal jurisdiction”? Or is it some amalgam of these types of jurisdiction? Needless to say, the answer is of considerable litigation importance. Prescriptive jurisdiction defects go to the merits of the case and may be waived if not timely raised.⁹⁸ Similarly, an objection to personal jurisdiction vindicates a party right that also must be timely raised or waived.⁹⁹ On the other hand, judicial subject matter jurisdiction defects can be raised at any time, including by the court *sua sponte*.¹⁰⁰

The *Restatement* is remarkably question begging on this point. Comment a. states: “Discovery for use in a judicial or administrative proceeding is an exercise of jurisdiction by a state, whether it emanates from an order of a court or from a demand by a party pursuant to a statute or rule of practice.”¹⁰¹ This is not very helpful. The comment then goes on to instruct courts to measure “such exercise of jurisdiction . . . with the principle of reasonableness,” and parenthetically references sections 403 and 421.¹⁰² But this too is not very helpful, since section 403 governs

95. *Id.* § 442 cmt. e.

96. *See id.* §§ 401(a), 402.

97. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (noting that “Congress possesses legislative jurisdiction” where the regulated acts concern commerce with foreign nations); *see also* Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1978) (defining legislative jurisdiction as “the power of a state to apply its law to create or affect legal interests”). This type of jurisdiction is not exclusive to legislatures, however. For example, common-law judicial decision making also involves some exercise of jurisdiction to prescribe. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401(a), 402 cmt. i (1987).

98. *See, e.g., Messner v. Calderone*, 407 Fed. App’x 972, 973–74 (7th Cir. 2011); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992).

99. *See* FED. R. CIV. P. 12(h)(1); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982).

100. *See* FED. R. CIV. P. 12(h)(3); *see also infra* note 110.

101. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 cmt. a (1987).

102. *Id.*

the reasonableness of a state's exercise of *prescriptive* jurisdiction, while section 421 governs the reasonableness of a state's *adjudicative* jurisdiction. Which is it?

Fortunately, courts addressing this question seem to have gotten it right, at least when it comes to procedural absolute conflicts, and appear to treat the exercise of jurisdiction as an exercise of prescriptive jurisdiction. Whether the jurisdiction is exercised by a legislature or court, it relates to the application and enforcement of rules, not to the court's inherent power to hear a case. For example, a foreign blocking statute certainly looks like an exercise of prescriptive jurisdiction by a foreign state in that it seeks to regulate not just parties but also U.S. courts. The Supreme Court has basically said as much, observing "the language of the [French blocking] statute, if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge."¹⁰³ On the flip side, from the perspective of a party abroad subject to a U.S. court's discovery order, that order also looks like not only an exercise of adjudicatory authority but also of prescriptive authority in a foreign locale—albeit by a court instead of a legislature—backed up by some enforcement capability.¹⁰⁴ As in other areas,¹⁰⁵ here the academic categories of prescriptive, adjudicative, and enforcement jurisdiction tend to lose heuristic value. A discovery order, for instance, embroils all three: a rule telling a foreign actor how to behave, as a result of the court's power over the parties and the case, accompanied by the threat of a sanction.

Teasing out these distinctions may sound like hairsplitting depending on one's background in the intricacies of the law of jurisdiction. But what is crucial from both a procedural and practical litigation perspective is this: the exercise of jurisdiction is emphatically *not* a question of subject matter jurisdiction, or the power of the court to hear the case to begin with—a challenge that may be raised at any time, including by the court itself. There is no question that the court has power over the dispute; rather, the question is about how and when the court's exercise of power should extend to compel actors abroad to violate foreign law. This is consistent with the Supreme Court's statement that "[i]t is well settled that such [foreign blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute."¹⁰⁶ In other words, "the task" U.S. courts face "is not one of defining power but of developing rules governing the proper exercise of power."¹⁰⁷ As one lower

103. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.29 (1987).

104. *Id.* (noting that "the District Court's discovery orders arguably have some impact in France").

105. Cf. Anthony Colangelo, *Response: Adjudicative Versus Prescriptive Jurisdiction, Translating Historical Intent, and a Brief Universal Jurisdiction Rejoinder*, SCOTUSBLOG (July 20, 2012, 12:50 PM), <http://www.scotusblog.com/2012/07/response-adjudicative-versus-prescriptive-jurisdiction-translating-historical-intent-and-a-brief-universal-jurisdiction-rejoinder/>.

106. *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 544 n.29 (citing *Societe Internationale v. Rogers*, 357 U.S. 197, 204–06 (1958); see also *id.* at 540 (explaining that the "Hague Convention does not divest the District Court of jurisdiction to order discovery under the Federal Rules of Civil Procedure").

107. *United States v. First Nat'l City Bank*, 396 F.2d 897, 901 (2d Cir. 1968).

court recently put it, “the United States Supreme Court held that an American court has the power to require a party to respond to discovery conducted in accordance with the Rules of Civil Procedure, although the court must make a discretionary determination about whether to do so on the facts of the case.”¹⁰⁸ In short, the court has subject matter jurisdiction over the case; the real question is whether to apply and enforce its rules of procedure where they are incompatible with foreign rules to which the party is also subject.

This classification of jurisdiction is also consistent with the Federal Rules of Civil Procedure themselves—in particular, the “well established [law] that a failure to object to discovery requests within the time required constitutes a waiver of any objection.”¹⁰⁹ Again, if the issue were purely one of subject matter jurisdiction, it would not be subject to waiver; courts could even raise it *sua sponte*.¹¹⁰ Moreover, if we consider the objection to jurisdiction as going to party rights and fairness as this Article suggests, then like an objection to personal jurisdiction, the jurisdictional challenge is personal to the party and may be waived accordingly.

Interestingly, and as we will see next, courts consider substantive absolute conflicts as going not to the merits, but rather to the court’s subject matter jurisdiction. This seems counterintuitive: absolute conflicts of procedural law go to the merits of a case, while absolute conflicts of substantive law go to judicial subject matter jurisdiction. I contend that the latter view is wrong under recent Supreme Court case law and that substantive absolute conflicts too ought to be treated as issues of prescriptive and enforcement jurisdiction going to the merits of a case.

2. Substantive Absolute Conflicts of Law

a. What They Look Like

Substantive absolute conflicts of law occur when two states’ substantive laws regulating primary conduct compel contradictory actions. Most prevalent so far are conflicts involving antitrust laws,¹¹¹ though substantive absolute conflicts are by no means limited to antitrust and have arisen in areas as diverse as employment law,¹¹² trading with the enemy,¹¹³ and human rights.¹¹⁴

108. *In re Activision Blizzard, Inc.*, 86 A.3d 531, 539 (Del. Ch. 2014).

109. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992).

110. *See, e.g., United States v. S. Cal. Edison Co.*, 300 F. Supp. 2d 964, 972 (E.D. Cal. 2004) (“The Court has an independent obligation to address *sua sponte* whether it has subject-matter jurisdiction.”) (internal quotation marks omitted), *quoted in Grupo Dataflux v. Atlas Global Grp, L.P.*, 541 U.S. 567, 593 (2004).

111. *See, e.g., In re Vitamin C II*, 810 F. Supp. 2d 522 (E.D.N.Y. 2011); *Trugman-Nash, Inc. v. N.Z. Dairy Bd., Milk Prods. Holdings (N. Am.)*, 954 F. Supp. 733 (S.D.N.Y. 1997); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970); *see also Douglas H. Meal, Governmental Compulsion as a Defense Under United States and European Community Antitrust Law*, 20 COLUM. J. TRANSNAT’L L. 51 (1981).

112. *See Mahoney v. RFE/RL, Inc.*, 47 F.3d 447, 450 (D.C. Cir. 1995).

113. *See Societe Internationale v. Rogers*, 357 U.S. 197, 198–99 (1958); *United States v. Brodie*, 174 F. Supp. 2d 294, 296 (E.D. Pa. 2001).

114. *See Yousuf v. Samantar*, 699 F.3d 763, 776 (4th Cir. 2012), *cert. denied*, 134 S. Ct.

Early case law in the antitrust realm adopted a fairly strict position that if “defendants were compelled by regulatory authorities” of a foreign government to violate U.S. law abroad, “such compulsion is a complete defense to an action under the [U.S.] antitrust laws.”¹¹⁵ This position comports with the Restatement’s general view, noted above, that “a state may not require a person to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.”¹¹⁶ In this context, the foreign sovereign compulsion defense requires that foreign law actually compel the violation of U.S. law (and not merely permit or encourage it),¹¹⁷ and that the compulsion is “genuine,” that is, not “sought or induced by the defendants.”¹¹⁸ The rationale behind this position draws in part from respect for foreign sovereigns but more profoundly from the systemic desire to foster commerce among nations and to protect parties subject to contradictory overlapping laws.

For instance, in *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, the plaintiff alleged that the defendant had illegally boycotted the plaintiff so as to deny it Venezuelan crude oil.¹¹⁹ The District Court for the District of Delaware, in an opinion by Judge Caleb Wright, held that foreign sovereign compulsion by the Venezuelan regulatory authorities in Venezuela constituted “a complete defense” to the operation of U.S. antitrust law there.¹²⁰ According to the court, “[i]t requires no precedent . . . to acknowledge that sovereignty includes the right to regulate commerce within the nation. When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign.”¹²¹ On this rationale, the court essentially interpreted the Sherman Act as not reaching the foreign activity, noting that “[a]nticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce. . . . The Sherman Act does not go so far.”¹²²

This reasoning obviously exhibits strong deference to foreign sovereigns and, in this respect, conjures the related act of state doctrine.¹²³ Yet upon inspection, the

897 (2014); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1209–10 (9th Cir. 2007).

115. *Interamerican*, 307 F. Supp. at 1296.

116. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 441(1) (1987).

117. See *In re Vitamin C II*, 810 F. Supp. 2d 522, 544–45 (E.D.N.Y. 2011); *Trugman-Nash, Inc. v. N.Z. Dairy Bd., Milk Prods. Holdings (N. Am.)*, 954 F. Supp. 733, 735 (S.D.N.Y. 1997); see also *Mannington Mills, Inc. v. Congoleum Corp.* 595 F.2d 1287, 1293 (3d Cir. 1979) (“Where the governmental action rises no higher than mere approval, the compulsion defense will not be recognized.”).

118. *Interamerican*, 307 F. Supp. at 1297, 1302. This requirement also appears in the Supreme Court’s seminal foreign sovereign compulsion decision, *Societe Internationale v. Rogers*, 357 U.S. 197, 208–09 (1958), which explained that the noncompliant party had not “deliberately courted legal impediments,” and that noncompliance “was due to inability fostered neither by its own conduct nor by circumstances within its control.” *Id.* at 211.

119. 307 F. Supp. at 1292.

120. *Id.* at 1296.

121. *Id.* at 1298.

122. *Id.*

123. See *id.* at 1299.

opinion also relies heavily and more centrally on the systemic desire to foster trade among nations and to protect the rights of parties subject to conflicting overlapping laws. The court's point about activity compelled by a foreign government not fitting within the Sherman Act's definition of "commerce" was fundamentally about preserving the ability of U.S. actors to engage in commerce with other nations. The court explained, "Commerce may exist at the will of the government, and to impose liability for obedience to that will would eliminate for many companies the ability to transact business in foreign lands."¹²⁴ To be sure, "compliance with [foreign] authority" necessarily excused the operation of U.S. law because such compliance was, "in fact, a *sine qua non* of doing business."¹²⁵ The court also emphasized party rights, stressing the "defect[]" in the plaintiffs' position that defendants were liable for anticompetitive conduct as a matter of law because "[i]t ignores defendants' *right* to show that participation in what might otherwise be an illegal boycott is immunized by acquiescence in the order of a foreign government."¹²⁶ The court even went so far as to conclude that "[t]he ends of justice" required terminating the litigation in defendants' favor.¹²⁷

More recent cases have softened the impact of this hard and fast rule that foreign sovereign compulsion is a "complete defense" to U.S. law¹²⁸ both by not deferring to foreign governments' interpretations of their laws and by construing foreign laws narrowly so as to avoid absolute conflicts with U.S. law. For instance, unlike the court in *Interamerican*, which refused to "undertake . . . an inquiry"¹²⁹ into the meaning and validity of Venezuelan law, the Eastern District of New York very recently "decline[d] to defer to the Chinese government's statements to the court regarding Chinese law" in a potential substantive absolute conflict case styled *In re Vitamin C Antitrust Litigation*.¹³⁰ At issue was the degree of deference owed the Chinese government's statements regarding the effect of Chinese regulations that defendants claimed compelled their anticompetitive cartel. The Chinese government took the position that Chinese law indeed compelled the activity, but the court—after a detailed and searching independent evaluation of Chinese law—disagreed.¹³¹ Similarly, in *United States v. Brodie*, the Eastern District of Pennsylvania construed Canadian, U.K., and European Union laws "prohibiting corporations and individuals from not trading with Cuba in order to" comply with U.S. laws as not reaching defendants' sales of ion exchange resins to Cuba.¹³² While it of course cannot be certain that these cases would have been decided differently had they been decided

124. *Id.* at 1298.

125. *Id.* at 1304 (citation omitted) (internal quotation marks omitted).

126. *Id.* at 1302 (emphasis added).

127. *Id.* at 1304.

128. *Id.* at 1296.

129. *Id.* at 1298.

130. 810 F. Supp. 2d 522, 525 (E.D.N.Y. 2011).

131. This shift may also be due in part to the inclusion of Federal Rule of Civil Procedure 44.1, under which "[d]etermination of a foreign country's law is an issue of law." *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998). Although the rule had been in effect for four years at the time *Interamerican* was decided, see FED. R. CIV. P. 44.1 notes, it appears that the court in that case did not consider it.

132. 174 F. Supp. 2d 294, 296 (E.D. Pa. 2001).

around the time *Interamerican* was decided in 1970, the tenor of the opinions, and in particular the absence of strong deference to foreign governments, manifestly differs from earlier decisions.

Thus unlike procedural absolute conflicts, courts have been more willing to hold that substantive absolute conflicts excuse the operation of U.S. law abroad. The test appears to have sprung from some combination of respect for foreign sovereigns and, more fundamentally, the desire to foster international trade and protect party rights, when—to quote the recent decision in *In re Vitamin C Antitrust Litigation*—defendants are “caught between the proverbial rock and a hard place where compliance with one country’s laws results in violation of another’s.”¹³³ And while recent decisions show that courts are still willing to excuse the operation of U.S. law on this rationale,¹³⁴ there has been movement away from deferring conclusively to foreign sovereigns and toward construing foreign law so as not to generate absolute conflicts with U.S. law if possible.

b. How To Argue Them

Another major difference from procedural absolute conflicts is that courts addressing substantive absolute conflicts treat the issue as going to judicial subject matter jurisdiction instead of to the merits. The court in *Interamerican*, for example, cast its reasoning in subject matter jurisdiction language, explaining that “[t]he Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns.”¹³⁵ And the courts in both *Trugman-Nash, Inc. v. New Zealand Dairy Board* and *In re Vitamin C Antitrust Litigation* framed the issues, respectively, as whether “this Court’s subject matter jurisdiction over plaintiffs’ antitrust claims was precluded”¹³⁶ and whether judicial “abstention” was warranted.¹³⁷ As noted at the end of the last section, it seems counterintuitive that courts and lawyers treat procedural absolute conflicts as going to the prescriptive scope and application of the law and thus the merits of a case, while substantive absolute conflicts of classic conduct-regulating rules are treated as going to a court’s subject matter jurisdiction. And it is also probably wrong under recent Supreme Court precedent.

Judicial decisions classifying substantive absolute conflicts as going to the court’s subject matter jurisdiction have done so by taking a cue from the Supreme Court’s decision in *Hartford Fire*.¹³⁸ There the Court evaluated whether the Sherman Act reached foreign conduct as a question of the district court’s subject matter jurisdiction.¹³⁹ But as Justice Scalia pointed out in dissent, this was incorrect. Justice Scalia explained that “the extraterritorial reach of the Sherman Act . . . has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on

133. 810 F. Supp. 2d at 544.

134. See, e.g., *Trugman-Nash, Inc. v. New Zealand Dairy Bd., Milk Prods. Holdings (N. Am.) Inc.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997).

135. *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970).

136. *Trugman-Nash*, 954 F. Supp. at 735.

137. *In re Vitamin C II*, 810 F. Supp. 2d at 544.

138. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798–99 (1993).

139. *Id.*

whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct.”¹⁴⁰ Justice Scalia then observed that “[t]here is, however, a type of ‘jurisdiction’ relevant to determining the extraterritorial reach of a statute; it is known as ‘legislative jurisdiction,’ or ‘jurisdiction to prescribe.’”¹⁴¹ And it “refers to ‘the authority of a state to make its law applicable to persons or activities,’ and is quite a separate matter from ‘jurisdiction to adjudicate.’”¹⁴² On this view, the proper inquiry in *Hartford Fire* was not whether courts had subject matter jurisdiction over claims arising out of foreign conduct but rather whether Congress intended the Sherman Act’s substantive conduct regulating rules to reach that conduct.¹⁴³ To resolve this question, Justice Scalia employed longstanding canons of statutory construction¹⁴⁴ to conclude that Congress did not so intend.

Justice Scalia got his revenge, so to speak, in *Morrison v. National Australia Bank*, a case involving claims by foreign plaintiffs against foreign defendants for fraud in connection with stock purchased on a foreign exchange.¹⁴⁵ At issue was if, and how, a statutory presumption against extraterritorial application attached to the U.S. Securities Exchange Act.¹⁴⁶ Writing for the majority this time, Justice Scalia began the opinion’s legal discussion with a section devoted entirely to “correct[ing] a threshold error in the Second Circuit’s analysis.”¹⁴⁷ Namely, the lower court had mistakenly “considered the extraterritorial reach of § 10(b) [of the Exchange Act] to raise a question of subject-matter jurisdiction.”¹⁴⁸ Justice Scalia corrected this error: “But to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, ‘refers to a tribunal’s power to hear a case.’”¹⁴⁹ After distinguishing the extraterritorial reach of § 10(b)’s prescriptive conduct regulating rule prohibiting fraud as “an issue quite separate” from the subject matter jurisdiction of U.S. courts, Justice Scalia observed that as to the latter, under the Exchange Act “[t]he District Court here had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies to [the defendant’s] conduct,”¹⁵⁰ and quoted the relevant language of § 78aa, which provides “[t]he district courts of the United States . . . shall have exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder.”¹⁵¹

Morrison made clear, in other words, that the reach and application of a substantive conduct regulating law is a question of prescriptive, not judicial subject matter, jurisdiction. And thus under *Morrison*, absolute conflicts of substantive

140. *Id.* at 813 (Scalia, J., dissenting).

