The Political Economy of Choice of Law

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INTRODUCTION

Andrew Guzman has made an important contribution to our understanding of choice of law. First, his formalization of the analysis of the interests of states in imposing their jurisdiction over transactions clarifies the stakes and focuses attention on the important questions. Second, his emphasis on the well-being of individuals cuts through the fog that has afflicted much choice-of-law discussion. By speaking of sovereigns as the relevant parties, past analysis has confused the interests of states and their subjects, thereby obscuring both the individual and community concerns that the law shapes and reflects. Guzman makes us look at people and their needs. In a world in which governments propose to represent their subjects rather than remake them, and in which the hollowing out of the nation-state proceeds apace, Guzman provides exactly the right lens for us to see what choice of law does and should do.2

If anything, he may let off too lightly the traditionalists who use “sovereignty” as their touchstone for resolving choice-of-law issues. He notes, correctly but perhaps cryptically, that changes in the content of that concept have made it an uncertain, and therefore unreliable, means for allocating jurisdiction.3 But that is not the entire problem. I can think of three additional reasons that challenge the use of sovereignty as a means of organizing analysis of choice of law.

First, invocations of sovereignty tend to obscure what are really communitarian arguments. It is perfectly legitimate to maintain that a society has interests that transcend those of its individual members; a community can be more than the sum of its parts. But this truism does not release proponents of sovereign interests from the obligation to justify particular communal claims. To take an

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3. Guzman, supra note 1, at 884–86.
example from trade law, some countries argue that the state's duty to protect local culture requires it to interfere with the consumption choices of its citizens. Canada does in banning U.S. magazines, and France does in keeping U.S. television programs off its airwaves. 4 One may agree that culture constitutes a public good of the sort that a state must provide to avoid undersupply. Alternatively, one may consider the concept too amorphous to have much purchase, and the ability of producers of culture to obtain protection sufficiently great to excite suspicion about protectionist measures. 5 Either of these positions rests on testable claims about the function and production of culture. In debate of this kind, reliance on any concept of sovereignty is not only uninformative, but misleading.

Second, the protean nature of the sovereignty concept means that it can be made to work for almost any cause. By imposing no discipline on the user, the concept invites the substitution of hidden preferences and unexplained (perhaps unexamined) values for serious argument. Both the left, with its invocation of state sovereignty over natural resources, and the right, with its attack on international cooperation as a threat to national sovereignty, stray down this path. 6 Both hide political tastes—whether statist or laissez-faire—behind a curtain of sovereignty rhetoric.

Third, what the invocation of sovereignty never does is identify state interests that are distinct from, and in any sense opposed to, both the communal interests of a society and the summed interests of its members. Yet any positive or normative analysis of legal rules must grapple with the possibility that states may act in a way that harm their subjects. With the end of the Cold War, most people in the academy have come to accept the idea that some totalitarian or authoritarian states at times have diminished individual or communal welfare. More controversial, but still mainstream, is the hypothesis that even within reasonably effective representative democracies, the actors that populate the


5. I develop the debate at greater length in Paul B. Stephan, Barbarians Inside the Gate: Public Choice Theory and International Economic Law, 10 Am. U.J. Int’l. L. & Pol’Y 745, 765–67 (1995). These arguments also apply to choice of law when the question becomes the scope of a prohibition on transactions, such as the French law forbidding the sale of Nazi memorabilia as applied to Internet auctions or the German ban on hate speech as applied to foreign websites or chat groups. For a description of the French law by a U.S. court that refused to give it effect, see Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’antisemitisme, 145 F. Supp. 2d 1168, 1192–93 (N.D. Cal. 2001).