141. *Id.* (citations omitted).

142. *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. IV, intro. note (1987)).

143. *See id.* at 813–21.

144. *See id.* at 814–15.

145. 561 U.S. 247 (2010).

146. *See id.* at 253–54.

147. *Id.* at 253.

148. *Id.* at 254.

149. *Id.* (quoting *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009)).

150. *Id.* (citation omitted).

151. *Id.* at 254 n.3 (alteration in original) (quoting 15 U.S.C. § 78aa (2010)).

conduct regulating laws similarly ought to be treated as questions of prescriptive, not judicial subject matter, jurisdiction. Consequently, substantive absolute conflict issues go to the merits, not the court's power to hear a case. Further recommending this approach is that it irons out a doctrinal and procedural wrinkle between procedural and substantive absolute conflicts of law, thereby making the overall law of absolute conflicts more coherent.

3. Mixed Absolute Conflicts of Law

a. What They Look Like

As the name suggests, mixed absolute conflicts of law involve a combination of substantive and procedural laws that place parties in a legally impossible position because complying with one law necessarily means violating another. By far the most common mixed absolute conflict entails a domestic discovery order designed to facilitate litigation of a domestic substantive legal policy that runs up against a foreign law prohibiting the discovery not just for some strategic litigation purpose (like a blocking statute) but also to protect a foreign substantive legal policy.

The most famous and doctrinally prolific mixed absolute conflict case is *Societe Internationale v. Rogers*, which birthed the foreign sovereign compulsion defense.¹⁵² In what the Supreme Court described as "an intricate litigation," the U.S. Alien Property Custodian seized assets of the German firm I. G. Farben during World War II.¹⁵³ After the war, a Swiss holding company brought suit under the Trading with the Enemy Act to recover a portion of the seized assets on the basis that it owned them and was not "an enemy or ally of enemy" within the meaning of the act.¹⁵⁴ The U.S. government challenged this claim, arguing that the Swiss company was in fact an enemy because it was intimately connected with I. G. Farben and existed only to "camouflage and cloak" the firm's true German ownership.¹⁵⁵ To mount its case, the government requested production of a large number of the Swiss company's banking records. The problem was that the Swiss Federal Attorney had determined that the disclosure would have violated Swiss Penal Code provisions prohibiting "economic espionage" and Swiss Bank Law protecting secrecy of bank records, and accordingly confiscated the records.¹⁵⁶ Although the U.S. district court found that both the Swiss authorities and the Swiss firm had acted in good faith in seeking to comply with the production order and that there was no evidence of collusion to conceal the records, the court nevertheless ultimately granted the government's motion to dismiss the case for failure to comply with the order.¹⁵⁷ The court of appeals affirmed.¹⁵⁸

On certiorari, the Supreme Court framed the issue as "whether the District Court properly exercised its powers under Rule 37(b) [of the Federal Rules of Civil Procedure] by dismissing this complaint despite the findings" that the Swiss firm had

152. 357 U.S. 197, 198–99 (1958).

153. *Id.* at 198.

154. *Id.*

155. *Id.* at 199.

156. *Id.* at 200.

157. *Id.* at 203.

158. *Id.*

not colluded with Swiss authorities and had acted in good faith to try to produce the records.¹⁵⁹ The Court began by noting that the district court's powers under the Federal Rules are not unbounded; rather, they "must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law," and thus, "there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."¹⁶⁰ According to the Court, outright dismissal violated this due process guarantee because "fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign."¹⁶¹ With this, the foreign sovereign compulsion defense was born.

Yet it is important to appreciate what the Court did and did not decide in *Rogers*. The Court did not say that an absolute conflict with foreign law barred the district court from issuing the discovery order in the first place. Instead, it was the nature of the *sanction* for failure to comply with the order—namely, dismissal—that transgressed due process by denying the party the opportunity to contest the merits of the case. In fact, the Court indicated in dicta at the end of the opinion that less severe sanctions might be appropriate due to the failure of complete disclosure—for instance, "drawing inferences unfavorable to petitioner."¹⁶²

Lower courts since *Rogers* have taken the Court's language and reasoning in varying directions, with some courts applying the foreign sovereign compulsion doctrine only to the nature of sanctions¹⁶³ and others applying it both to the nature of sanctions and to the initial propriety of a discovery order requiring violation of foreign law abroad.¹⁶⁴ Despite different courts taking *Rogers* in different directions, a couple of trends emerge from the post-*Rogers* cases that are relevant to this Article's thesis. First, as noted at the outset, courts presently faced with mixed absolute conflicts almost always find that U.S. law compelling discovery wins out by counting both the procedural interest in "full and liberal discovery . . . [as] a means to achieve a larger goal: the just adjudication of civil disputes"¹⁶⁵ plus whatever substantive policy is advanced by the application of U.S. law. And this is especially so when the party requesting production is the United States.¹⁶⁶ Second,

159. *Id.* at 208.

160. *Id.* at 209.

161. *Id.* at 211.

162. *Id.* at 213.

163. *See, e.g., In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 1002 (10th Cir. 1977) ("The question of good faith came into play in *Societe*, but it was only in connection with the imposition of a sanction.").

164. *See, e.g., In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 554 (S.D.N.Y. 2002); *Minpeco, S.A. v. Conticommodity Servs, Inc.*, 116 F.R.D. 517, 520 (S.D.N.Y. 1987) (collecting cases approving the use of foreign law for determining the propriety of both sanctions and discovery orders).

165. *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 549 (N.D. Ill. 2004).

166. *See, e.g., United States v. First Nat'l City Bank*, 396 F.2d 897, 903 (2d Cir. 1968); *In re Grand Jury Subpoena*, 218 F. Supp. 2d at 554 ("Courts consistently hold that the United States interest in law enforcement outweighs the interests of the foreign states in bank secrecy

and relatedly, the idea that the Constitution and specifically the Due Process Clause places precincts on the power of courts to punish parties trapped between contradictory legal commands has been lost along the way in both the *Restatement* and judicial developments of the law. Yet this due process right is an ever more pertinent artifact in today's world of increasingly overlapping regulatory regimes—and one that Part II seeks to resurrect by focusing on party rights.

In these respects, the law's progression can be divided into two main stages: the immediate post-*Rogers* era in which courts mainly embraced *Rogers*'s focus on party rights and fairness and adopted the *Restatement (Second) of Foreign Relations Law* test that explicitly included such rights; and the post-*Restatement (Third) of Foreign Relations Law* era in which courts adopted the more recent Restatement test that sidelines party rights and fairness in favor of a more exclusive focus on state interests.

i. The *Restatement (Second)* Era

The recent focus on state interests in mixed absolute conflict cases to the exclusion of party rights is not always how the law looked.¹⁶⁷ Shortly after *Rogers*, the drafters of the *Restatement (Second) of Foreign Relations Law* included section 40, which purported to govern situations “[w]here two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct.”¹⁶⁸ The *Restatement* advised each state to: “moderat[e] the exercise of its enforcement jurisdiction, in the light of such factors as (a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,” and other factors like where the required conduct was to take place, the party's nationality, and the extent either state's enforcement action could be expected to lead to compliance.¹⁶⁹

Courts seized upon the states' vital national interests and the hardship on the parties as the most important aspects of this analysis. Thus in a case involving Citibank's German branch's refusal to produce documents where production would have imposed liability under German law, the Second Circuit began its analysis with “the obvious, albeit troublesome, requirement . . . to balance the national interests of the United States and Germany and to give appropriate weight to the hardship, if any,

and the hardships imposed on the entity subject to compliance.”). There are, of course, exceptions. See *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat* (Admin. of State Ins.), 902 F.2d 1275, 1280 (7th Cir. 1990) (U.S. interest in providing a forum for final resolution of disputes and enforcement of judgments yielded to Romania's interest in state secrecy).

167. Interestingly, some immediate post-*Rogers* cases appeared to assume, without addressing *Rogers*, that violation of foreign law provided an absolute bar to ordering production. See, e.g., *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962); *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960); *First Nat'l City Bank of N.Y. v. IRS*, 271 F.2d 616 (2d Cir. 1959). As later decisions noted, this may have resulted from the fact that these cases “dealt with a nonparty witness and that factor may have been the one distinguishing these cases from *Societe [v. Rogers]*.” *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 114 (S.D.N.Y. 1981). The impact of nonparty status will be discussed *infra* at Part II.B.1.iii.

168. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 (1965).

169. *Id.*

Citibank will suffer.”¹⁷⁰ Although the court clearly seemed to consider the competing national interests significant, and maybe even paramount, party hardship was nonetheless a meaningful part of the calculus.

The prominence of party rights at this time often even led courts to refuse to apply or punish noncompliance with U.S. law altogether. The Tenth Circuit in *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, for example, continued the party rights emphasis where *Rogers* left off, making it the central aspect of the court’s analysis and relied heavily on *Rogers*’s reasoning.¹⁷¹ At issue was the district court’s decision to hold a Delaware company, Rio Algom, and its president in civil contempt for failing to comply with a discovery order compelling production of documents located at the company’s corporate offices in Canada and to produce its president, who also resided in Canada, for related depositions.¹⁷² Rio Algom claimed that producing the records and its president would violate the Canadian Uranium Information Security Regulations of Canada’s Atomic Energy Control Act and, in turn, subject it to criminal sanctions.¹⁷³ Rio Algom produced numerous other records and formally requested permission from the Canadian authorities to comply with the U.S. court’s order, which was formally denied.¹⁷⁴

With *Rogers* as its “starting point,” the Tenth Circuit noted that the Supreme Court’s decision did not preclude a U.S. court from either ordering production or imposing sanctions where the production would violate foreign law.¹⁷⁵ What was required, instead, was a species of “balancing approach” designed to resolve “the dilemma” presented by “accommodation of the principles of the law of the forum with the concepts of due process and international comity.”¹⁷⁶ Although the court went on to quote the *Restatement*’s test, the key to its resolution of the absolute conflict centered on party rights. The court began by observing that in *Rogers* “the Supreme Court considered *primarily* the dilemma of the party subject to contradictory laws.”¹⁷⁷ The court then went on to describe in detail Rio Algom’s good faith in trying to comply with the order and that its corporate and president’s presence in Canada were bona fide and not the result of collusion to avoid U.S. law.¹⁷⁸ Only then did the court briefly consider “other relevant factors, namely the interests of Canada and the United States,” and found both to be “legitimate.”¹⁷⁹ “[B]alancing” these factors, the court concluded that the district court’s contempt order and resulting sanctions were unjustified.¹⁸⁰

Similarly, in *United States v. First National Bank of Chicago*, the Seventh Circuit relied principally on party rights and fairness to resolve the mixed absolute conflict

170. *First Nat’l City Bank*, 396 F.2d at 902.

171. 563 F.2d 992 (10th Cir. 1977).

172. *Id.* at 994.

173. *Id.* at 994–95.

174. *Id.*

175. *Id.* at 996.

176. *Id.* at 997 (quoting *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 341 (10th Cir. 1976).

177. *Id.* at 998 (emphasis added).

178. *Id.*

179. *Id.* at 998–99.

180. *Id.*

before it.¹⁸¹ The IRS had issued a summons to the bank seeking disclosure of account information located at the bank's Greek branch relating to two of the bank's customers. The bank refused on the basis that, under Greek law, "an employee of a bank who conveys any information in any manner pertaining to a deposit account is subject to a minimum of six months in prison."¹⁸² Once again, the court, confronting a mixed absolute conflict, began its analysis with *Rogers*, noting the "sensitive balancing" of factors, including those in the *Restatement*.¹⁸³ Among these factors, the "extent and nature of hardship[] [on the party] bears great weight."¹⁸⁴ The court found especially compelling both the severe criminal nature of the liability as well as the nonparty status of those foreign actors who would be punished under foreign law. More specifically, "the bank employees who would be exposed to penalty and First Chicago, which would be ordering its Greek employees to act unlawfully, are involved only as neutral sources of information and not as taxpayers or adverse parties in litigation."¹⁸⁵ Consequently, the court reversed and remanded with instructions to the district court to consider whether to order the bank to make a good faith effort to get permission from the Greek authorities to disclose the information.¹⁸⁶

Minpeco, S.A. v. Conticommodity Services, Inc. supplies yet another example of party rights and fairness taking priority in mixed absolute conflict analysis.¹⁸⁷ At issue was an order compelling production of a Swiss bank's documents that would have resulted in violating Swiss bank secrecy laws.¹⁸⁸ According to the Southern District of New York's assessment of the *Restatement* factors, "the competing interests of the countries involved and the hardship imposed by compliance . . . [are] far more important in the balancing test" than the other factors.¹⁸⁹ The court also highlighted that, despite not appearing in the *Restatement* factors, "the good or bad faith of the party resisting discovery" was integral to the Supreme Court's decision in *Rogers*, as was whether the party had courted foreign legal impediments.¹⁹⁰ The court found that both the United States and Switzerland had "substantial" interests in seeing their laws—and the substantive policies underlying those laws—enforced.¹⁹¹ The court then concluded that compliance with the order would place the bank and its employees "in violation of the Swiss criminal law, with little likelihood of asserting a successful defense,"¹⁹² resulting in significant hardship.

Of most significance, the requested documents were of low importance to the party requesting them and, somewhat like the Greek bank in *First National Bank*, the Swiss bank was "in the posture of a nonparty witness" since it was no longer a party

181. 699 F.2d 341 (7th Cir. 1983).

182. *Id.* at 344-45.

183. *Id.* at 345.

184. *Id.*

185. *Id.* at 346.

186. *Id.* at 346-47.

187. 116 F.R.D. 517 (S.D.N.Y. 1987).

188. *Id.* at 519.

189. *Id.* at 522.

190. *Id.* at 522-23.

191. *Id.* at 523-25.

192. *Id.* at 529.

to the litigation.¹⁹³ This fact dramatically changed the fairness calculus for the court because it “further removes [the bank’s] nondefendant trading customers—the individuals and entities whose business secrets would be revealed—from the litigations.”¹⁹⁴ It also rendered any sanction to a nonparty, such as “threatening a witness in a lawsuit with conflicting punitive measures by two sovereigns . . . disproportionate under the circumstances and excessively harmful to international comity.”¹⁹⁵ In short, a detailed inquiry into the fairness (or unfairness) of subjecting the Swiss bank to U.S. law tilted the balance away from granting a motion to compel production.¹⁹⁶

This is not to say that courts always decided against the application of U.S. law ordering discovery under *Rogers* and the *Restatement (Second)*. In *SEC v. Banca Della Svizzera Italiana*, for example, the Southern District of New York ordered production of information from a foreign bank regarding alleged insider trading where the production appeared to be in violation of foreign law where the bank was located.¹⁹⁷ But the court did, in line with the cases discussed so far, focus heavily on *Rogers* and fairness in reaching its decision. The court explained that *Rogers* “holds that the good faith of the party resisting discovery is a key factor in the decision whether to impose sanctions when foreign law prohibits the requested disclosure,”¹⁹⁸ and that “[a] noncomplying party’s good or bad faith is a vital factor to consider.”¹⁹⁹ While the court also weighed the national interests at stake and briefly reviewed other “less important” factors in the *Restatement*,²⁰⁰ its finding that the bank “acted in bad faith” by making “deliberate use of Swiss nondisclosure law to evade . . . the strictures of American securities law against insider trading” took center stage.²⁰¹ For under *Rogers*, the bank was “in the position of one who deliberately courted legal impediments . . . and who thus cannot now be heard to assert its good faith after this expectation was realized.”²⁰² To permit the bank to hide behind foreign law would, in such a situation, “be a travesty of justice.”²⁰³

193. *Id.* at 527. But the court also stressed that the bank “is not the innocent party caught up in events beyond its control that the Greek bank and its employees were in the *First National Bank of Chicago* case. Until recently, [the Swiss bank] was a key defendant in these cases, and whether acting as a principal or as an agent, placed itself in the thick of things . . .” *Id.*

194. *Id.* at 530.

195. *Id.*

196. *See id.*; *see also* *Minpeco, S.A. v. Conticommodity Services, Inc.*, 118 F.R.D. 331, 334 (S.D.N.Y. 1988) (“Moreover, as in that decision [Minpeco], BPS’ status as a nonparty witness in this case weighs heavily against granting the instant motion. In fact, ‘it has been suggested that the factor which distinguished the early Second Circuit cases adopting a restrictive approach to ordering discovery in the face of foreign nondisclosure laws was the fact that they all involved a nonparty witness.’” (quoting *Minpeco*, 116 F.R.D. at 527)).

197. 92 F.R.D. 111, 111 (S.D.N.Y. 1981).

198. *Id.* at 114.

199. *Id.*

200. *Id.* at 117–19.

201. *Id.* at 117.

202. *Id.* (alterations in original) (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 208–09 (1958)).

203. *Id.* at 119.

ii. The *Restatement (Third)* Era

Things changed with the 1987 publication of the *Restatement (Third) of Foreign Relations Law*. The relevant portions are quoted more fully earlier in the Article,²⁰⁴ and place an initial and heavy emphasis on state interests, directing courts to take into account “the extent to which noncompliance with the [U.S. discovery] request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.”²⁰⁵ Entirely gone is the hardship factor. The only party rights or fairness aspect of the analysis comes at the sanctions stage, where the *Restatement* indicates that courts may require a party trapped in an absolute conflict to “make a good faith effort to secure permission from the foreign authorities to make the information available.”²⁰⁶ Such a good faith effort has nothing to do with whether to enforce the order in the first place, but in line with the dicta at the end of *Rogers*, may mitigate the severest sanctions like contempt and dismissal.²⁰⁷ In this sense, the *Restatement (Third)* can purport to track *Rogers*—but it does so in a way that hits the decision’s conclusions in only the most arid and superficial manner, ignoring the fairness engine that drove the reasoning behind those conclusions. *Rogers* did not emphasize or even really discuss the competing state interests in working out its holding, but instead focused on the rights of the party to a fair hearing under the Due Process Clause in light of an antinomy that the party had neither created nor courted, and had tried in good faith to avoid.²⁰⁸

Yet lower courts began adopting the new *Restatement* test in short order,²⁰⁹ under which they deemed the balance of national interests “the most important factor.”²¹⁰ The case law demonstrates that the combination of U.S. procedural and substantive interests favoring disclosure ordinarily outweigh foreign state interests prohibiting disclosure.²¹¹ Thus in *Richmark Corp. v. Timber Falling Consultants*, the Ninth Circuit found that “the United States’ interests in vindicating the rights of American plaintiffs and in enforcing the judgments of its courts” outweighed China’s interest in the confidentiality of its corporations’ information.²¹² And in *In re Grand Jury*

204. See *supra* notes 92–95 and accompanying text.

205. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (1987).

206. *Id.* § 442(2)(a).

207. *Id.* § 441(2)(b).

208. See *supra* Part I.B.3.a.

209. See, e.g., *Linde v. Arab Bank, PLC*, 706 F.3d 92, 109–10 (2d Cir. 2013) (citing § 442); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992) (same); *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat (Admin. of State Ins.)*, 902 F.2d 1275, 1281–83 (7th Cir. 1990) (same).

210. See *Richmark*, 959 F.2d at 1476 (finding balance of national interests to be most important factor); see also *Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548, 558 (S.D.N.Y. 2012); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51, 54 (E.D.N.Y. 2010); *Madanes v. Madanes*, 186 F.R.D. 279, 286 (S.D.N.Y. 1999).

211. See, e.g., *Richmark*, 959 F.2d at 1477; *Wultz*, 910 F. Supp. 2d at 559; *In re Air Cargo*, 278 F.R.D. at 54; *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 547 (S.D.N.Y. 2002). But see *Reinsurance Co. of Am.*, 902 F.2d at 1280–81 (7th Cir. 1990); *In re Activision Blizzard, Inc.*, 86 A.3d 531, 547–52 (Del. Ch. 2014).

212. *Richmark*, 959 F.2d at 1477.

Subpoena, the Southern District of New York explained that “[t]he United States [sic] interest in enforcing its criminal laws . . . [and s]pecifically [its] . . . strong national interest in combatting international bribery” outweighed foreign confidentiality interests.²¹³ More recently, the Southern District of New York also flatly observed that “[w]hen the U.S. interest ‘in fully and fairly adjudicating matters before its courts’ is combined with its interest in combating terrorism, the U.S. interest ‘is elevated to nearly its highest point, and diminishes any competing interests of the foreign state.’”²¹⁴ Similarly, the Eastern District of New York has elaborated that “in weighing the factor considered most important” under the new *Restatement* test—namely, “the balance of national interests at play”—the combination of “a case involving violations of antitrust laws whose enforcement is essential to the country’s interests in a competitive economy” plus “‘the United States[.]’ . . . substantial interest in fully and fairly adjudicating matters before its courts” easily outweighed “the only French interest . . . in controlling access to information within its borders, fueled at least in part by a desire to afford its citizens protections against discovery in foreign litigation.”²¹⁵

State courts also have followed this method of counting up U.S. interests. The Delaware Chancery Court recently explained in a mixed absolute conflict case that “Delaware has a substantial interest in providing an effective forum for litigating disputes involving the internal affairs of Delaware corporations. ‘Delaware [also] [has] a significant and substantial interest in actively overseeing the conduct of those owing fiduciary duties to shareholders of Delaware [corporations].’”²¹⁶ Consequently, “[a]gainst Delaware’s powerful interest” the French blocking statute didn’t stand a chance.²¹⁷ Indeed, even had the state interests been evenly matched, according to the court, “[u]nder Sections 441 and 442 of the *Restatement*, a tie goes to the forum.”²¹⁸

It is also worth adding that any type of government enforcement has strong potential to tilt the balance in favor of U.S. law. In criminal cases, for example, courts understandably have felt the need to “accord some deference to the determination by the Executive Branch—the arm of the government charged with primary responsibility for formulating and effectuating foreign policy—that the adverse diplomatic consequences of the discovery request would be outweighed by the benefits of disclosure.”²¹⁹ For its part, the *Restatement* acknowledges with a kind of ambivalent approval the argument that “when the United States government convokes a grand jury, issues a civil investigative demand, or brings a law suit, a

213. *In re Grand Jury Subpoena*, 218 F. Supp. 2d at 562–63.

214. *Wultz*, 910 F. Supp. 2d at 559 (quoting *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 443–44 (E.D.N.Y. 2008)).

215. *In re Air Cargo*, 278 F.R.D. at 54–55 (quoting *Compagnie Francaise D’Assurance Pour le Commerce Extérieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984)).

216. *In re Activision Blizzard*, 86 A.3d at 547 (alterations in original) (quoting *Armstrong v. Pomerance*, 423 A.2d 174, 177 (Del.1980)).

217. *See id.* at 549.

218. *Id.*

219. *United States v. Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985) (citing a draft of what was to become the *Restatement (Third) of Foreign Relations Law*); *see also In re Grand Jury Subpoena* Dated Aug. 9, 2000, 218 F. Supp. 2d 544, 547 (S.D.N.Y. 2002).

decision has already been made that the matter is important to the national interest, whether it concerns an antitrust violation, securities fraud, or tax evasion.”²²⁰ Some courts have even taken this argument and extended it beyond enforcement by the government itself to private suits that seek to vindicate private as well as public policies. Hence in *In re Air Cargo Shipping Services Antitrust Litigation*, the court explained that antitrust law “enforcement through private civil actions such as this one is a critical tool for encouraging compliance with the country’s antitrust laws,” and therefore weighed in favor of U.S. law compelling production.²²¹ Likewise, the Delaware Chancery Court in *In re Activision Blizzard, Inc. Stockholder Litigation* emphasized, “[t]he fact that this action is being pursued by a stockholder plaintiff rather than by a government agency does not diminish Delaware’s interest,”²²² because “[o]ur legal system has privatized in part the enforcement mechanism for policing fiduciaries by allowing private attorneys to bring suits on behalf of nominal shareholder plaintiffs.”²²³

All that said, courts have not completely accepted the recent *Restatement’s* invitation to elevate state interests at the expense and to the exclusion of party rights. Most, if not all, courts retain vestiges of party rights elements from previous tests based on *Rogers* and the *Restatement (Second)*, and, although these elements no longer occupy a paramount place in the analysis, they are often included as add-ons to the *Restatement (Third)* factors.²²⁴ Of particular significance to this Article’s thesis, courts have also added even more subtlety and sophistication to the fairness calculus, for example by starting to articulate a fairness element of reciprocity, or the notion that by purposefully availing themselves of benefits of the forum parties fairly ought to be amenable to associated burdens as well. These benefits may take the form of simply availing themselves of business opportunities and markets in the forum but also may more specifically touch upon availment of forum law.²²⁵ Part II picks up on

220. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 reporter’s note 9 (1987) (“Attorneys representing the United States government, however, also do not always undertake the evaluation called for, particularly on issues of discovery. Requiring them, too, to come before the court with a reasoned justification for a discovery request may be expected to lead to more careful consideration of a request for information within the executive branch, including consideration of alternative methods of obtaining the desired information.” (citation omitted)).

221. 278 F.R.D. 51, 54 (E.D.N.Y. 2010).

222. *In re Activision Blizzard*, 86 A.3d at 548.

223. *Id.* (citation omitted) (internal quotation marks omitted).

224. In particular, some courts continue to weigh hardship and good faith factors. See *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477–78 (9th Cir. 1992); *Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548, 559–60 (S.D.N.Y. 2012); *SEC v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 337–41 (N.D. Tex. 2011); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51, 53–54 (E.D.N.Y. 2010); *In re Grand Jury Subpoena*, 218 F. Supp. at 563–64 (S.D.N.Y. 2002).

225. See *Quaak v. KPMG-B*, 361 F.3d 11, 22 (1st Cir. 2004) (“We do not mean to minimize the potential difficulty of the situation that KPMG-B faces. To some extent, however, that situation is the natural consequence of its decision to ply its wares in the lucrative American marketplace. Having elected to establish a major presence in the United States, KPMG-B must have anticipated that it would be subject to suit in this country (and, thus, subject to pretrial discovery rules that are pandemic to the American justice system).”); *Richmark*, 959 F.2d at

these nascent glimmerings of novel fairness concerns in the case law and develops them as part of a rule of law test that can aid in promoting fairness and predictability for parties trapped in absolute conflicts across jurisdictions.

b. How to Argue Them

As with procedural absolute conflicts, most courts appear to treat mixed absolute conflicts as questions of prescriptive jurisdiction that ask whether to apply and enforce U.S. law in light of a contradictory foreign law, and not as questions of the court's subject matter jurisdiction or power to entertain the case. As the court in *United States v. First National City Bank* put it, "It is no longer open to doubt that a federal court has the power to require the production of documents located in foreign countries Thus, the task before us . . . is not one of defining power but of developing rules governing the proper exercise of power."²²⁶ The *Restatement (Second)* also suggests that viewing foreign sovereign compulsion as both a prescriptive jurisdiction doctrine and an enforcement jurisdiction doctrine is correct; it explains that "[a] state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct" that would violate another state's laws.²²⁷ As with potential extraterritorial exercises of prescriptive jurisdiction regarding substantive

1479 ("[W]hen Beijing availed itself of business opportunities in this country, it undertook an obligation to comply with the lawful orders of United States courts"); *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 545 (N.D. Ill. 2004) ("Caribe maintains offices in the United States. By choosing to locate in the United States and to take advantage of the laws of the United States in doing so, Caribe has weakened its argument that Caribe's obligations under Belize law should trump its obligations under United States law."); *In re Grand Jury Subpoena*, 218 F. Supp. 2d at 563 ("[T]o some extent businesses that 'serve two sovereigns' assume the risk of conflicting legal imperatives." (quoting *United States v. Chase Manhattan Bank, N.A.*, 584 F. Supp. 1080, 1086 (S.D.N.Y. 1984))); *In re Activision Blizzard*, 86 A.3d at 548-49 ("[E]ach of the Vivendi Directors submitted to the jurisdiction of the Delaware courts when they agreed to be an Activision director. By submitting to the jurisdiction of the Delaware courts, those individuals consented to the methods used by the Delaware courts for conducting and deciding litigation, including the processes for discovery under the Delaware rules." (citation omitted)); *id.* at 549 ("Notably, Vivendi has chosen previously to sue in the United States to take advantage of the greater access to evidence provided by American-style discovery.").

226. 396 F.2d 897, 900-01 (2d Cir. 1968); *see also* *Reinsurance Co. of America v. Administratia Asigurarilor de Stat (Admin. of State Ins.)*, 902 F.2d 1275, 1279 (7th Cir. 1990) (describing the question in terms of "jurisdiction to prescribe and enforce rules of law"); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 997 (10th Cir. 1977) ("[A] local court has the power to order a party to produce foreign documents despite the fact that such production may subject the party to criminal sanctions in the foreign country." (citing *Societe Internationale v. Rogers*, 357 U.S. 197 (1958))); *Wultz*, 910 F. Supp.2d at 552 (explaining District Court's "jurisdiction . . . to order a foreign national party before it to produce evidence physically located [abroad]" (citation omitted) (internal quotation marks omitted)); *In re Grand Jury Subpoena*, 218 F. Supp. 2d at 556; *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 520 (S.D.N.Y. 1987).

227. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 39(1) (1965); *see also* *Dexia Credit Local*, 231 F.R.D. at 542 (quoting Restatement).

laws,²²⁸ “courts must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign affairs.”²²⁹ Procedurally, these issues go to the merits²³⁰ and, if not timely raised, may be waived in line with the Federal Rules of Civil Procedure.²³¹

4. Horizontal Absolute Conflicts of Law

The term “horizontal absolute conflicts of law” describes situations where two or more coequally positioned states’ laws directly conflict, say, State A law prohibits what State B law requires. I extend this label to conflicts of laws between nation states, subnational states, and mixes of both. An exception would be if the conflict involves the law of a subnational state that is: (i) part of a national federal or quasi-federal system, (ii) the subnational law conflicts with overall system law, and (iii) system law is hard-wired to win because of institutionally imposed supremacy. For example, the U.S. Constitution’s Supremacy Clause generally empowers federal law to trump state law if the former is constitutional,²³² effectively predetermining the outcome of that absolute conflict. In turn, the conflict is more properly considered a vertical absolute conflict because one law, U.S. federal law, swoops down to trump another law, U.S. state law. A more complex vertical conflict arises if international law purports to trump a contrary state law, whether national or subnational—an issue that comprises the next section’s analysis.

Horizontal absolute conflicts, by contrast, imagine clashes between coequal laws in the private international law sense.²³³ They therefore describe clashes between national laws like U.S. and French law, clashes between subnational state laws like Texas and Oklahoma law, and even clashes between a subnational state law like Texas law and a national law like French law. Much has been said already about horizontal absolute conflicts. To be sure, they illustrate each of the categories in the taxonomy so far, though international law occasionally fluttered by in the form of treaties like the Hague Convention on Taking Evidence Abroad.²³⁴

Rather than rehearsing their characteristics again, I would like to highlight an alluring move borrowed—and to some degree modified—from domestic conflict of laws methodology to resolve horizontal absolute conflicts in favor of forum law in the international system: the notion of “apparent conflicts” of law. Perhaps the best explanation of apparent conflicts is that they are really “false conflicts” of law hiding out as “true conflicts” or “absolute conflicts,” in that they present no real conflict of laws among states within a governmental interest analysis. Brainerd Currie, the

228. *Cf. Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

229. *First Nat’l City Bank*, 369 F.2d at 901.

230. *United States v. First Nat’l Bank of Chicago*, 699 F.2d 341, 343 (7th Cir. 1983).

231. *Richmark*, 959 F.2d at 1473 (“It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection.”).

232. U.S. CONST. art. VI, cl.2.

233. See *In re Maxwell Commc’n Corp.*, 93 F.3d 1036, 1049 (2d Cir. 1996), for an example of absolute conflict between U.S. and English laws.

234. Convention for Taking Evidence Abroad in Civil or Commercial Matters, July 27, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

inventor of these categories, provides the following methodological instruction to courts: "If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict."²³⁵ Apparent conflicts therefore ask courts to look a little harder at what might at first *appear* to be a "true" or "absolute" conflict, but in reality is not. Courts engage in this deeper look by delving below the surface of the apparent conflict and identifying a more profound—indeed a more fundamental—policy shared by the involved states.

For example, take a case in which a U.S. court requested information related to alleged bankruptcy fraud in Belize. According to the court, "The United States has a strong interest in ferreting out and remedying [bankruptcy] fraud."²³⁶ And while Belize may have some "interest in protecting the privacy and confidentiality of the trust information" in Belize, "Belize has a strong interest in not allowing its trust laws, and the trusts created under them, to be used for fraud."²³⁷ Consequently, "[t]his Belize interest in preventing fraud is consistent with United States' national interests and weighs in favor of issuing an order of production, because it suggests that a conflict in the respective national interests *may be more apparent than real*."²³⁸

Similarly, when enforcement of U.S. antitrust law came up against the French blocking statute, U.S. courts had no problem disregarding the blocking statute because "[t]he interest in prohibiting price-fixing . . . is shared by France, given its membership in the European Economic Community which has also adopted prohibitions against price-fixing."²³⁹ The same goes for anticorruption. As one U.S. court explained in a Foreign Corrupt Practices Act investigation, "the United States has a strong national interest in combating international bribery."²⁴⁰ In turn, foreign confidentiality law prohibiting disclosures regarding the investigation could be set aside because the court concluded that the foreign nation "shares the United States interest in combating bribery, especially as its economic growth depends upon international partnerships and trade in its developing natural resources."²⁴¹ And finally, when it comes to "combating terrorism," courts have found the U.S. interest is practically at its apogee, outstripping any foreign interest in bank secrecy, particularly because—and here is where apparent conflict reasoning comes in—a foreign state's "interest in building confidence in its banking industry does not encompass an interest in protecting the confidentiality of those who participate in the funding of international terrorism."²⁴² This last example provides a fertile segue into the next section on vertical absolute conflicts, in which international law purports to trump contrary national law.

235. Brainerd Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1242 (1963) reprinted in HAY, WEINTRAUB, AND BORCHERS, *CONFLICT OF LAWS* 524 (13th ed. 2009).

236. *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 549 (N.D. Ill. 2004).

237. *Id.*

238. *Id.* (emphasis added).

239. *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51, 54 (E.D.N.Y. 2010).

240. *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 562 (S.D.N.Y. 2002).

241. *Id.*

242. *Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548, 559 (S.D.N.Y. 2012).

But before getting there, I want to conclude the horizontal absolute conflicts discussion with some clarifications and conclusions. First, to be clear, I do not mean to suggest that courts addressing horizontal absolute conflicts in the international arena borrow exactly from apparent conflict methodologies in the largely domestic conflict of laws field—a field that itself displays variation among apparent conflict analyses.²⁴³ It would be disingenuous, for example, to say there is *no* conflict of laws in the international scenarios discussed above. After all, foreign nations do have confidentiality and privacy laws that are in tension with the shared underlying substantive policies courts have identified. Rather, the idea is that, in the overall weighing of state interests or policies, the involved states would agree on the resolution of the conflict based on more profound shared policies.

Relatedly, the apparent conflict analysis explicated above holds immense sway for the state-interest balancing that the *Restatement* contemplates. We have seen already that U.S. courts double- and sometimes triple-count U.S. interests to arrive at the application of forum law. The reason U.S. law ordinarily wins out, in other words, is that, simply put, the United States has a lot of interests according to U.S. courts. One is the full and fair adjudication of disputes; two is the vindication of some substantive legal policy; and three is deference to the executive when it comes to clashes with foreign laws that embroil foreign affairs. Against this flood of U.S. interests, a foreign nation's comparatively "weak national interest in prohibiting disclosure of the information sought,"²⁴⁴ to quote one U.S. court, doesn't stand a chance. And as illustrated below, any lingering possibility foreign interests might have of winning the conflict is all but eviscerated by the apparent conflict analysis outlined above.