organs of state power behave in ways that further their own interests rather than those of any particular group in society. According to this theory, governments, and in particular bureaucracies, seek to maximize their discretionary authority over resources, regardless of the preferences of groups within the society for the use of those resources.\footnote{See Clayton P. Gillette & Paul B. Stephan, Richardson v. McKnight and the Scope of Immunity after Privatization, 8 Sup. Ct. Econ. Rev. 103, 122–29 (2000); Paul B. Stephan, Accountability and International Lawmaking: Rules, Rents and Legitimacy, 17 Nw. J. Int’l L. & Bus. 681, 706, 716–19 (1996–1997) [hereinafter Stephan, Accountability]; Paul B. Stephan, International Governance and American Democracy, 1 Intl. J. Int’l L. 237, 248–53 (2000).} Whether this phenomenon occurs, and if so, where and to what extent, remain debatable questions. But sovereignty rhetoric tends to preclude the possibility of determining the incidence of such a phenomenon by conflating notions of sovereign interest and national welfare.

As to the key elements of Guzman’s argument, then, I am completely onboard. Welfare is the right criterion for assessing choice-of-law rules both because of its moral force (treating people as ends rather than means) and methodological robustness. Ceteris paribus, international anarchy as to jurisdiction allocation reduces welfare; strict territoruality leads to underregulation; universal resort to extraterritorial regulation through the application of the ALCOA effects test\footnote{See Guzman, supra note 1, at 906–09.} will lead to overregulation. Each of these claims is unassailably correct, as long as one lets the ceteris proviso do the heavy lifting.

The issue is not the validity of Guzman’s analysis, but rather its sufficiency. In seeking to justify an approach that, with respect to choice-of-law scholarship (although not other legal contexts), is innovative and potentially controversial, has he pursued simplicity and elegance at the expense of robustness? Given that Guzman’s project is normative rather than positive, are we not entitled to a more nuanced and complicated account of welfare issues?

I advance three propositions that fit within Guzman’s methodology but point toward different policy recommendations than those he advocates. Each reflects claims made in my prior work, which also focuses on welfare rather than sovereignty.\footnote{For my earlier work on these issues, see Stephan, Accountability, supra note 7; Paul B. Stephan, Choice of Law and Its Consequences: Constitutions for International Transactions, 26 Brook. J. Int'l L. 211 (2000); Paul B. Stephan, The Futility of Unification and Harmonization in International Commercial Law, 39 Va. J. Int’l L. 743 (1999) [hereinafter Stephan, Futility of Unification]; Stephan, supra note 2.} First, interstate efforts to coordinate legal rules come with costs as well as benefits. Second, the loosening of normative criteria applied to government agents to influence their decisionmaking also entails costs. Third, the process for choosing enforcement mechanisms has some bearing on the desirability of the choices made. The implication of private rights of action by courts has serious problems that are independent of the desirability of any particular act of implication. I elaborate on each proposition and its implications for Guzman’s specific proposals.
I. The Costs of Cooperation

Guzman makes a conventional argument about international cooperation: International organizations can promote negotiations over substantive issues by facilitating transfer payments (in other words, logrolling), and the possibility of logrolling increases the range of achievable outcomes.\(^\text{10}\) Previously, Guzman has used this argument to support the nesting of negotiations over antitrust cooperation within a multilateral forum such as the World Trade Organization (WTO).\(^\text{11}\) Depending on one's view of the third-party effects from particular transactions, it is possible to extend this position to a wide range of regulatory subjects, including environmental safeguards, product safety, worker rights, animal rights, culture and morality, intellectual property, and redistributive justice. Others more imaginative than I may add to this list.\(^\text{12}\)

The argument is correct as far as it goes, but proves less than Guzman implies. Yes, structuring negotiations in a way that embraces logrolling may increase the chances of achieving value-enhancing agreements. But these conditions also may make value-subtracting agreements more likely. In any particular case, we must ask whether the benefits of a potentially desirable agreement, discounted by the likelihood of a particular institutional structure achieving it, is greater than the costs generated by a potentially undesirable agreement, discounted by the likelihood of that structure producing such an agreement. Rarely is the answer to this question obviously in the affirmative.