Let us begin with a classic conflict of laws state interest analysis. The decision maker must engage in a three-step inquiry. It must identify (1) the different states' contacts with the dispute, (2) the different states' policies, and (3) whether application of the states' laws to the dispute will or will not advance those policies. It is probably safe to say that in the cases we've been discussing more than one state has a contact with the dispute, whether it involves transnational antifraud, antitrust, anticorruption, or antiterrorism. At a minimum, one state's courts (U.S. courts in our scenarios) have, as the forum for procedurally resolving the dispute, a contact, while foreign nations have a contact with the dispute as the location of the conduct and/or the information requested to proceed under U.S. rules. In the end, if a case involves a party subject to U.S. personal jurisdiction, or produces effects in the United States, or touches upon U.S. interests abroad, there is a U.S. contact. The same goes for foreign nations.

Once the contacts have been identified, the second step of the inquiry moves on to articulating the interests or policies of the different states. If we were to chart them out using the cases discussed throughout the Article so far, they might look something like Table 1.

243. For example, compare the California approach, *People v. One 1953 Ford Victoria*, 311 P.2d 480 (Cal. 1957), with the Currie approach, *Brainerd Currie, The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963), with the District of Columbia approach, *Kaiser-Georgetown Cmty. Health Plan, Inc. v. Stutsman*, 491 A.2d 502 (D.C. 1985).

244. *In re Air Cargo Shipping*, 278 F.R.D. at 54–55.

Table 1. Interests or policies of the different states

U.S. Interests	Foreign Interests
Full and fair adjudication U.S. substantive policy Deference to executive	Protection of confidentiality/privacy

And here is where apparent conflicts of the type described above add to the calculus in favor of applying U.S. law. If we were to again chart the interests—this time using an apparent conflict technique—we would have something like Table 2.

Table 2. Interests or policies of the different states

U.S. Interests	Foreign Interests
Full and fair adjudication <i>Shared</i> U.S. and foreign substantive policy Deference to executive	Protection of confidentiality/privacy <i>Shared</i> U.S. and foreign substantive policy

Note that in this chart, the two foreign interests are in tension with one another. Either protection of confidentiality hinders advancing the states’ shared substantive policy, or vice versa. In turn, when it comes to the third step of the analysis—which asks whether the state’s interests are advanced by applying its laws—the shared interest in the underlying substantive policy effectively moves into the category favoring application of U.S. law, since both states have an interest in advancing that same underlying policy. The chart therefore may be revised accordingly:

Table 3. Interests or policies of the different states

Interests advanced? Pro-disclosure law	Interests Advanced? Anti-disclosure law
Full and fair adjudication U.S. substantive policy Foreign substantive policy Deference to executive	Foreign protection of confidentiality/privacy

From a U.S. court’s perspective, this move essentially quadruples the interests favoring U.S. law—interests that a sole foreign interest in confidentiality cannot conceivably counter.

A final point regarding apparent conflicts is that while they may sway the balance overwhelmingly in favor of forum law in some cases, they also open up conflict analysis in ways that can shore up fairness to parties. Consider the absolute conflict that encompasses both procedural and substantive rules. The transnational actor in this absolute conflict case is, in fact, caught in two absolute conflicts of law: an absolute conflict of procedural laws and an absolute conflict of substantive laws. What apparent conflict analysis shows us is that not all or even many cases involve both substantive and procedural absolute conflicts. An apparent conflict analysis can effectively remove the absolute conflict of substantive laws, leaving only the procedural absolute conflict—created, for example, by a foreign blocking statute.

Because, as the cases indicate,²⁴⁵ policies underlying substantive laws tend generally to be more powerful and carry greater penalties and likelihood of enforcement than those relating to procedural rules, the outcome looks fairer to the party caught in the absolute conflict. That is, the party is being penalized or held liable for something that was, in fact and law, substantively prohibited in both jurisdictions. And the party was on notice of that shared substantive prohibition. For rule of law criteria that value notice and predictability, apparent conflict analysis can therefore dampen the initial apparent unfairness presented by some absolute conflicts of law.

5. Vertical Absolute Conflicts of Law

Vertical absolute conflicts also envisage the same law applicable across the relevant jurisdictions, but conceptualize this law as in some sense hierarchically superior to each state's domestic law because it is part of international law. It is neither necessary nor feasible here to engage in a larger discussion of how and why international law trumps national law, principally because I will limit my vertical conflicts category to situations where the relevant states have affirmatively adopted and implemented the international law at issue. To put the point another way, the question of whether and how international law may trump national law is most contentious where a state rejects or has not adopted the international law at issue, and goes something like: How can that international law then bind that state and, more specifically, override that state's own laws in its own sovereign territory?

But we do not need to address that question, at least for now, because we can make out a vertical conflicts category and jurisprudence in situations where states *have* affirmatively adopted and implemented the international law at issue, and that international law clashes with another aspect of the state's domestic law. These situations present vertical conflicts of law because the state itself has consented to the applicability of international law and, indeed, has implemented it in that state's own laws. Of course, implicit in this view is the assumption that international law exists and may bind states vis-à-vis each other, at least in some situations—here, in the least controversial situation where states have affirmatively agreed to be bound by it and have incorporated it into their own laws. Only the most ardent skeptic of international law would deny its force in such situations. While such skepticism might pose a nice academic question, in the real world of judicial decision making in transnational litigation, courts acknowledge the existence and force of international law in these situations,²⁴⁶ and I will too for purposes of this Article.

Yet it is also worth noting that even if one is unwilling to assume international law can override national law in these situations, the outcome would likely be the same anyway: international law wins. A functionally alternative way to conceptualize the conflict is through a straight-up state interest balancing approach of the sort we saw in the previous section.²⁴⁷ Here a state's international legal commitment itself resolves the absolute conflict in favor of international law. That is, on one side of the ledger are both states' commitments to the international legal

245. *Supra* cases cited note 90.

246. *See infra* Part I.B.5.a.

247. *See supra* Part I.B.4.

rule at issue; while on the other side is one state's commitment to a conflicting domestic rule. This conceptualization does not comport as well with the notion of a vertical (as opposed to a horizontal) conflict of laws, but the outcome is pretty much the same in that the international law at issue wins. And, as we will see, it is an approach that can prove useful to courts where either the international law or the extent to which it binds the foreign state is unclear.²⁴⁸

I start with a couple of examples of the purer version of a vertical conflict in which international law can be conceptualized as overriding conflicting national law and then give an example of a more interest-based resolution in which international law weights the scale to outweigh a conflicting parochial foreign state interest. I end by discussing limitations to a vertical conflict analysis; namely, in order to use it—and especially the purer version—there must both be a discernible international law and the forum state's domestic implementing legislation must accurately reflect that international law. Before jumping into these variations, I should note too that, like horizontal conflicts, vertical conflicts may be substantive, procedural, or mixed in nature because, like domestic law, international law may be substantive or procedural. Hence the examples that follow often implicate both a substantive international law (e.g., no financing terrorism) and a procedural international law (e.g., provide legal assistance in proceedings designed to enforce that substantive international law).²⁴⁹

a. The Purer Version

As the Article's Introduction alluded to, the most prominent and illustrative vertical conflicts arising out of the cases so far have been between the international law against financing terrorism and attendant rules of mutual legal assistance on the one hand, and domestic bank secrecy and confidentiality laws on the other. A number of cases out of U.S. federal courts sitting in New York provide powerful and meticulous examples.

Weiss v. National Westminster Bank, for instance, involved claims against a British bank for financing terrorism in the Middle East—specifically, the activity of Hamas.²⁵⁰ Plaintiffs requested disclosure of information and materials that the bank claimed were protected by U.K. bank secrecy laws.²⁵¹ With respect to the “greatest” and “most important” factor in the foreign sovereign compulsion calculus—namely, “[t]he interests of the United States and the United Kingdom”—the district court appealed directly to the shared international legal commitments of both countries in combating financing terrorism.²⁵² In the court's words,

[B]oth countries' participation in international treaties and task forces aimed at disrupting terrorist financing[] outweighs the British interest in preserving bank customer secrecy. The United Kingdom has an interest in granting plaintiffs' discovery requests, as it signed international

248. See *infra* Part I.B.5.b.

249. I thank Roger Alford for kindly helping me to see and fill this gap in my analysis.

250. 242 F.R.D. 33, 35–36 (E.D.N.Y. 2007).

251. See *id.* at 39.

252. *Id.* at 45.

treaties in order to facilitate international cooperation to combat terrorism, and requires its banks to monitor customer ties to terrorists.²⁵³

The court went on to detail extensively the international agreements, instruments, and the implementation thereof in the respective countries' laws. Of particular significance,

Both the United States and the United Kingdom are signatories to the United Nations' International Convention for the Suppression of the Financing of Terrorism, which recommends that nations "adopt[] effective measures for the prevention of the financing of terrorism" Both countries are also members of the Financial Action Task Force (the "FATF"), which likewise seeks international cooperation in combating terrorist financing.²⁵⁴

The court quoted the instruments' language making it "'an offense . . . [to] provide[] or collect[] funds . . . in the knowledge that they are to be used . . . ' for terrorist acts."²⁵⁵ And, "[i]n particular, countries should . . . [n]ot refuse to execute a request for mutual legal assistance on the grounds that laws require financial institutions to maintain secrecy or confidentiality."²⁵⁶ These instruments, in turn, established "[t]hat Britain has an interest in thwarting the financing of terrorism by imposing monitoring and reporting obligations on its banks regarding customers who finance, or may be suspected of financing, terrorist acts around the world."²⁵⁷ In support, the court quoted Article 12 of the U.N. Convention for the Suppression of the Financing of Terrorism ("Financing Convention"), which compels states parties to afford each other mutual legal assistance in combating financing terrorism.²⁵⁸

253. *Id.*

254. *Id.* at 48 (alterations in original) (quoting International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49, at 408 (Dec. 9, 1999)); *see also id.* at 51 ("[L]ike the United States, Britain has also expressed and demonstrated a profound and compelling interest in eliminating terrorist financing.").

255. *Id.* at 48 (alterations in original) (quoting International Convention for the Suppression of the Financing of Terrorism, *supra* note 254).

256. *Id.* at 48–49 (alterations in original) (quoting FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS 12 (2003)).

257. *Id.* at 51.

258. *Id.* The court noted that although the provisions are couched in terms of mutual legal assistance among states, "plaintiffs' action seeking discovery from a bank alleged to be providing material support to terrorists and compensation for victims of international terrorist attacks is not inconsistent with the British and American interests in international efforts to detect and fight global terror." *Id.* This seems right to me for at least two reasons. First, it is clear that the statute at issue—the Antiterrorism Act or "ATA", which creates civil liability for criminal acts of terrorism—was created "as a mechanism for protecting the public's interests through private enforcement." *Linde v. Arab Bank, PLC.*, 706 F.3d 92, 112 (2d Cir. 2013). And second, there is no textual limitation to a particular branch of a state's government. Thus mutual legal assistance need not be limited to, say, the executive's request for assistance or a combination of executive and judicial request, and may extend to a judicial request for assistance in a civil suit authorized by a statute enacted by the political branches.

Moreover, the court also looked to domestic measures implementing international commitments, like the Bank of England's direction—pursuant to a European Union Council regulation—to “financial institutions that any funds which they hold for on behalf of [sic] Hamas must not be made available to any person”²⁵⁹ And it concluded that, “pursuant to international treaties and British law, the United Kingdom has required that British banks, including NatWest, be subject to several regulatory obligations that require the investigation of bank clients’ potential links to known terrorists, and the disclosure of activities of customers suspected to be engaged in terrorist activities.”²⁶⁰ Ultimately, the court held that strongly shared international legal commitments of the United States and United Kingdom in combating financing terrorism and attendant rules of mutual legal assistance overrode Britain’s domestic interest in bank privacy, such that “ordering NatWest to provide plaintiffs with discovery would not ‘undermine the important interests of the state where the information is located,’ but rather, enforce them.”²⁶¹

Similarly, in *Strauss v. Credit Lyonnais, S.A.*, plaintiffs sued a French bank for, among other things, financing Hamas’ terrorist activity in the Middle East and sought discovery; in response, the bank interposed the French blocking statute and bank secrecy laws.²⁶² Once again, “the balance of national interests” was accorded “the most weight” in the court’s analysis.²⁶³ And as in *Weiss*, the court found that “both countries’ participation in international treaties and task forces aimed at disrupting terrorist financing, outweigh the French interest, if any, in precluding Credit Lyonnais from responding to plaintiff’s discovery requests.”²⁶⁴ Like the United Kingdom in *Weiss*,

most importantly, France, like the United States, also has expressed and demonstrated a profound and compelling interest in eliminating terrorist financing. That France has an interest in eradicating the financing of terrorism by imposing monitoring and reporting obligations on its banks regarding customers who finance, or may be suspected of financing, terrorist acts around the world, is established by the fact that France has signed international treaties that mandate such monitoring and disclosure and explicitly direct the member countries to cooperate in legal proceedings against suspected terrorist financing groups.²⁶⁵

Strauss relied chiefly on the same international agreements and instruments that *Weiss* did, including the Financing Convention and the FATF.²⁶⁶ The court also

259. *Weiss*, 242 F.R.D. at 52 (citation omitted) (internal quotation marks omitted).

260. *Id.*

261. *Id.* at 53 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 (1987)).

262. (*Strauss I*), 242 F.R.D. 199, 203–04, 206–07 (E.D.N.Y. 2007).

263. *Id.* at 211 (quoting *Reino De Espana v. American Bureau of Shipping*, No. 03CIV3573LTSRL, 2005 WL 1813017, at *3 (S.D.N.Y. Aug. 1, 2005)); *see also id.* at 213 (describing the competing national interests as “of the greatest importance in determining whether to defer to the foreign jurisdiction” (quoting *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 544 (1987))).

264. *Id.* at 213–14.

265. *Id.* at 222.

266. *See id.*

observed that France had implemented relevant EU regulations so as to “require[] its banks to monitor any assets potentially available to HAMAS.”²⁶⁷ Accordingly, the court found that France’s “interest in fighting global terrorist financing . . . arguably overrides the French concern for confidentiality with respect to its bank customers. Granting plaintiffs’ motion to compel would thus ‘give effect to formal . . . international agreements.’”²⁶⁸ As in *Weiss*, therefore, the court concluded that discovery would “enhance the French interest in fighting global terrorist financing and ‘give effect to formal . . . international agreements’ to which France is a party.”²⁶⁹

b. The State Interest Version

Linde v. Arab Bank, PLC, provides an example of an absolute conflict that uses international law more exclusively as part of a state-interest balancing approach.²⁷⁰ While the cases above describe some weighing of state interests, they also speak of “giving effect to”²⁷¹ and “enforc[ing]”²⁷² “formal . . . international agreements” and commitments,²⁷³ such that international law might “override[]”²⁷⁴ a conflicting parochial concern. By contrast, *Linde* appeals more exclusively to a balancing-of-interests approach in which international law simply counts. The difference in the language and the tenor of the opinions in this regard is not entirely semantic. There is an analytical distinction between conceptualizing international law as a binding commitment that can override parochial concerns on the one hand, and international legal commitments as weights on the scale on the other. Although the outcome may functionally turn out the same in that both types of analysis end up favoring the international law at issue, this conceptual and analytical distinction is nonetheless worth identifying, not least because it throws into sharp relief the different ways international law can influence domestic judicial decision making. It also may end up producing different outcomes where the purer version is seen as conceptually and doctrinally stronger.

Linde dealt primarily with the appropriate sanctions when a foreign bank continually resisted U.S. discovery on the basis of foreign bank secrecy laws.²⁷⁵ But I want to use it here as another illustration of an absolute conflict that draws from international law for its resolution—albeit one in a somewhat unique procedural posture because it was an appeal from the district court’s imposition of sanctions and sought collateral-order review and a writ of mandamus before the Second Circuit.²⁷⁶

267. *Id.* at 223.

268. *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 cmt. c (1987)).

269. *Strauss v. Credit Lyonnais, S.A. (Strauss II)*, 249 F.R.D. 429, 453 (E.D.N.Y. 2008) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 cmt. c (1987)) (essentially replicating the analysis of *Strauss I* to deny defendants’ motions for protective orders against discovery).

270. 706 F.3d 92 (2d Cir. 2013).

271. *Strauss II*, 249 F.R.D. at 451.

272. *Id.* (quoting RESTATEMENT (THIRD) § 442 cmt. c).

273. *Id.* (quoting RESTATEMENT (THIRD) § 442 cmt. c).

274. *Strauss I*, 242 F.R.D. at 223.

275. *Linde*, 706 F.3d at 95.

276. *See id.* at 103–08.

Plaintiffs alleged that the Arab Bank had, among other activities, financed terrorism in the Middle East and requested discovery from the bank's Jordanian and Lebanese branches.²⁷⁷ The bank refused on the basis of Jordanian and Lebanese bank secrecy laws.²⁷⁸ En route to denying appellate review, the Second Circuit found "that Jordan and Lebanon have expressed a strong interest in deterring the financial support of terrorism, and that these interests have often outweighed the enforcement of bank secrecy laws, even in the view of the foreign states."²⁷⁹ The court noted that both countries were signatories to regional agreements in the Middle East and North Africa "which specifically renounce bank secrecy as a basis for refusing requests for mutual legal assistance in money laundering and terrorist financing investigations."²⁸⁰ Interestingly, the court did not rely on the Financing Convention, perhaps because only Jordan was a party to the Convention and, even so, had a potentially problematic limiting declaration.²⁸¹

Again, I want to put aside for the moment whether the international law against financing terrorism contained in the Financing Convention can bind states that are not parties to the convention (I think it can via customary international law evidenced in large part by the convention).²⁸² Even in the absence of a positive acceptance of the convention by both states, the court was able to use their other international commitments to aggregate state interests in favor of the international rule at issue. In this connection, the court observed that the state interest "analysis invites a weighing of *all* of the relevant interests of *all* of the nations affected by the court's decision."²⁸³ That Jordan and Lebanon had joined regional agreements that promoted mutual legal assistance for financing terrorism cases and rejected bank secrecy laws as obstacles to such assistance was enough. In the court's view, when the shared international legal interests of all concerned states were aggregated and measured against competing domestic state interests, international law tipped the scale in favor of its own rules.

277. *See id.* at 98–99.

278. *See id.* at 99.

279. *Id.* at 111.

280. *Id.* at 112 (quoting *Linde v. Arab Bank, P.L.C.*, 463 F. Supp. 2d 310, 315 n.5 (E.D.N.Y. 2006)) (internal quotation marks omitted).

281. International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49, at 7 (Dec. 9, 1999). The declaration provides that:

The Government of the Hashemite Kingdom of Jordan does not consider acts of national armed struggle and fighting foreign occupation in the exercise of people's right to self-determination as terrorist acts within the context of paragraph 1(b) of article 2 of the Convention. . . . Accordingly Jordan is not bound to include, in the application of the International Convention for the Suppression of the Financing of Terrorism, the offences within the scope and as defined in such Treaties.

282. For my views on this question with respect to financing terrorism, see Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 133–34 (2007).

283. *Linde*, 706 F.3d at 111.

c. Limiting Principles and Implications

Before moving on to Part II's more normative discussion, I want to stress an aspect of the vertical conflict cases that is integral to classifying them as vertical conflicts within this Article's analysis—especially the purer version in which international law is conceptualized as overriding national law. Namely, the U.S. law at issue prohibited activity that was prohibited by international law and did so in language that was basically identical to the international legal definitions contained in the treaties. The U.S. Antiterrorism Act (ATA) under which plaintiffs sued in the cases discussed above provides civil remedies for “international terrorism” and includes under that heading offenses under section 2339C of the U.S. Code, which criminalizes financing terrorism.²⁸⁴ That code provision in turn implements U.S. obligations under the Financing Convention and defines the offense in terms that mirror the convention's definition.²⁸⁵

Simply put, if the argument is that one state's law implementing international law can override another state's national law that conflicts with international law so as to constitute a vertical conflict of laws between international and national law, the first state's law actually must implement international law. That is, it must accurately incorporate international law and not expand it in new or idiosyncratic ways.²⁸⁶ This condition goes not only to the assent of other states to be bound by the precise international law at issue and the consequent legitimacy of enforcing that law but also to fairness to parties subject to the contradictory overlapping laws. For instance, the pure vertical conflicts jurisprudence is quick to point out that hardship to the parties is diluted where parties were on notice of the international legal norm being applied to them.²⁸⁷ But if national law—here, the U.S. law implementing the international norm—does not do so accurately, this notice argument disintegrates.

A potential sticking point for the vertical conflicts theory articulated so far as applied to actual cases might be that many of the major international instruments and treaties prohibiting activities under international law tend to be couched in terms of public law enforcement. More specifically, they mostly proscribe the activity they regulate as criminal offenses and contemplate mutual legal assistance among states.²⁸⁸ Although courts in civil suits certainly textually qualify as arms of states, a

284. 18 U.S.C. § 2339C(a) (2012).

285. Compare Financing Convention, *supra* note 281, at art. 2(1)(b), with 18 U.S.C. § 2339C(a)(1)(B). See also Colangelo, *supra* note 282, at 195–99.

286. For a more detailed explanation of this point, see Anthony J. Colangelo, *International Law in U.S. State Courts: Extraterritoriality and “False Conflicts” of Law*, 48 INT'L LAW. 1, 10–13 (2014). This requirement would obtain whether the domestic legal system is monist or dualist in nature. See *id.*

287. In *Strauss II*, for example, the court explained “that the FATF, of which France is a member, has warned financial institutions that they could be exposed ‘to significant reputational, operational and legal risk’ if they engage in business relationships with ‘high risk’ customers such as charities collecting funds related to terrorist activities.” 249 F.R.D. 429, 455 (E.D.N.Y. 2008) (quoting *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609, 613 (E.D.N.Y. 2006)); see also *Strauss I*, 242 F.R.D. 199, 226 (E.D.N.Y. 2007); *Weiss v. Nat'l Westminster Bank, PLC*, 242 F.R.D. 33, 56 (E.D.N.Y. 2007).

288. Colangelo, *supra* note 282, at 189–201.

civil cause of action of the sort contained in the ATA might be seen as going beyond the norm contained in the treaty by placing its enforcement, or at least the initiation thereof, in the hands of private parties as opposed to government actors.

There are, however, counterarguments—frequently raised in ATS cases²⁸⁹—that even if the relevant international instruments prohibit an offense as a public law matter, civil cases alleging international law violations are still an acceptable way to enforce international law without doing violence to how international law is traditionally enforced. These counterarguments assert that international law itself generally does not care how its substantive norms are implemented via domestic legal apparatuses since that is a matter for a state's internal, not international, law; that private international law has long held that domestic forum law provides procedures and remedies for the application of both foreign and international substantive law;²⁹⁰ and that as a domestic law matter, separation of powers and foreign affairs concerns about private parties as opposed to government actors bringing suit have presumably been resolved *ex ante* by the very creation of a statutory private enforcement mechanism (like the ATA) and what courts have deemed “private attorneys general,” or the private parties initiating proceedings.²⁹¹ In short, both public and private international law demonstrate a fairly robust history of leaving enforcement of substantive international norms to the processes of domestic legal systems. And the fact that governments authorize private parties in addition to their own agencies to enforce international law does not change the substance of that law; instead, it merely allocates resources so as to maximize enforcement.

Nonetheless, for purposes of the vertical conflicts presently under discussion, any sticking point about public versus private enforcement of international law via civil suits is simply inapplicable. The key international instruments against financing terrorism explicitly contemplate private enforcement via civil proceedings. Article 5 of the Financing Convention, for example, provides:

Each State Party, *in accordance with its domestic legal principles*, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, *civil* or administrative.²⁹²

In sum, for the most prolific vertical conflicts of law presently arising in the cases, the relevant international instruments expressly contemplate civil actions and therefore erase objections that civil enforcement constitutes unacceptably parochial or idiosyncratic expansions of the international norm being enforced via domestic proceedings.

289. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665–66 (2013).

290. For elaboration of my thoughts on some of these points, see Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 GEO. J. INT'L L. 1329 (2013).

291. *Weiss*, 242 F.R.D. at 49 (internal quotation marks omitted).

292. Financing Convention, *supra* note 281, at art. 5(1) (emphasis added).

Now that we know what absolute conflicts of law are, how they differ from and relate to other doctrines, their own myriad doctrinal manifestations, and the conceptual and procedural dynamics that attend those manifestations, we can start to craft mechanisms for resolving them.

II. RESOLVING ABSOLUTE CONFLICTS

The elementary concept I would like to employ in fashioning a mechanism for resolving absolute conflicts of law is the notion of the rule of law. By this, I mean simply “[t]he supremacy of regular as opposed to arbitrary power.”²⁹³ For some readers, the term “rule of law” may conjure an encyclopedic labyrinth of definitions and connotations from legal philosophy, constitutional theory, and popular culture. I hope to avoid entering that maze by using it in the core sense that law seeks “the objective of giving a meaningful direction to human effort,”²⁹⁴ to quote Lon Fuller. That is, I want to use it mainly in a functional and pragmatic way to describe those features of law that make it effective at shaping human behavior, features that tend toward predictability and stability and away from arbitrariness and anarchy. Fundamental to these features is that actors can fairly comply with the law. Why is this concept so important to our increasingly interconnected regulatory world? To quote a prominent trade scholar, the rule of law “suggests a degree of certainty and predictability, facilitating the economic transactions that ultimately provide our bread or tacos, internet connections, and data transmittal that increase peoples’ standards of living and make society better off.”²⁹⁵ Or in the words of a fairly recent

293. BLACK’S LAW DICTIONARY 1531 (10th ed. 2014); GARNER’S DICTIONARY OF LEGAL USAGE 791 (3d ed. 2011).

294. FULLER, *supra* note 1, at 66. I also take no stand on whether the rule of law contains any inherent moral qualities. For the most famous airing of this debate, see Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H. L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). Naturally there are variances in different scholars’ views on what criteria the rule of law stands for; nonetheless, there is widespread agreement that the rule of law contains the minimum threshold criteria employed in this Article. See generally GETTING TO THE RULE OF LAW (James E. Fleming ed., 2011).

295. Eleanor M. Fox, *Rule of Law, Standards of Law, Discretion and Transparency*, 67 SMU L. REV. 795, 795 (2014). For the underlying notion that trade enhances overall welfare, see generally JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 49–195 (2007); JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 578 (W. J. Ashley ed., Reprints of Economic Classics 1976) (1848); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Robert Maynard Hutchins, ed., Encyclopædia Britannica 1952) (1776). For a recent prediction that the benefits of trade may push international law itself to develop to incorporate a norm of free trade, see Anthony D’Amato, *Groundwork for International Law*, 108 AM. J. INT’L L. 650, 677 n.117 (2014) (noting that “there is no free-trade norm in customary international law at present. But the principle of reciprocity would appear to predict the emergence of such a norm. The dynamic factor supporting free trade is the rapidly rising global tide of consumer expectations, fueled by information (through television and the Internet) about living standards of people in developed countries. It is possible that the international system will evolve, in years to come, a norm of free trade. The interdependence of states resulting from such a norm would foster the autopoietic system’s

U.S. Court of Appeals decision addressing an absolute conflict of laws, in our “world [of] economic interdependence . . . international commerce depends to a large extent on ‘the ability of merchants to predict the likely consequences of their conduct in overseas markets.’”²⁹⁶ More broadly, Jeremy Waldron notes that “the whole point of the [rule of law] is to secure individual freedom by providing a predictable environment in which individuals can act freely, plan their affairs, and make their decisions.”²⁹⁷

Yet the nature of an international system comprised of multiple autonomous or semiautonomous legal systems puts significant and perhaps impossible pressure on the notion of the rule of law. For the rule of law seems to assume the possibility of a system of rules that can be molded—implicit in which is some authority capable of doing the molding. It is therefore unsurprising that the rule of law often takes the form of directives or signposts to that authority, whether it is the imaginary ruler Rex in Fuller’s description of eight ways to fail to make law,²⁹⁸ or a new government trying to find its feet.²⁹⁹ The constitutional dilemma presented by the international system is that there is no authority, at least traditionally understood, to which these directives can be addressed.³⁰⁰ International law is a quintessentially bottom-up as opposed to a top-down lawmaking system. Take the rule of law criterion at the heart of this Article: avoidance of contradictory laws. If two laws fight each other in a domestic system, some ultimate authority can definitively resolve that battle. But in

goal of persistence.”).

296. *Quaak v. KPMG-B*, 361 F.3d 11, 19 (1st Cir. 2004) (quoting *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992)).

297. Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 *EUR. J. INT’L L.* 315, 338 (2011).

298. FULLER, *supra* note 1, at 33–38.

299. See, e.g., U.S. INST. OF PEACE, *ESTABLISHING THE RULE OF LAW IN IRAQ* (2003), available at <http://www.usip.org/sites/default/files/resources/sr104.pdf>. For a sampling of literature here, see Tom Ginsburg, *In Defense of Imperialism? The Rule of Law and the State-Building Project*, in *GETTING TO THE RULE OF LAW*, *supra* note 294, at 224, 224; Richard W. Miller, *Might Still Distorts Right: Perils of the Rule of Law Project*, in *GETTING TO THE RULE OF LAW*, *supra* note 294, at 265, 265; Jane E. Stromseth, *Justice on the Ground? International Criminal Courts and Domestic Rule of Law Building in Conflict-Affected Societies*, in *GETTING TO THE RULE OF LAW*, *supra* note 294, at 169, 169.

300. See Waldron, *supra* note 297, at 320 (observing that “it may be thought that the absence of an over-arching sovereign in some ways makes the [rule of law] more difficult in the international sphere, because the absence of centralized authority generally means it is harder to subject law-making and legal administration to [rule of law] discipline: non-centralized law-making and administration are haphazard and effectively uncontrolled”). Waldron’s central claim that an international rule of law applies principally for the benefit of individuals, not national governments, seems to me plainly correct. He appears to treat the issue mainly as going to the applicability of substantive international law, or what we might call public international law. See *id.* at 323. The absolute conflict scenario discussed in this Article provides somewhat more complex problems because, as I explain above in the body, it deals also with private international law—which traditionally is a matter of each state’s internal law. So not only do absolute conflicts raise potential problems regarding the application of an at least theoretically harmonized international substantive law, they also raise problems regarding states coordinating in some way their own internal laws so as to supply a degree of predictability for human actors in the international multistate realm.

the international system, there is no definitive ultimate authority to which a rule of law directive against contradictory laws may be addressed. The contradiction may well resolve itself, but the resolution will not be the result of some overarching sovereign authority's decision to obey the rule of law. Further compounding the dilemma is that each state's own internal legal system has an equally powerful claim to the legitimacy of its own laws. Thus, what we might think of as an "international rule of law" necessarily and problematically raises a determinative predicate question about whether the notion of the rule of law can even apply in the first place to a singularly exceptional composite system of multiple coequal constituent legal systems with no overarching rulemaking authority.

As my decision to use the rule of law probably gives away, I think it can apply to the international system. Nothing integral to the notion of supplying predictable and stable rules for legal actors requires a single overarching authority capable of molding those rules. They may develop in a decentralized and organic fashion. We have seen already that the frontline decision makers for resolving absolute conflicts so far have been courts. The very existence of the common law suggests that courts are capable of crafting rules that both strive toward and achieve a sufficient degree of coherence for the governance of human behavior.

The confounding variable in the conflict of laws and private international law fields, of course, is that conflict of laws rules are a matter of each state's internal law.³⁰¹ As a result, different states may adopt different methodologies for resolving conflicts of law, and thus the question of which law will eventually govern a given multijurisdictional dispute hinges on where that case is initiated. As Part I detailed, the raw data thus far in the form of judicial decisions strongly indicates that courts presently weigh competing state interests, resulting in the jurisdiction where a case is initiated being the jurisdiction whose laws most likely will apply.³⁰² Now, one might say that this in itself supplies a fairly predictable rule. But the problem is that transnational actors subject to multiple contradictory laws typically have no control over where cases against them are initiated, whether the cases are private lawsuits or public enforcement actions.³⁰³ Any precision this sort of rule provides is therefore *ex post*, not *ex ante*, to the crucial moment of deciding whether to engage in the transnational activity to begin with. Aside from obvious invitations to forum shop, it also decreases predictability and increases arbitrariness of the law.

The most successful marriage between the rule of law and the field of conflict of laws in the international system would ask states and, in practice, courts, to adopt largely the same conflict of laws methodology and that the methodology be neutral, or fairly independent, of pro- or anti-forum bias. While this was tried without much success in the *First Restatement of Conflict of Laws*, that approach was based on a rigidly formalistic artifice of legal fictions that purported to resolve nearly all choice

301. PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 6 (5th ed. 2010).

302. See *supra* Part I.B.4.

303. Choice of forum and choice of law clauses in contracts could remedy some of this problem, but in the vast majority of cases discussed such clauses would be inapplicable or invalidated because the cases deal with public rather than private law disputes, even if private parties fill in as the enforcers of public norms. See, e.g., *supra* notes 222–223 and accompanying text.

of law issues through a series of a priori principles that “localized” multijurisdictional activity in a single jurisdiction based on a single point of contact.³⁰⁴ The rigidity of the rules in turn led to them being riddled with unpredictably applied exceptions, or “escape devices,”³⁰⁵ by courts—paradoxically leading to a breakdown in the rule of law and spawning what has been called a “choice of law revolution” led in part by Currie’s governmental interest analysis.³⁰⁶

Far from the type of approach envisaged by the *First Restatement*, I want to advance for courts a more flexible multifactored test that focuses on fairness to parties, and I want to apply it to only one type of conflict of laws: absolute conflicts. Although a multifactored fairness standard may lead to different applications by different courts, two key assets recommend it over other approaches: it is the same across jurisdictions, and the test itself preferences party rights and fairness. As I will argue below, this fairness focus promises to create opportunities and mechanisms for parties subject to absolute conflicts or potential absolute conflicts to play a role in the resolution of those conflicts in favor of one law over the other. As to both the rule of law and the field of conflict of laws, it is probably most realistic and productive to talk about the law and what we would like it to achieve in terms of degrees. If the ultimate aim is predictability and stability for transnational actors subject to contradictory laws, a fairness test looks more attractive than prevailing alternatives that effectively locate the decision of what law will apply outside transnational actors’ control after they have acted. Also recommending a fairness test is that it is not brand new. It has both the wisdom and the luxury of drawing from factors courts have intuited and elaborated for decades, and simply reorients the focus of absolute conflicts analysis around these factors instead of raw state interests. Finally, at least in U.S. law, it is doctrinally anchored in *Rogers’s* use of the Due Process Clause to address absolute conflicts in the form of foreign sovereign compulsion.³⁰⁷

The cases exhibit a number of fairness factors, the most salient of which grow directly out of *Rogers*, such as good faith in trying to comply with contradictory laws and the hardship parties likely will face as a result of the absolute conflict of laws. Courts have also developed other fairness factors that relate to and can be housed in these initial factors, including the reciprocity of bearing burdens commensurate with benefits received from a legal system; the party or nonparty status of the actor subject to the absolute conflict; notice that the party might be subject to the absolute conflict; and whether the absolute conflict was, in some way, of the party’s own making. Together these factors supply a fairly well-rounded approach to resolving absolute conflicts. Moreover, they may also capture the varying state interests at play in a given absolute conflict case in a more nuanced way than prevailing state interest methodologies. For instance, good faith efforts to comply with contradictory laws may be met with waiver of the law or accommodation by the interested states, revealing a more accurate picture of the strength of those states’ interests; similarly, the hardships parties will face resulting from the absolute conflict provide a faithful representation of the relative strengths of the conflicting state interests based on a

304. SYMEON C. SYMEONIDES & WENDY COLLINS PERDUE, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* 49 (3d ed. 2012) (describing conflict localization).

305. *Id.*

306. *See* Symeonides, *supra* note 45, at 34–35.

307. *See* *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958).

detailed assessment of the nature of the law itself, the likelihood of enforcement, and the existence and likelihood of success of potential defenses. After describing these factors, the Article concludes by suggesting that they can lead to better outcomes.

A. Good Faith

Good faith can enter into absolute conflict analyses at multiple stages. It can constitute an almost preliminary determination about whether the absolute conflict of laws to which a party is subject is or is not of the party's own making. And it can factor into determining whether a party actually tried to comply with the conflicting laws in good faith and was in fact unable to do so. Moreover, courts have employed these good faith considerations both when determining whether to subject a party to an absolute conflict by applying forum law in the first place and, if forum law does apply to create an absolute conflict, when determining the appropriate sanctions for noncompliance with forum law.