There are two categories of reasons why international cooperation may produce undesirable outcomes. First, negotiators may give excessive weight to the preferences of private groups with unrepresentative preferences but especially low organizational costs. Guzman discusses this conventional public choice story, but he does not give concrete examples.\(^\text{13}\) Second, persons with an interest in the institutions established or promoted by international cooperation may seek the adoption of agreements that expand the competence, discretion, and authority of those institutions at the expense of desirable regulatory outcomes. A common example is an agreement that replaces clear rules reflecting

\(^{10}\) Guzman, supra note 1, at 936–38.


\(^{13}\) Guzman, supra note 1, at 900–04. A literature addressing this question does exist. Instances when international accords have entailed redistribution of rights that might have lowered overall welfare include the WIPO Copyright Treaty, see Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 Va. J. INT’L L. 369, 427–34 (1997), the Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, the Warsaw Convention on the Unification of Certain Rules Relating to International Transportation by Air, and the Uniform Customs and Practice for Documentary Credits, see Stephan, *Futility of Unification*, supra note 9, at 744.
best commercial practice with open-ended standards that expand the discretion of those who must interpret and apply those standards.\textsuperscript{14}

Such value-subtracting cooperation is plausible, but how likely is it? Why would conventional evolutionary pressures not apply to discourage and weed out unwise agreements? As the costs of such arrangements become clearer over time, would they not encounter increasing pressure for reform? On balance and over time, should we not expect more desirable cooperation than undesirable agreements?

Absent empirical proof, I can only offer hypotheses as to why value-subtracting international cooperation may occur more often than is normally supposed. First, the people who negotiate international agreements, as well as the people who serve the institutions that promote these negotiations, have powerful incentives to achieve some kind of agreement regardless of substantive outcome. Association with a concluded agreement brings prestige, opportunities to offer interpretation, and invitations to participate in subsequent negotiations. Second, the legislatures that must approve these agreements face take-it-or-leave-it choices that limit their power to shape what gets adopted. Thus, they are less likely to reject agreements that may reduce overall welfare. Third, the difficulty of reaching the sustained level of agreement necessary to permit frequent updates of existing agreements pushes negotiators toward delegations of lawmaking authority to international institutions. This flexibility may come at the cost of beneficial cooperation.\textsuperscript{15}

Consider, for example, the possibility of building international standards for competition law into the package of agreements administered by the WTO. Proposals to do this date back to the late 1940s, when European countries sought to constrain aggressive U.S. assertion of extraterritorial antitrust jurisdiction through the stillborn International Trade Organization (ITO).\textsuperscript{16} The United States was prepared to negotiate over WTO responsibility for competition policy coordination at the Seattle summit in 1999.\textsuperscript{17} The Doha Round of trade talks has included this proposal on its agenda.\textsuperscript{18} Proponents of this step,
including Guzman, argue that greater coordination will lead to more effective enforcement. As a result, government-sponsored or government-tolerated cartels and monopolies will give way to a new wave of competition, enhancing consumer welfare through lower prices and a wider array of goods and services. Just as centralizing competition policy at the European Community (EC) level allowed Europe to overcome the parochial and protectionist regimes that individual states had put in place, creation of a multilateral competition law will lead to suppression of those inefficiencies that current national law encourages.¹⁹

Perhaps so. But if one looks at other experiences besides the formation of Europe’s common economic space, the evidence is less convincing. The United States already has entered into at least two cooperative regimes. One, an executive agreement between the Justice Department and the EU, provides for information sharing and consultation, but does not address substantive standards.²⁰ The other, Chapter Fifteen of the North American Free Trade Agreement (NAFTA), comes closer to what a WTO-administered regime might resemble, except it precludes formal and obligatory dispute settlement of the sort that the WTO employs.²¹ Neither the executive agreement nor NAFTA seek to allocate regulatory jurisdiction. Both agreements are innocuous, doing nothing objectionable but hardly demonstrating that increased international cooperation leads to more vigorous competition law. Neither provides real support for Guzman’s claim that cooperation leads to more efficient regimes.