1. No Courting Legal Impediments

Rogers again provides a fruitful starting point. To begin with, the Supreme Court considered and rejected as unsupported by the record the government's "suggest[ion] that petitioner stands in the position of one who deliberately courted legal impediments" to compliance with U.S. law, "and who thus cannot now be heard to assert its good faith after this expectation was realized."³⁰⁸ However, the Court explained that "[c]ertainly these contentions, if supported by the facts, would have a vital bearing on justification for dismissal of the action, but they are not open to the Government here."³⁰⁹ In short, a party cannot claim a good faith inability to comply with contradictory laws if the contradictory law was in some way procured by the party. The fact that the absolute conflict in *Rogers* was not of the party's making was an important factor that "compel[led] the conclusion on this record that . . . failure to satisfy fully the requirements of this production order was due to inability fostered neither by [the party's] own conduct nor by circumstances within its control."³¹⁰

Although *Rogers* is a mixed absolute conflict case, this rule is consistent with courts' treatment of substantive absolute conflicts as well. The court in *Interamerican Refining Corporation*, for example, excused the operation of U.S. antitrust law because undisputed evidence showed that "defendants were compelled by regulatory authorities in Venezuela to boycott plaintiff" and "[n]othing in the materials before the Court indicates that defendants either procured the Venezuelan order or that they acted voluntarily pursuant to a delegation of authority to control the oil industry."³¹¹ That is, "defendants complied in good faith with Venezuelan regulatory authorities. There is no evidence that the compulsion was sought or induced by the defendants and there is undisputed evidence to the contrary."³¹²

308. *Id.* at 208-09.

309. *Id.* at 209.

310. *Id.* at 211.

311. *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1296-97 (D. Del. 1970) (footnote omitted).

312. *Id.* at 1302.

Indeed, the evidence demonstrated that “defendants were eager to sell to plaintiff,” and did so “in good faith before and after the ban.”³¹³

2. Extensive Efforts at Compliance

The other important factor for the Court in *Rogers* was “petitioner’s extensive efforts at compliance” with the discovery order, the combination of which led to the conclusion “that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.”³¹⁴ Good faith efforts at compliance thus may constitute an additional requirement on top of not procuring or “court[ing] legal impediments” in the form of absolute conflicts of law.³¹⁵ For the Court in *Rogers*, this combination of good faith helped invalidate the lower court’s dismissal of the case against the petitioner under the Due Process Clause.³¹⁶ Yet as noted in Part I, the Court did not free the petitioner from the absolute conflict of laws altogether; the U.S. discovery order still applied.³¹⁷ Rather, the party’s good faith helped mitigate the potential sanctions constitutionally available for failing to comply with forum law.³¹⁸

3. At Both the Order and the Sanctions Stage

Some lower courts have extended *Rogers* in procedural and mixed absolute conflict cases to the antecedent determination of whether forum law even applies to create the absolute conflict in the first place. These courts have used good faith both when determining whether to apply forum law to create the absolute conflict and, like *Rogers*, when determining sanctions.³¹⁹ As with much of the law in this area, the progenitor of these developments was the Second Circuit,³²⁰ though other courts have shown a similar willingness to refuse to order initial discovery.³²¹ As the Southern

313. *Id.* at 1304.

314. *Rogers*, 357 U.S. at 211–12.

315. *See id.* at 209.

316. *Id.*

317. *Id.* at 205.

318. *Id.* at 211.

319. *See, e.g.*, *United States v. First Nat’l Bank of Chicago*, 699 F.2d 341, 346–47 (7th Cir. 1983) (directing on remand an inquiry “to consider whether to issue an order requiring . . . a good faith effort to receive permission from the Greek authorities to produce the information specified in the summons” and distinguishing a case in which “the court of appeals had the benefit of findings by the district court, including a finding that the bank had not made a good faith effort to comply with the subpoena”); *see also* cases cited *infra* notes 320–322.

320. *See Trade Dev. Bank v. Cont’l Ins. Co.*, 469 F.2d 35, 39–42 (2d Cir. 1972) (refusal to issue order to compel); *see also In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 554 (S.D.N.Y. 2002); *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 521 (S.D.N.Y. 1987) (“[T]he Second Circuit Court of Appeals has not adopted the approach of distinguishing the analysis appropriate for deciding to issue an order compelling discovery from that for imposing sanctions for non-compliance. The Court of Appeals in the more recent cases has consistently considered foreign law implications in reviewing both orders to compel and orders imposing sanctions.”).

321. *See, e.g.*, *SEC v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 340–41 (N.D. Tex.

District of New York in *Minpeco* observed, “[c]ourts in this circuit have considered a resisting party’s good faith efforts to comply with discovery at the order stage as well as the sanctions stage,” including “whether a party’s inability to produce documents as a result of foreign law prohibitions was fostered by its own conduct prior to the commencement of the litigation.”³²²

For example, the district court in *In re Grand Jury Subpoena* explained that “[a]n affirmative showing of good faith is required at the order stage” and found that in the FCPA case before it the U.S. corporation “has ‘courted legal impediments’ and does not appear to have genuinely attempted to comply” with U.S. law,³²³ which, along with other factors, led the court to grant the government’s motion to compel discovery.³²⁴ More specifically, the corporation had repeatedly “sought advice from the [foreign] Ministry of Justice intended to elicit support for resisting anticipated subpoenas from the grand jury” through communications that, among other things, “suggest[ed] bases for noncompliance, including whether the documents belong to the Corporation or the Republic under the Republic’s law, what jurisdiction the government maintains over them, and what ‘limitations’ exist under the Republic’s law that would prohibit transmission of the documents out of the country.”³²⁵ In *Banca Della Svizzera Italiana*, the district court similarly stressed that under *Rogers*, a “party’s good or bad faith is a vital factor,” and found that the bank had “deliberately courted legal impediments” and “acted in bad faith” by purposefully hiding behind Swiss nondisclosure law to “evade . . . the strictures of American securities law against insider trading,”³²⁶ powerfully contributing to the court’s decision to compel disclosure.³²⁷

On the other hand, perhaps the strongest example of good faith factoring into an absolute conflict analysis in a party’s favor is the Tenth Circuit’s decision in *In re Westinghouse*, discussed earlier,³²⁸ in which a U.S. corporation headquartered in Canada and its president were held in civil contempt for failing to comply with a U.S. discovery order.³²⁹ The company, Rio Algom, and its president argued that to comply with the order would invariably expose them to criminal liability under Canadian uranium and atomic energy laws.³³⁰ The record revealed that the Canadian courts had already roundly dismissed letters rogatory to obtain the information requested in the U.S. proceedings on the grounds that to do so would violate Canadian law and public policy, and that Rio Algom also had formally requested permission from the Canadian government to release the information and that Canadian government

2011) (refusing to order discovery, “at least in the first instance,” and discussing bank’s good faith).

322. *Minpeco*, 116 F.R.D. at 522–23; see also *Weiss v. Nat’l Westminster Bank PLC*, 242 F.R.D. 33, 56 (E.D.N.Y. 2007).

323. *In re Grand Jury Subpoena*, 218 F. Supp. 2d at 563–64.

324. *Id.* at 564.

325. *Id.* at 563–64.

326. *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 114, 117 (S.D.N.Y. 1981).

327. *Id.* at 119.

328. See *supra* notes 171–180 and accompanying text.

329. *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 994 (10th Cir. 1977).

330. *Id.* at 994–95.

agencies, like the courts, had firmly rejected the request.³³¹ The court found that “Rio Algom has made diligent effort to produce materials not subject to the Canadian regulation” and sought permission to disclose materials subject to regulation from the Canadian authorities “in the best of faith.”³³² In making these findings, the court explained, “[t]here is nothing in the record which would indicate that Rio Algom . . . ‘ran’ to Canada as this controversy was developing in order to gain the protection of Canadian law”; nor had Rio Algom “in some manner caused the nondisclosure regulation to be promulgated in Canada in order to cover up its activities or that Rio Algom and the Canadian Government acted in collusion.”³³³ This good faith played a dominant role in the court’s decision to vacate the district court’s contempt order and associated sanctions.³³⁴

4. Defining Good Faith

All of the above raises an integrally important question about good faith for an absolute conflict analysis: What kinds of steps satisfy, or should satisfy, the definition of good faith?

a. Bad Faith

As with any difficult definitional question, one place to start is by defining what is *not* good faith. Here the court’s discussion in *In re Grand Jury Subpoena* can be instructive.³³⁵ The court found that the corporation suspected of foreign corrupt practices actively solicited from foreign officials legal impediments to anticipated U.S. proceedings—including by suggesting possible legal restrictions to the foreign officials—instead of trying to foster cooperation with the foreign government.³³⁶ That type of activity certainly seems to fall within *Rogers*’s definition of “court[ing] legal impediments to production,” and accordingly qualifies as bad faith.³³⁷ A similar finding was made by the district court in *Linde v. Arab Bank, PLC*.³³⁸ Despite the bank’s professions of good faith in the form of letters to foreign banking authorities purporting to request permission to disclose information protected by foreign bank secrecy laws, the court found that “the letters were calculated to fail” because they “represented . . . that plaintiffs’ allegations have ‘no basis in reality or in the law’” and inaccurately “stated that the [U.S.] court had ‘provided for respecting confidentiality laws in the countries of the[] accounts’ when the court had made no such provision, leading to the ultimate finding that the bank’s “false or exaggerated assertions hardly support a finding of good faith.”³³⁹

331. *Id.* at 995.

332. *Id.* at 998.

333. *Id.*

334. *Id.* at 999.

335. *In re Grand Jury Subpoena* Dated Aug. 9, 2000, 218 F. Supp. 2d. 544 (S.D.N.Y. 2002).

336. *Id.* at 563–64.

337. *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958).

338. 269 F.R.D. 186, 199 (E.D.N.Y. 2010).

339. *Id.*

As to the defendant bank's efforts to comply, the court underscored that the bank could not in good faith "claim[] credit" for its productions to date because those productions had come only after the court had ordered them,³⁴⁰ a finding other decisions have made as well.³⁴¹ Finally, "years of delay caused by defendant's refusals to produce weigh against a finding of good faith" as did the defendant's "selective compliance with foreign bank secrecy laws."³⁴² In all, soliciting foreign legal impediments, years-long dilatory tactics, and selective compliance with the foreign law purporting to prohibit production all point toward bad faith.

b. An Affirmative Showing

Now that we have an idea of what bad faith looks like, we can move to more neutral ground and begin to approach good faith. As the quoted language from *In re Grand Jury Subpoena* suggests, courts that have considered the issue generally require "[a]n affirmative showing of good faith."³⁴³ And the cases hold that it is up to the party alleging noncompliance due to foreign law to make this showing. Thus in rejecting a Chinese corporation's claims that production would violate Chinese law, the Ninth Circuit in *Richmark Corp. v. Timber Lane Falling Consultants* explained that a party claiming that foreign law prohibited production was "required . . . to make an *affirmative showing* of its good faith in seeking permission to disclose the information," and upheld the lower court's sanctions because the corporation "has made no such affirmative showing here."³⁴⁴ Similarly, in *Dexia Credit Local v. Rogan*, the court faulted the defendants, who claimed Belize law prohibited them from producing documents, for failing to seek "an order of the Belize courts specifically authorizing them to disclose the trust information."³⁴⁵ According to the court, "[t]he failure . . . to take good faith steps to avoid a conflict with Belize law weighs against relaxing their obligations under United States law."³⁴⁶ In short, a party intending to rely on an absolute conflict with foreign law as an excuse for noncompliance with U.S. law does nothing at its peril. The cases demonstrate that, at the very least, the party must take steps to be excused from the foreign law in order to make "[a]n affirmative showing of good faith."³⁴⁷

340. *Id.*

341. *Linde v. Arab Bank, PLC*, 706 F.3d 92, 110 (2d Cir. 2013).

342. *Linde*, 269 F.R.D. at 200; *see also Linde*, 706 F.3d at 113; *In re Activision Blizzard, Inc.*, 86 A.3d 531, 550 (Del. Ch. 2014) ("Vivendi's prior decisions to disregard the Blocking Statute when advantageous undercut its ability to invoke the Blocking Statute now, when the shoe is on the other foot. Rather than taking a consistent and principled stance, Vivendi appears to be adopting positions of convenience. Vivendi's own actions undermine its current assertions about the significance of the Blocking Statute . . .").

343. *In re Grand Jury Subpoena* Dated Aug. 9, 2000, 218 F. Supp. 2d 544, 563 (S.D.N.Y. 2002).

344. 959 F.2d 1468, 1479 (9th Cir. 1992) (emphasis in original).

345. 231 F.R.D. 538, 548 (N.D. Ill. 2004).

346. *Id.*

347. *In re Grand Jury Subpoena*, 218 F. Supp. 2d at 563.

c. Showing Efforts to Comply

As to efforts toward compliance, *Rogers* itself supplies fairly ample argument that disclosing the universe of relevant materials not covered by the foreign law prohibition goes far toward establishing “extensive efforts at compliance,”³⁴⁸ as well as continuing efforts to secure waivers and permissions from foreign authorities.³⁴⁹ *In re Westinghouse* similarly confirms that “diligent effort to produce materials not subject” to the foreign law prohibition in addition to “s[seeking] a waiver” from the foreign authorities under foreign law exhibits good faith.³⁵⁰

d. Not Evading U.S. Law

Perhaps the most difficult aspect of the good faith analysis remains, however, and involves whether the party subject to the absolute conflict purposefully used foreign law to “evade . . . the strictures of American . . . law,”³⁵¹ as the court in *Banca Della Svizzera Italiana* put it. Unlike the other, more objective aspects of the good faith analysis—either the record shows good faith attempts to obtain waivers or it does not, either there was extensive production of nonprohibited materials or there was not—this involves a highly subjective aspect. *Banca Della Svizzera Italiana* suggests that reliance on foreign bank secrecy law to hide what looks like a clear violation of U.S. substantive law—there, U.S. law against insider trading—is itself evasive and cannot qualify as good faith.³⁵² And *Minpeco* indicates that some level of advance planning to comply with U.S. law may be required, for instance seeking waivers of foreign privacy laws *before* entering into U.S. markets.³⁵³ On the other hand, *In re Westinghouse* seemed to take a more sanguine approach to the party’s failure to comply as a result of foreign law, noting that nothing in the record “indicate[d] that Rio Algom or its president ‘ran’ to Canada as this controversy was developing in order to gain the protection of Canadian law.”³⁵⁴

348. *Societe Internationale v. Rogers*, 357 U.S. 197, 211 (1958).

349. *Id.* at 203 (detailing that “additional documents, with the consent of the Swiss Government and through waivers, were released and tendered for inspection, so that by July of 1956, over 190,000 documents had been procured. Record books of Sturzenegger were offered for examination in Switzerland, subject to the expected approval of the Swiss Government, to the extent that material within them was covered by waivers. Finally, petitioner presented the District Court with a plan, already approved by the Swiss Government, which was designed to achieve maximum compliance with the production order: A ‘neutral’ expert, who might be an American, would be appointed as investigator with the consent of the parties, District Court, and Swiss authorities. After inspection of the Sturzenegger files, this investigator would submit a report to the parties identifying documents, without violating secrecy regulations, which he deemed to be relevant to the litigation. Petitioner could then seek to obtain further waivers or secure such documents by letters rogatory or arbitration proceedings in Swiss courts.”).

350. *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 998 (10th Cir. 1997).

351. *SEC v. Banca Della Svizzera Italiana*, 92 F.D.R. 111, 117 (S.D.N.Y. 1981).

352. *Id.* at 118.

353. *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 528–29 (S.D.N.Y. 1987).

354. *In re Westinghouse*, 563 F.2d at 998.

Although more subjective and flexible than the other good faith components, a number of considerations appear to factor into this good faith analysis. One is the type of foreign law at issue. In line with the distinction drawn in Part I,³⁵⁵ the more procedural the foreign law looks, the less deference it is given; the more substantive the law looks, the more deference it is given in a good faith analysis. Even though *Minpeco* ultimately found against good faith, it noted that weighing against bad faith was “that this is not a situation in which the party resisting discovery has relied on a sham law such as a blocking statute to refuse disclosure.”³⁵⁶ By contrast, the court in *In re Westinghouse* found that the Canadian laws at issue there captured profound substantive policies—quoting the law—“to control and supervise the development, application and use of atomic energy.”³⁵⁷ Also relevant to judicial analysis of good faith on this front may be how long the foreign law has been in effect. If the law appears to have been enacted in close chronological proximity to the dispute, courts may view it less favorably in terms of good faith. If, on the other hand, it is part of a longstanding policy in the foreign nation, courts are more disposed to find good faith.³⁵⁸ Finally, a good faith finding may turn somewhat on the absolute conflict determination at issue. Courts appear more stringent in their requirements and to require a higher threshold of affirmative good faith conduct when deciding whether to order compliance with U.S. law in the first place as opposed to when determining sanctions for noncompliance.³⁵⁹

In sum, courts have developed a number of factors for discerning good faith in an absolute conflict of laws analysis, including whether the party in some way procured the absolute conflict and whether the party tried to get permission or waivers excusing the operation of foreign law. As to mixed and procedural absolute conflicts, courts also consider whether the party complied to the fullest extent feasible with a U.S. discovery order and whether the party purposefully used foreign law to evade U.S. law—with the latter factor containing a number of possible subfactors like what type of foreign law is at issue, the timing of the law’s enactment, and whether the absolute conflict analysis is at the order stage or the sanctions stage. Like any fairness test, this may seem vague, but it is not vacuous. These factors provide concrete guidance to courts for measuring a party’s good faith when subjected to an absolute conflict or potential absolute conflict of laws, and helpful markers for placing the party’s conduct on a “continuum of fault,” as one court described it.³⁶⁰ It is also important to recall that good faith is but one of multiple fairness elements and that “notwithstanding [a litigant’s] good faith, [the court is] not precluded from” subjecting parties to absolute conflicts of law, particularly in mixed and procedural

355. See *supra* Part I.B.1–3.

356. *Minpeco*, 116 F.R.D. at 528.