Moving from casual empiricism to conceptual analysis, one can advance other reasons why WTO-administered competition policy might make us worse off than we are now. More than insularity and parochialism on the part of national approaches explains the underdevelopment of international competition law. In many parts of the world—the EU in particular—governments use competition law not to promote consumer welfare but to pursue social protection. Competition bodies habitually bar consolidations within an industry that would increase consumer welfare but also would eliminate redundant jobs. Because these industries ordinarily operate less efficiently, they also require protection from foreign competition. Although trade law accomplishes some of this, governments also can wield competition law as a sword against the foreign competitors of local producers.

Strategic trade policy also gets tangled up in this.²² Governments can use

¹⁹. Guzman, supra note 1, at 935–36.
²¹. See North American Free Trade Agreement, Dec. 8–17, 1992, art. 1501(3), 32 I.L.M. 605, 663 (“No party my have recourse to dispute settlement under this agreement for any matter arising under this Article.”), available at 1992 WL 812398. For a review of WTO dispute settlement, see Stephan, supra note 17.
competition law to attack offshore threats to national champions. Using effects-based extraterritorial jurisdiction, they can both challenge current practices as contrary to their competition rules and block prospective industrial consolidation. The issue is not efficiency gains; indeed, strategic trade policy dictates attacking exactly those firms that threaten to produce more at a lower cost. For example, one reasonably could suspect that EU opposition to both the Boeing-McDonnell Douglas and the GE-Honeywell mergers was motivated by an intention to promote the interests of the Airbus consortium, not by a desire to improve the welfare of consumers of aircraft.

Add to this mix the understandable desire of institutional architects and institutional actors to expand the scope and scale of their authority, and problems only deepen. Resisting this tendency requires clear rules that minimize administrative discretion. Yet competition policy seems distinctly unsuitable for the formulation of such constraints. No nation has yet found competition policy to be reducible to precise rules, the enforcement of which entails low monitoring costs. In the United States, more than a century of practice and judicial gloss has not succeeded in creating a legal structure that prevents each new administration from lending a distinctive stamp to the content and enforcement of antitrust law.

One reason for the absence of clear, and therefore easily monitored, rules is a core uncertainty about the meaning of competition policy. Academic economists aside, a consensus as to the appropriate goals of competition law does not exist. Perhaps competition law should focus only on maximizing consumer welfare, as most economists and many others would prefer, but dispersion of concentrated economic power, social solidarity, and redistribution of wealth compete as possible ends.23 It seems implausible that an international concord could achieve closure in this debate where national deliberative processes have failed. And without widely accepted standards and transparent enforcement practices, an international institution would be free to serve its own ends at the expense of the global welfare that Guzman seeks to maximize.

Where does this leave us? I want to be careful not to make the error that I suggest Guzman may have made. I have sketched out an account of negative success in international cooperation, describing how an agreement governing competition policy may leave use worse off than does the noncooperative status quo. I have identified reasons why this scenario is plausible, but I do not assert that it is inevitable, or even that this outcome is necessarily more likely than an agreement that optimizes consumer welfare. Perhaps with enough inducement, reinforced with strong normative arguments supplied by Guzman and others, the WTO could craft an agreement on competition policy that would constrain efforts to promote job security and trade protection at the expense of consumer

welfare. My point is simply that we cannot take such an outcome for granted, and that as a result we must approach the possibility of negotiations with greater caution and skepticism than Guzman counsels.

II. ACCURATE BUT IMPRECISE STANDARDS

Guzman's article argues that the traditional criteria for allocating regulatory jurisdiction—location of the parties, domicile, and conduct—do not capture the interests at stake nearly as well as does an effects test that recognizes interested jurisdictions.\textsuperscript{24} He would have us use the traditional tests, if at all, only as a proxy for effects, and then only when the fit between proxy and the underlying effect seems reasonably close.\textsuperscript{25} Any other approach, he argues, would lead toward underregulation of international transactions because some effects of these transactions would not be taken into account.\textsuperscript{26}

As with his argument about international cooperation, Guzman's point is correct as far as it goes. In the best of all possible worlds, we should account for all the effects of a transaction and permit only those whose benefits, calculated globally, exceed their costs. The effects test is the most accurate standard for determining which jurisdictions have an interest in either authorizing or impeding particular activity. However, "most accurate" is not the same as "best."