357. *In re Westinghouse*, 563 F.2d at 995 (internal quotation marks omitted).

358. *SEC v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 341 (N.D. Tex. 2011) (explaining in finding good faith that “the Swiss laws relied upon . . . have been on the books for decades”).

359. Compare *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 548 (N.D. Ill. 2004), *Minpeco*, 116 F.R.D. at 528–29, and *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 117 (S.D.N.Y. 1981), with *In re Westinghouse*, 563 F.2d at 998.

360. *Linde v. Arab Bank, PLC*, 269 F.R.D. 186, 200 (E.D.N.Y. 2010) (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002)).

absolute conflicts cases.³⁶¹ The other major fairness element courts have developed and relied upon is the hardship parties likely will face if subjected to an absolute conflict of laws—to which we now turn.

B. Hardship

As with good faith, hardship also stems from the Supreme Court's opinion in *Rogers*.³⁶² According to the Court, "[i]t is hardly debatable that fear of criminal prosecution constitutes a weighty excuse" for noncompliance with U.S. law, "and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign."³⁶³ The Court was careful to distinguish this type of absolute conflict situation "from one where a party claims that compliance with a court's order will reveal facts which may provide the basis for criminal prosecution of that party under the penal laws of a foreign sovereign thereby shown to have been violated."³⁶⁴ Rather, it was imperative "that the very fact of compliance by disclosure of banking records [pursuant to U.S. law] will itself constitute the initial violation of Swiss laws."³⁶⁵ Thus, and as with substantive absolute conflicts,³⁶⁶ there is an initial requirement that there actually be an absolute conflict of laws.

Also, like good faith, the hardship factor contains a number of subinquiries, most prominently: the likelihood that the foreign law will be enforced—evidenced by, for example, the nature of the foreign law; the foreign government's statements and responses to the U.S. proceedings; whether the law has been enforced in the past; and the availability and likelihood of successful defenses under foreign law. The subinquiries further divide into whether the foreign law is criminal or civil, statutory or judge-made; the status of the party in relation to the litigation; taking on burdens commensurate with the party's avilment of U.S. law and the U.S. legal system; whether the party was on notice of the hardship; and whether the party's claimed hardship was of its own making, all of which will be explored below.

Before delving into these, however, I want to mention at the outset that *Rogers* also alluded to another type of hardship when it noted, "[t]his is not to say that petitioner will profit through its inability to tender the records called for" and hinted that sanctions less severe than dismissal, like an adverse inference at trial, might be justifiable because "[i]t may be that in a trial on the merits, petitioner's inability to produce specific information will prove a serious handicap in dispelling doubt the Government might be able to inject into the case."³⁶⁷ If the Due Process Clause protects the procedural rights of parties subject to an absolute conflict of laws, it also protects the procedural rights of parties seeking to enforce—and especially parties seeking to enforce their own rights under—U.S. law. In this connection, litigation-related factors that courts have developed, and that the restatements have

361. *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 456 (E.D.N.Y. 2008) (internal quotation marks omitted).

362. *See Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

363. *Id.* at 211.

364. *Id.*

365. *Id.*

366. *See supra* Part I.B.2.

367. *Rogers*, 357 U.S. at 212–13.

adopted, like the importance of the requested material to the litigation³⁶⁸ and the availability of alternative means of securing the information,³⁶⁹ may be housed under the hardship factor but weigh the hardship to the other party to the litigation, not to the party subject to the absolute conflict. Indeed these factors underpin mirror-reflection rule of law values that allow the state to do its job for the benefit of everyone else. For it is both inaccurate and crude to think of the state as simply “a ferocious evil in people’s lives that needs constraining;” rather, the state “can also be a force for domestic peace, for equality, and for a generally high level of social wellbeing, precisely by virtue of ensuring, through lawful process, that the state successfully monopolize the use of force and by being a generally equalizing participant in the battle over the allocation of private power.”³⁷⁰ The rule of law ought to respect and counter-value these functions as well.

1. Hardship to the Party Subject to the Absolute Conflict

As noted, when gauging hardship to the party subject to the absolute conflict, courts evaluate a number of sub-factors such as the likelihood that foreign law will be enforced; whether foreign law is criminal or civil, statutory or judge-made; the status of the party to the litigation; and, more innovatively, the reciprocity of bearing burdens commensurate to the benefits received from U.S. law and the U.S. legal system; whether the party was on notice of the potential hardship when it acted; and whether the alleged hardship was of the party’s own making.

a. Likelihood of Enforcement

The likelihood that foreign law will be enforced can be further broken down into a number of sub-sub-factors, which may or may not be present on the facts of a given case. For instance, courts may look to the type of law at issue: Is it a purely procedural law directed at blocking U.S. discovery that was never really intended to be enforced (i.e., a “blocking statute”), in which case it is afforded little deference? Or does it capture an authentic substantive policy actually intended to be enforced, in which case it is accorded more deference? In addition, has the foreign government indicated that the law will be enforced, has the law been enforced in the past, and are there potential defenses under foreign law with a likelihood of success?

i. Procedure Versus Substance (Again)

Consistent with other facets of the law of absolute conflicts,³⁷¹ courts assessing hardship accord substantially less weight to a foreign law that is purely procedural in nature and that is designed only to block U.S. discovery with no threat of actual enforcement. *In re Air Cargo Shipping Services Antitrust Litigation*, for example, explained that “a number of courts have discounted this hardship when considering the

368. See *Strauss v. Credit Lyonnais (Strauss II)*, S.A., 249 F.R.D. 429, 439–40 (E.D.N.Y. 2008).

369. See *Strauss v. Credit Lyonnais (Strauss I)*, S.A., 242 F.R.D. 199, 210 (E.D.N.Y. 2007).

370. Robin West, *The Limits of Process*, in *GETTING TO THE RULE OF LAW*, *supra* note 294, at 32, 49.

371. See *supra* Part 1.B.1.

French blocking statute,”³⁷² because the foreign law does not subject parties “to a realistic risk of prosecution.”³⁷³ Here, courts have looked not only at the statute but also to its legislative history.³⁷⁴ Courts have contrasted pure blocking statutes with statutes that capture an authentic foreign policy that foreign states genuinely intend to enforce. Thus in *Minpeco*, the court found that the Swiss Penal Code provisions protecting bank secrecy not only imposed a “substantial fine” and “incarceration,” but also that—unlike with the French blocking statute—no argument could be made that the bank and its employees “face no real threat of prosecution.”³⁷⁵ The court in *SEC v. Stanford International Bank, Ltd.*, came to a similar conclusion, pointing out “Switzerland’s historical interest in promoting privacy in the bank-customer relationship” and emphasizing—unlike with the French foreign blocking statute—“the absence of any evidence suggesting that Switzerland crafted its laws specifically to impede United States courts’ discovery orders.”³⁷⁶

ii. Foreign Government Action

Courts evaluating the likelihood that foreign law will be enforced also consider actions of the foreign government in seeking to enforce, and enforcing in the past, the foreign law at issue. For instance, the Second Circuit in *First National City Bank* observed that “when foreign governments, including Germany, have considered their vital national interests threatened, they have not hesitated to make known their objections to the enforcement of [U.S. law],” but that the German government in the case before it had not “expressed any view on this case or indicated that, under the circumstances present[ed],” German law and policy would be violated by enforcing U.S. law.³⁷⁷ *Strauss I* and *Strauss II* also supply good examples and once again deal with the French blocking statute. *Strauss I* noted that “the French government has failed to submit any objections” to the enforcement of U.S. law and that “[g]lariously absent from the submission by Credit Lyonnais is any indication that civil or criminal prosecutions by the French government or civil suits by [the bank’s clients] are likely, rather than mere possibilities.”³⁷⁸ *Strauss II* confirmed that “the [French] bank has failed to demonstrate that either [the bank’s clients] or the French government would likely seek to prosecute or otherwise sanction Credit Lyonnais for complying” with U.S. law.³⁷⁹ Other courts to have examined the statute similarly have found that “[t]here is little evidence that the statute has been or will be enforced.”³⁸⁰

Indeed, in the *Strauss* cases the bank had already disclosed some protected information and had faced no legal consequences under French law for those disclosures, thereby undermining its argument that “such hardship is either imminent

372. 278 F.R.D. 51, 53 (E.D.N.Y. 2010).

373. *Id.* at 53–54 (quoting *Bodner v. Banque Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000)).

374. *Id.*

375. *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 525–26 (S.D.N.Y. 1987).

376. *SEC v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 339–40 & n.31 (N.D. Tex. 2011).

377. *United States v. First Nat’l City Bank*, 396 F.2d 897, 904 (2d Cir. 1968).

378. *Strauss v. Credit Lyonnais, S.A. (Strauss I)*, 242 F.R.D. 199, 224–25 (E.D.N.Y. 2007).

379. *Strauss v. Credit Lyonnais, S.A. (Strauss II)*, 249 F.R.D. 429, 455 (E.D.N.Y. 2008).

380. *Compagnie Francaise D’Assurance Pour Le Commerce Extérieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984).

or inevitable.”³⁸¹ Similarly, in *Wultz v. Bank of China, Ltd.*, the court found unpersuasive the bank’s protests of likely hardship, observing that the bank “has apparently never been sanctioned by the Chinese government for complying with American court orders to produce documents in contravention of China’s bank secrecy laws.”³⁸² Even though the bank had previously complied with such orders, it had received no sanction other than a “‘severe warning’ from Chinese banking regulators.”³⁸³ And the court in *In re Grand Jury Subpoena* appears simply to have concluded that the foreign government and the U.S. corporation alleged to have engaged in foreign corrupt practices were colluding and, in light of such collusion, neither had adequately “presented any evidence that the confidentiality asserted by the Republic is enforced by any active prosecution.”³⁸⁴

By contrast, where the evidence showed a real threat of foreign enforcement, courts have been far less inclined to impose U.S. law.³⁸⁵ Probably the best example is *Reinsurance Company of America, Inc., v. Administratia Asigurarilor de Stat*.³⁸⁶ The Seventh Circuit found that Romanian state secrets law prohibiting disclosure was “vigorously enforced” and that those who complied with U.S. law would face a “very real threat” of being “subject to the criminal sanctions of the law protecting state secrets.”³⁸⁷ Given the equally legitimate but competing U.S. and Romanian interests, the court held that “the potential hardship to [the party subject to the potential absolute conflict] tipped the balance against asserting [U.S.] jurisdiction.”³⁸⁸

iii. Potential Defenses

Courts have also been willing to look more closely at foreign law in order to determine the likelihood that a case will result in liability if it is in fact brought to enforce the foreign law.³⁸⁹ Thus in *Dexia Credit Local*, the court examined the Belize Trusts Act that the defendants claimed would be violated if they complied with U.S. law.³⁹⁰ Upon inspection, the court concluded that even if U.S. law were applied, it was unclear that it would create liability because, on at least one interpretation, it could apply “without any conflict between United States and Belize law.”³⁹¹

The most salient consideration in this analysis of foreign law is the existence and likelihood of success of potential defenses. *Weiss v. National Westminster Bank* is illustrative.³⁹² The court found that the bank “has demonstrated that British bank secrecy laws are actually enforced” but failed to demonstrate any real risk of

381. *Strauss II*, 249 F.R.D. at 455.

382. 910 F. Supp. 2d 548, 553–54 (S.D.N.Y. 2012).

383. *Id.*

384. *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 563 (S.D.N.Y. 2002).

385. *See, e.g.*, *SEC v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 339–40 (N.D. Tex. 2011).

386. 902 F.2d 1275 (7th Cir. 1990).

387. *Id.* at 1280–81.

388. *Id.* at 1283.

389. *See, e.g.*, *United States v. First Nat’l City Bank*, 396 F.2d 897, 905 (2d Cir. 1968).

390. *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 546–48 (N.D. Ill. 2004).

391. *Id.* at 546.

392. 242 F.R.D. 33 (E.D.N.Y. 2007).

enforcement in its own case and, importantly, that even if the law were enforced, the bank “will have a valid defense” under British law.³⁹³ But the evidence must actually show a valid defense for courts to conclude that the potential defense reduces the likelihood of enforcement. In *Weiss*, that evidence took the form of both the British law itself and an expert opinion on the law and its exceptions.³⁹⁴ By contrast, in *Minpeco* the court determined that the evidence showed “the likelihood of a successful defense to a Swiss prosecution based on [Swiss Law] is highly speculative in the circumstances of these cases.”³⁹⁵ To be sure, reading closely the law and the expert opinions, the court concluded “that not even plaintiffs’ experts would predict the success of these defenses in the circumstances of these cases.”³⁹⁶ Accordingly, while courts are willing to look to foreign law, including potential defenses, in assessing whether the law is likely to be successfully enforced, evidence must demonstrate that any defenses under foreign law are valid and likely to be successful in the circumstances of the case for courts to use them to discount the likelihood of enforcement. This evidence typically takes the form of not just the foreign law but also expert opinion on that law.

b. Characteristics of the Foreign Law

Apart from the likelihood of enforcement inquiry, courts also inquire into the characteristics of foreign law creating or potentially creating absolute conflicts with U.S. law. Unsurprisingly given *Rogers*’s statement that “fear of criminal prosecution constitutes a weighty excuse” for noncompliance with U.S. law,³⁹⁷ if the foreign law is a criminal law, courts are more inclined to view it as creating hardship.³⁹⁸ Yet while the criminal character of a foreign law can certainly *help* parties subject to the law argue hardship, that a foreign law is instead civil or administrative in character may not necessarily *hurt* parties alleging hardship. While some courts have used the civil character of a foreign law to downplay hardship,³⁹⁹ others have adopted the view “that a sharp dichotomy between criminal and civil penalties is an imprecise means of measuring the hardship for requiring compliance with” U.S. law⁴⁰⁰ and have been willing to interpret foreign civil penalties—especially those that might look criminal under U.S. law—as satisfying the hardship component.⁴⁰¹

393. *Id.* at 55–56.

394. *Id.*

395. *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 526 (S.D.N.Y. 1987).

396. *Id.*

397. *Societe Internationale v. Rogers*, 357 U.S. 197, 211 (1958).

398. *See Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat* (Admin. of State Ins.), 902 F.2d 1275, 1281 (7th Cir. 1990); *see also SEC v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 338 (N.D. Tex. 2011) (“The prospect that the foreign litigant would face criminal penalties rather than civil liabilities weighs in favor of the objecting party.” (internal quotation marks omitted)); *Strauss v. Credit Lyonnais, S.A. (Strauss I)*, 242 F.R.D. 199, 225 (E.D.N.Y. 2007) (same) (collecting cases).

399. *See, e.g., United States v. First Nat’l Bank of Chicago*, 699 F.2d 341, 345 (7th Cir. 1983); *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 546 (N.D. Ill. 2004).

400. *United States v. First Nat’l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968).

401. *See, e.g., Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962).

Along the lines of the criminal versus civil distinction, courts also may look to whether the foreign law is statutory or judge-made, as well as the law's purpose, in assessing hardship. The Second Circuit in *First National City Bank*, for instance, found significant that the German bank secrecy law at issue there "was not part of the statutory law of Germany; rather, it was in the nature of a privilege that could be waived by the customer but not the bank."⁴⁰² The judge-made character of the law seemed to water down the potential hardship in the court's eyes, and the law's protection for private parties, not the state, put it on the private as opposed to the public side of the public/private divide, dampening expected hardship because the penalties were likely less penal in nature.⁴⁰³ Also of significance was that the law could be waived by the bank's clients,⁴⁰⁴ a feature that other courts have picked up on, and that, as in the good faith analysis above, courts have treated as imposing a sort of obligation on the party subject to foreign law to seek waiver. I address this waiver obligation below when analyzing whether the hardship resulted in any way from the party's own actions.⁴⁰⁵

c. Party Status

Another, and sometimes critical, component in the hardship calculus is whether the party subject to the potential absolute conflict is a party to the primary litigation or instead has the status of a nonparty witness absent a satellite discovery issue. In short, the farther away from the primary litigation a party is, the more hardship courts are willing to find. Indeed, hardship to a party sufficiently removed from the central litigation can be dispositive. Probably the best example here is the Seventh Circuit's opinion in *First National Bank of Chicago*.⁴⁰⁶ The Court of Appeals reversed the district court's order compelling disclosure of information under U.S. law in light of contrary Greek bank secrecy laws principally because those who would have been forced to comply with U.S. law in violation of Greek law in Greece were not parties to the main litigation.⁴⁰⁷ The Seventh Circuit explained: "We think it significant in weighing the hardship factor that the bank employees who would be exposed to penalty and First Chicago, which would be ordering its Greek employees to act unlawfully, are involved only as neutral sources of information and not as taxpayers or adverse parties in litigation."⁴⁰⁸ All other things being equal for the court—both the United States and Greece had equally legitimate state interests—hardship to a nonparty to the central litigation yet potentially subject to an absolute conflict weighted the scale against applying U.S. law compelling disclosure.⁴⁰⁹ Other courts have similarly focused on the nonparty status of the person or entity subject to the

402. *First Nat'l City Bank*, 396 F.2d at 899.

403. *See id.* at 903.

404. *Id.*

405. *See infra* Part II.B.1.e.

406. *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983).