One of the early insights of the law and economics literature was a recognition that in many contexts the formulation of a legal rule requires trade-offs between precision and accuracy, and that sacrificing either value entails costs.\textsuperscript{27} Exactly because it aspires to comprehensiveness, a rule that accounts for all its instrumental consequences, however accurate, cannot be formulated precisely. Rather, it requires a case-by-case application, as we learn ex post what particular transactions lead to. But in this environment, parties to transactions cannot know in advance what regulatory rules will apply. As a result, they must invest in precautions, including passing up otherwise desirable transactions because of uncertainty as to the applicable rules.

As open-ended standards go, the effects test is especially deficient in the precision department. To apply the effects test requires only a causation story, limited solely by the creativity of the storyteller. Consider causation arguments that actual litigants and commentators have made to seek the benefits of the effects test: Victims of overseas torts have argued that the ongoing consequences of their injuries, including the consequences to family members, constitute a local effect. In commercial cases, plaintiffs have successfully argued that a wide range of market transactions have direct effects on the United States.\textsuperscript{28}

\textsuperscript{24} Guzman, supra note 1, at 920–24.
\textsuperscript{25} Id. at 920–21.
\textsuperscript{26} Id.
\textsuperscript{27} The classic statement of the argument is Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. LEGAL STUD. 257 (1974).
\textsuperscript{28} See, e.g., Saudi Arabia v. Nelson, 507 U.S. 349, 361–63 (1993) (rejecting, over strong dissent, the argument that wrongful arrest, imprisonment, and torture constitute "commercial activity" that
In the context of securities laws, purchasers of stock have argued (so far unsuccessfully) that because of global capital markets any misleading statement made to anyone anywhere in the world may divert capital from U.S. uses and thus has an effect on the United States. 29 With respect to the Racketeering Influenced and Corrupt Organizations statute (RICO), 30 which provides treble damages to victims of specified criminal conduct, commentators have argued that the ability of organized crime to disregard national boundaries and thereby distort local markets justifies the application of this especially rigorous sanctioning scheme to all such misconduct wherever it occurs. 31 In the context of the antitrust laws, commentators have argued, and the Supreme Court seems to have agreed, that anticompetitive behavior aimed only at foreign consumers has a U.S. effect to the extent that the producer can amass a "war chest" that may fund subsequent anticompetitive behavior in the United States. 32 The point is clear: Creative lawyers can construct causation arguments that tie almost any foreign act to some local effect.

Guzman apparently recognizes this problem because he does not argue that all national regulatory schemes should be presumed to apply whenever there exists a local effect. To the contrary, he embraces the Supreme Court’s controversial presumption against extraterritoriality. This position rests on an insight about the lawmaking process. The legislature must make a choice between underregulation and overregulation in the face of contending interests, each of which has an opportunity to make its case and press its influence. Groups affected by underregulation normally would have at least as much voice in this contest as those affected by overregulation, so we may assume that choice to underregulate represents a deliberate decision of the legislature. 33

would give U.S. courts jurisdiction over defendant); Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 617 (1992) (holding that default on bonds was "commercial activity" that would subject defendant to suit in U.S. courts).


33. Guzman, supra note 1, at 925-27. Guzman recognizes that broad recognition of contractual choice of regulatory regime also serves to promote certainty and to reduce the undesirable consequences of effects-based jurisdiction. Id. at 913-15. In my earlier work, I argued for an even broader conception of consensual choice of regulatory jurisdiction, such as through an extension of the place of incorporation rule now applicable to corporate governance concepts. Stephan, supra note 2; see also O’Hara & Ribstein, supra note 2, at 1202-07 (making similar arguments).
Another way of making the same point is to characterize the presumption against extraterritoriality as an information-forcing rule. Persons who would be harmed by underregulation (typically local consumers of harmful goods and services produced abroad) are more likely to have lower costs of communicating with lawmakers about these harms than would those persons who would be harmed by overregulation (typically foreign consumers who would be unable to obtain beneficial goods and services from local producers). The better rule, arguments of this sort go, would put the burden of producing information on the persons who can do so at the lowest cost.

I agree with all this, but I fear it does not go far enough. When states have rejected territoriality, as they largely have as to antitrust, securities regulation, trademark law, and bankruptcy, we seem to face a Hobson's choice: unbridled use of the effects test leading to suboptimal noncooperation, or creation of international institutions to mediate conflicts overregulation. What other alternatives are there?

The Restatement, as well as many courts and commentators, would have us pursue a third way, consisting of a multifactored reasonableness test. This approach allows a state, on a case-by-case basis, to decline jurisdiction to regulate in instances that satisfy the effects test, if the local stakes seem insubstantial. However, I agree with Guzman that this approach achieves few benefits and increases the uncertainty costs associated with regulation. Rather than global, one-size-fits-all standards such as "reasonableness," we need jurisdictional rules that pursue precision within the confines of the structure and purposes of particular regulatory schemes.

Consider, for example, the allocation of jurisdiction to enforce intellectual property rights. The allocational test we use depends on what purpose we see these rights as serving. If we conceive of these regimes as intended principally to benefit producers by rewarding investments in the products associated with these rights, then we might rely on the effects test, inter alia, to punish in-

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34. This concept originated in contracts scholarship but has migrated to analysis of regulatory decisionmaking. For further discussion, see Gillette & Stephan, supra note 7, at 129-37. See generally Alan O. Sykes, Regulatory Protectionism and the Law of International Trade, 66 U. CHI. L. REV. 1 (1999) (arguing for a default of no exceptions for nonstandard content regulations when interpreting trade liberalization agreements).

35. Guzman also implies, correctly I think, that in the absence of any strong intuition as to which approach otherwise is superior, lawmakers should prefer the rule that generates the least uncertainty. Using this criterion, territoriality clearly beats effects. Guzman, supra note 1, at 920-21.


37. Guzman, supra note 1, at 926; see also Hartford Fire Ins. Co., 509 U.S. at 797-99 (rejecting balancing); Laker Airways, Ltd. v. Sabena, Belgium World Airlines, 731 F.2d 909, 948-50 (D.C. Cir. 1984) (same).
fringements that divert foreign sales from local producers. If we instead regard these regimes as intended to optimize consumer welfare through the promotion of interbrand competition, we might regard the question of the scope and scale of enforcement to depend entirely on the judgment of the jurisdiction where consumption takes place. The latter approach results in a straightforward territorial limitation on jurisdiction, but restricts jurisdiction further by making local production activity irrelevant.

My broader point is that we cannot put aside tests such as location, domicile, and conduct without a richer array of doctrinal tools than just effects jurisdiction and international agreements. I have argued before that there is an array of circumstances in which some combination of territoriality and consensual choice of jurisdiction is likely to bring about results that would be superior to those resulting from either universal application of the effects test or treaty-based international cooperation. The array of circumstances is greater than many have assumed. Without rejecting any of Guzman’s basic points, one can argue that his normative agenda lacks sufficient focus and does not account fully enough for the implications of the valid claims he makes.

III. PROCESS AND RULES: THE CASE OF PRIVATE CAUSES OF ACTION

Guzman argues that one way to induce states to internalize the costs of effects-based regulation is to insist on national treatment in the application of regulatory schemes. Requiring identical treatment of foreign and local persons—whether the beneficiaries or the subjects of regulation—makes it more likely that the regulating state will internalize the costs of the scheme. Fuller cost internalization will lead to better determination about the scope, as well as the content, of regulation.

I accept the argument wholeheartedly. Guzman may understate the extent to which the U.S. law of extraterritorial jurisdiction currently departs from this norm, but this does not undercut the force of his normative claim. His next step, however, presents greater complications than he acknowledges.