407. *Id.* at 346. The court did, however, direct the district court "to conduct further inquiry . . . to consider whether to issue an order requiring First Chicago to make a good faith effort to receive permission from the Greek authorities to produce the information." *Id.*

408. *Id.*

409. *Id.*

potential absolute conflict of laws in the hardship analysis.⁴¹⁰ Even if the answer was not always dispositive in determining whether to apply U.S. law to create an absolute conflict, it still weighed heavily in determining hardship.⁴¹¹

Moreover, as the *Minpeco* court astutely observed, in addition to practical problems with enforcing U.S. law against a nonparty, there may also be inequities in punishing a party removed from the U.S. proceedings.⁴¹² The court explained that typical sanctions like an adverse inference, or preclusion from presenting certain evidence at trial, or even a default judgment, would be unavailable.⁴¹³ Instead, the only response to a nonparty's noncompliance that the court felt would be available to it was contempt and the imposition of a fine substantial enough to be coercive.⁴¹⁴ But, as the court pointed out, "such a sanction—threatening a witness in a lawsuit with conflicting punitive measures by two sovereigns—would be disproportionate under the circumstances and excessively harmful to international comity."⁴¹⁵

d. Reciprocity

Courts have also expanded the hardship criterion to include less concrete inquiries that nonetheless carry strong jurisprudential backing from other areas of law that use fairness to gauge the exercise of jurisdiction. For example, a number of courts have used reciprocity-type arguments similar to what one sees in Supreme Court jurisprudence gauging the exercise of a state's personal jurisdiction over a defendant.⁴¹⁶ The basic rationale is that by enjoying the benefits of the forum and its laws, a party also must submit to commensurate legal burdens.⁴¹⁷ One of the best illustrations of this reasoning comes from the Delaware Chancery Court in *In re*

410. See, e.g., *SEC v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 340 (N.D. Tex. 2011) ("SG Suisse is not a party to this action. And, the fact that the Stanford Defendants used their SG Suisse accounts to facilitate their scheme does not transform SG Suisse into a culpable party absent evidence of its complicity. Thus, this portion of the hardship analysis also weighs in SG Suisse's favor."); *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 530 (S.D.N.Y. 1987) ("[A]lthough not decisive in itself, it cannot be ignored that BPS is no longer a primary defendant in these cases, a reality which further removes its nondefendant trading customers—the individuals and entities whose business secrets would be revealed—from the litigations.").

411. *Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d at 340.

412. *Minpeco*, 116 F.R.D. at 530.

413. *Id.*

414. *Id.*

415. *Id.*

416. The personal jurisdiction analysis applies differently to plaintiffs and requires only a minimum baseline of "notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985).

417. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) ("[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.").

*Activision Blizzard, Inc.*⁴¹⁸ The defendants were corporate directors of a Delaware corporation headquartered in California whose stock was listed on a U.S. exchange.⁴¹⁹ Rejecting the defendants' objections to discovery based on the French blocking statute, the court reasoned:

each of the [defendants] submitted to the jurisdiction of the Delaware courts when they agreed to be an Activision director. By submitting to the jurisdiction of the Delaware courts, those individuals consented to the methods used by the Delaware courts for conducting and deciding litigation, including the processes for discovery under the Delaware rules.⁴²⁰

To be sure, further strengthening this reciprocity rationale was that the corporation "has chosen previously to sue in the United States to take advantage of the greater access to evidence provided by American-style discovery."⁴²¹ And, in so doing, the corporation had disregarded the very French law it was invoking.⁴²² In the court's view, the corporation's "prior decisions to disregard the Blocking Statute when advantageous undercut its ability to invoke the Blocking Statute now, when the shoe is on the other foot."⁴²³ It was only fair, according to the court, that the defendants bear burdens reciprocal the benefits they availed themselves of under U.S. law.⁴²⁴

This reciprocity rationale surfaces repeatedly throughout the case law. Early on, for instance, the Second Circuit in *First National City Bank* relied upon "the need to 'surrender to one sovereign or the other the privileges received therefrom' or, alternatively a willingness to accept the consequences" in rejecting the defendant's objections to the application of U.S. law on the grounds that it absolutely conflicted with German law.⁴²⁵ Similarly, the court in *Banca Della Svizzera Italiana* sought "to bring home the obligations a foreign entity undertakes when it conducts business on the American securities exchanges" by demanding disclosure under U.S. discovery rules.⁴²⁶ And the court in *In re Grand Jury Subpoena* cast the reciprocity rationale in assumption of risk terms, noting that "hardship [is] mitigated . . . to some extent [because] businesses that 'serve two sovereigns' assume the risk of conflicting legal imperatives."⁴²⁷

Even courts that ended up deciding not to compel the application of U.S. law so as not to create an absolute conflict with foreign law have acknowledged the reciprocity rationale. *In re Westinghouse*, for instance, recognized that the party from

418. 86 A.3d 531 (Del. Ch. 2014).

419. *Id.* at 533.

420. *Id.* at 548–49 (citation omitted).

421. *Id.* at 549.

422. *Id.* at 550.

423. *Id.*

424. *See id.*

425. *United States v. First Nat'l City Bank*, 396 F.2d 897, 905 (2d Cir. 1968) (quoting *First Nat'l City Bank of N.Y. v. IRS*, 271 F.2d 616, 620 (2d Cir. 1959)).

426. *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 119 (S.D.N.Y. 1981).

427. *In re Grand Jury Subpoena* Dated Aug. 9, 2000, 218 F. Supp. 2d 544, 563 (S.D.N.Y. 2002) (quoting *United States v. Chase Manhattan Bank, N.A.*, 584 F. Supp. 1080, 1086 (S.D.N.Y. 1984)).

whom discovery was requested “is a Delaware corporation doing business in Utah and hence enjoys the benefits and privileges afforded by the United States,” which in turn opened up the argument that “it is only proper that [the corporation] be compelled to comply” with U.S. law.⁴²⁸ Finding this rationale only “superficially appealing” in light of the Canadian contacts at play—in particular, the physical location of the requested information in Canada—the Tenth Circuit reversed the district court’s contempt order and sanctions against the corporation for failing to comply with the discovery request.⁴²⁹ While in some tension with the majority of courts’ use of the reciprocity rationale to dilute hardship, the decision also confirms reciprocity’s place in the analysis. Overall, the more a party avails itself of the forum and its laws, the more inclined courts will feel to impose reciprocal burdens under those laws on a paradigmatic fairness rationale that also appears in other judicial evaluations of jurisdiction.

e. Notice and the Party’s Own Making

The final two hardship features go hand-in-hand both conceptually and in the cases, so I group them together here, too. They evaluate the degree of notice a party had of the absolute conflict and whether the hardship resulting from an absolute conflict was of the party’s own making. I put the notice consideration first in the sequence because it oftentimes constitutes a precursor to determining whether the absolute conflict was of the party’s own making by imputing to parties knowledge of, and some requirement to avoid *ex ante*, the conflict. Put another way, if a party had ample notice that an absolute conflict might apply to it so as to create hardship, and there were obvious ways to try to resolve or avoid the conflict and the party did not attempt them, but instead barreled ahead either blindly, knowingly, or purposefully into the conflict, courts may find that the party helped contribute to its own hardship.

Yet before getting there, I should note that notice alone also may operate to reduce hardship. As the end of the vertical conflicts section hinted,⁴³⁰ courts dealing with international legal norms that absolutely conflict with parochial national laws have found that parties trapped between the two laws were on notice that they were subject to the overriding international law, and this notice functioned to reduce the party’s anticipated hardship. The *Strauss* cases, for example, emphasized under the hardship heading that international instruments prohibiting financing terrorism to which France was a party “warned financial institutions” that doing business with “‘high risk’ customers such as charities collecting funds related to terrorist activities” could expose those institutions “‘to significant reputational, operational and legal risk.’”⁴³¹ The court in *Weiss* made an almost identical finding with respect to the British bank attempting to use British bank secrecy law to resist disclosing information in a case

428. *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 999 (10th Cir. 1977).

429. *Id.*

430. See *supra* note 287 and accompanying text.

431. *Strauss v. Credit Lyonnais, S.A. (Strauss I)*, 242 F.R.D. 199, 226 (E.D.N.Y. 2007) (quoting *Weiss v. Nat’l Westminster Bank PLC*, 453 F. Supp. 2d 609, 619 (E.D.N.Y. 2006)); see also *Strauss v. Credit Lyonnais, S.A. (Strauss II)*, 249 F.R.D. 429, 455 (E.D.N.Y. 2008).

alleging financing terrorism.⁴³² In all of these vertical conflicts cases, notice itself of the overriding international law diluted the party's hardship in the court's analysis.⁴³³

Notice of a looming absolute conflict and, more particularly, of potential ways around the conflict, may also reduce hardship if the party did not try to use available means to avoid the conflict in the first place. Somewhat similar to the good faith requirement of showing affirmative efforts to comply by obtaining permission from foreign governments,⁴³⁴ courts may construe a failure to adequately seek avoidance of the conflict as the party itself contributing in some way to the conflict, in turn weakening the claimed hardship resulting from the (potentially avoidable) conflict. Though instead of the foreign government, here it is usually other private parties that hold the keys to releasing the party from the absolute conflict. Thus in *Banca Della Svizzera Italiana*, the court explained that the bank secrecy privilege belonged not to the state but to "bank customers and may be waived by them. It is not something required to protect the Swiss government itself or some other public interest."⁴³⁵ Likewise, after explaining that Swiss banking law protects—and may be waived by—bank customers, *Minpeco* suggested that the bank "should have required its brokerage customers to execute waivers of their bank secrecy rights as a condition to trading on U.S. markets."⁴³⁶ And in *Dexia Credit*, where the party interposed a fairly inscrutable Belize trust law against production, the court found that the party could have better discerned whether the law actually prohibited the production given that at least some interpretations of the foreign law appeared not to.⁴³⁷

2. Hardship to the Other Party

On the flip side of the hardship calculus is hardship to the other party to the litigation. Namely, the hardship that party would face if foreign law is interposed to thwart the regular operation of U.S. law that ordinarily would allow the party to utilize its procedural rights to vindicate its substantive rights. Here due process is both a shield and a sword. It potentially shields the party trapped in the absolute conflict from the full extent of the hardship the absolute conflict imposes. But it also

432. *Weiss v. Nat'l Westminster Bank, PLC*, 242 F.R.D. 33, 56 (E.D.N.Y. 2007) (observing that international instruments to which Britain is a party "warned NatWest and other financial institutions that they could be exposed 'to significant operational and legal risk' if they engage in business relationships with 'high risk' customers such as charities collecting funds related to terrorist activities") (quoting *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609, 619 (E.D.N.Y. 2006)).

433. This type of reasoning is not limited strictly to vertical absolute conflicts. At least one court appears to have used notice alone to discount hardship resulting from U.S. discovery rules. See *Quaak v. KPMG-B*, 361 F.3d 11, 22 (1st Cir. 2004) ("We do not mean to minimize the potential difficulty of the situation that KPMG-B faces. To some extent, however, that situation is the natural consequence of its decision to ply its wares in the lucrative American marketplace. Having elected to establish a major presence in the United States, KPMG-B must have anticipated that it would be subject to suit in this country (and, thus, subject to pretrial discovery rules that are pandemic to the American justice system).").

434. See *supra* Part II.A.4.b-c.

435. *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 118 (S.D.N.Y. 1981).

436. *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 525 (S.D.N.Y. 1987).

437. *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 548 (N.D. Ill. 2004).

lops off portions of that shield if they place too high a burden on the party seeking to vindicate its own rights in U.S. courts—sometimes to the detriment of the party stuck in the absolute conflict. Thus in *Rogers*, we saw due process shield the petitioner from summary dismissal but also potentially cut off petitioner's ability to mount certain types of defenses at trial.⁴³⁸ The case law and the *Restatement* articulate three related considerations in mixed and procedural absolute conflict scenarios for measuring whether to pierce the protective shield in favor of disclosure: the relevance of the requested material to the litigation, the specificity of the request, and the availability of alternative means of obtaining the requested material.⁴³⁹

As to the relevance of the requested material, the cases appear to demand a higher threshold than that contemplated by ordinary discovery rules⁴⁴⁰—or as one court put it, “more than merely relevant under the broad test generally for evaluating discovery requests.”⁴⁴¹ Courts view information that is “vital,”⁴⁴² “crucial,”⁴⁴³ and “essential”⁴⁴⁴ to the litigation as weighing in favor of the party seeking discovery. What this means in the actual litigation context is that “the outcome of litigation . . . ‘stand[s] or fall[s] on the present discovery order,’”⁴⁴⁵ or, at the very least, that the information is “highly relevant . . . to the claims and defenses” in the case.⁴⁴⁶ Courts have also found such a requirement attractive because it obviates “civil law countries’ traditional concerns with pretrial fishing expeditions.”⁴⁴⁷ On the other hand, courts have been concerned that refusing discovery in such situations could inflict real hardship on parties seeking to right legal wrongs against them. According to the court in *Stanford*, a case that alleged massive transnational Ponzi schemes, refusing access to overseas records where the illicit profits were stored could have meant that “[i]n the end, the greatest hardship would fall to the Ponzi schemes’ victims, who may be able to recover only pennies on the dollar.”⁴⁴⁸

438. *Societe Internationale v. Rogers*, 357 U.S. 197, 211–13 (1958).

439. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (1987).

440. *In re Activision Blizzard, Inc.*, 86 A.3d 531, 544 n.5 (Del. Ch. 2014) (citing cases).

441. *Id.* at 544; see also *Weiss v. Nat’l Westminster Bank, PLC*, 242 F.R.D. 33, 43 (E.D.N.Y. 2007) (“Because the scope of civil discovery in the United States is broader than that of many foreign jurisdictions, some courts have applied a more stringent test of relevancy when applying the Federal Rules to foreign discovery.”). Rule 26(b)(1) of the Federal Rules of Civil Procedure provides for the disclosure of “any nonprivileged matter that is relevant to any party’s claim or defense.” FED. R. CIV. P. 26(b)(1).

442. *SEC v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 330 (N.D. Tex. 2011); *Strauss v. Credit Lyonnais, S.A. (Strauss II)*, 249 F.R.D. 429, 440 (E.D.N.Y. 2008).

443. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992); *Weiss*, 242 F.R.D. at 43; *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 528 (S.D.N.Y. 1987).

444. *In re Activision Blizzard*, 86 A.3d at 544.

445. *Richmark*, 959 F.2d at 1475 (citing *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 999 (10th Cir. 1977)).

446. *Strauss II*, 249 F.R.D. at 440.

447. *Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d at 332 (internal quotation marks omitted).

448. *Id.* at 331. Although the SEC was the actual party seeking the material, it was standing in for the victims, as is the case in a large number of government enforcement actions. See *id.* at 326.

The other two considerations are somewhat more straightforward and also both resemble and tend to heighten the requirements of ordinary discovery rules. As to specificity, the law imposes an obligation on the party seeking discovery in absolute conflict cases to make requests “reasonably tailored to the circumstances of th[e] case.”⁴⁴⁹ And, just as courts “must limit . . . discovery” that is “unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive”⁴⁵⁰ under the Federal Rules of Civil Procedure, in absolute conflicts cases “[i]f the information sought can easily be obtained elsewhere, there is little or no reason to require a party to violate foreign law.”⁴⁵¹ On the other hand, if “[t]here is no alternative source”⁴⁵² for the information, courts are more inclined to compel discovery.

In short, hardship is a two-way street. The cases show that courts are attuned not only to hardships imposed on parties subject to absolute conflicts but also to hardships imposed on other parties to the litigation because they may be deprived of the procedural and substantive legal benefits they ordinarily would enjoy absent the absolute conflict.

As with any fairness analysis, good faith and hardship show that there can be factors, sub-factors, and even sub-sub-factors—some of which may be present and some of which may not, depending on the case. At what point certain facts transform into a doctrinal “factor” for a court’s legal analysis is a difficult question, and one I don’t pretend to fully answer here. The cases are sufficiently diverse and scattered across fields that even culling the considerations courts use in their decision making is hard. The deeper one digs into the facts of each case, the more one finds aspects that may have swayed a court’s decision. And yet, there are commonalities and themes. My hope in this Part is to have articulated and communicated these themes and the factors they hinge upon clearly enough to build an initial and useful blueprint for discerning fairness in absolute conflicts cases going forward.

CONCLUSION

Imagine you are deciding whether to engage in activity that potentially may subject you to contradictory legal commands of different jurisdictions. The essential question you face—and the essential question this Article has sought to explore and answer—is: What kind of methodology would you prefer for determining the law or laws that ultimately will apply to your activity?

On the one hand are prevailing tests that focus heavily if not exclusively on state interests. The practical result of these tests is that only after you have acted will you have an idea of what law will apply to you based on where the case against you, whether criminal or civil, is initiated. And just to be clear, you likely also have no

449. *Id.* at 332; *see also* Weiss v. Nat’l Westminster Bank, PLC, 242 F.R.D. 33, 44 (E.D.N.Y. 2007).

450. FED. R. CIV. P. 26(b)(2)(C)(i).

451. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992); *see also In re Activision Blizzard, Inc.*, 86 A.3d 531, 545 (Del. Ch. 2014) (the “actions, decisions, and related communications are at the heart of this case and are not available from other sources”).

452. *In re Activision Blizzard*, 86 A.3d at 546.

meaningful control over that decision. This type of methodology most often takes the form of a crude governmental interest approach that simply counts up state interests in a way that almost ineluctably leads to the application of forum law so as to trap you in an absolute conflict with foreign law. While these tests may pay lip service to your efforts to comply with both laws in good faith and the hardships you may face as a result of the absolute conflict, such considerations are often minimized to the vanishing point or gobbled up by predatory state interests.

And the legal and practical fallout is manifest on many levels. Because the forum cannot excuse on its own the operation of a foreign sovereign's laws, these tests promise only to increase absolute conflicts of law in a shrinking world in which transnational actors are increasingly subject to multiple contradictory regulatory regimes. Proliferating absolute conflicts is itself disturbing because they do violence to the rule of law by placing human actors in legally impossible situations. For as this Article has now argued at length, absolute conflicts are qualitatively different from other doctrines like true conflicts because they necessarily make compliance with law, broadly conceived, impossible. And as a practical consequence, they also promise to chill or even paralyze transnational activity beneficent to overall welfare.

The time has come to start thinking creatively about how rule of law criteria held so dear to the functioning of our domestic legal systems can migrate and adapt to the multistate international system. Predicate to this thinking is a willingness to conceive of the international system as a system to which the rule of law can and should apply. As I have argued, the absence of an overarching top-down lawmaking authority does not inevitably deprive the international system of the benefits of the rule of law. It does, however, pose new and interesting challenges for legal thinkers intent on bringing those benefits to bear.

This Article has sought to meet that challenge in the absolute conflict context by developing an alternative methodology to prevailing tests that asks courts across jurisdictions to reorient their analysis around fairness to parties instead of state interests. Perhaps most crucial to this fairness analysis is its focus on the parties' own conduct: engaging in activity and seeking to comply with the law in good faith, trying affirmatively to avoid antinomies through various means any good lawyer can advise on, fair notice, and a willingness to bear both avoidable and unavoidable hardships commensurate with benefits received. By placing a degree of control in parties' hands, the law becomes more predictable *ex ante*, shoring up the system's stability while distancing the absence of law, or anarchy—the antithesis of the rule of law.