42. See id., at 196–98.
43. Discrimination against foreigners is pervasive in this body of law. The three-part test that U.S. courts often use to decide whether to apply a regulatory scheme to extraterritorial transactions includes the nationality of the plaintiff. See sources cited supra note 32. This approach has the effect of making it harder for foreign plaintiffs to invoke U.S. law in cases where a U.S. plaintiff could. In addition, a suit brought by a foreign plaintiff is more likely to be dismissed on grounds of forum non conveniens than is a comparable suit with a U.S. plaintiff. See, e.g., Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 101–03 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001).
To safeguard against administrative violations of the national-treatment principle, Guzman would incorporate private causes of action into existing regulatory schemes. He argues that administrative agencies face local political constraints and thus are likely to engage in selective enforcement of facially neutral rules. The inherent lack of transparency attendant to prosecutorial discretion makes it difficult to correct such tendencies. Private enforcement avoids this problem, because plaintiffs self-select in a manner that does not depend on nationality. Obstacles put in the way of private plaintiffs would have to be explicit, and thus violations of national treatment would be evident to outside observers.\textsuperscript{44}

Guzman doubtlessly has in mind how most countries in the world, except the United States, implement competition law. Almost all developed countries (not just Japan, the one example Guzman discusses) leave it to administrative agencies to decide whether mergers and other cooperative behavior harm competition. Arguably this explains why, as I suggest above, competition law in much of the world does more to protect entrenched interest groups than to promote consumer welfare. Shifting discretion to the courts to interpret and apply this law might open up more anticompetitive arrangements to attack and thereby increase both local and global welfare.

Yet the private right of action is a mixed blessing. The incentives for potential plaintiffs to initiate litigation do not necessarily correspond to those that would optimize welfare. Depending on the procedural rules in effect, plaintiffs may bear little of the costs generated by their suits and anticipate great rewards for success. The United States, with its unique combination of contingent fee arrangements, class actions, broad pretrial discovery, and both explicit (treble and punitive damages) and implicit (pain and suffering) supercompensatory damages, almost certainly has reached the point where the costs of private litigation to advance regulatory schemes exceed the corresponding benefits.\textsuperscript{45}

A doctrinal peculiarity of U.S. law exacerbates the problem of suboptimal private rights of action. If creation of the capacity to bring a private suit depended solely on the legislature, one would expect persons who may bear the costs of such suits to communicate their concerns to the lawmakers. However, U.S. courts have developed the doctrine of implied rights of action as a means of circumventing legislative consideration of this issue. Despite the occasional expression of reservations, the Supreme Court generally has gone along with judicial creation of private rights.\textsuperscript{46}

The academy for the most part has called

\textsuperscript{44} Guzman, supra note 1, at 930–33.


\textsuperscript{46} Compare Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (refusing to imply private right of action under antidiscrimination regulations implementing Title VI), with Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 648 (1999) (holding implied private right of action under Title IX extends to school indifference to peer sexual harassment). Perhaps the most extensive critique of implied private
for more judicial creativity in this field. As a result, the courts—a body that more than any other has its information filtered through lawyers, a group with a comprehensive bias in favor of expanding litigation opportunities—has the capacity to authorize private suits in the absence of any legislative action. We have every reason to believe that courts will embrace these suits well past the point where their costs exceed their benefits.

I do not mean to suggest that private enforcement of public regulatory interests necessarily is undesirable. In many instances, private litigation can serve as a check on the government’s tendency to pursue its own agenda and that of influential but unrepresentative groups. But because private suits do engender costs that, in some contexts, may exceed the benefits they produce, we need to be careful about how we decide whether to let such litigation proceed. Leaving the decision to courts may result in an oversupply of private rights of action. Requiring legislative approval, by contrast, is more likely to produce decisions that reflect the balance of interests involved.

Of course, Guzman does not call for the judicial implication of private rights of action. He only calls for more private enforcement. But in a legal environment where courts tend to exercise this prerogative and the academy for the most part cheers them on, I worry that his quite sound argument for private causes of action will be misinterpreted as a call for judicial creation of them. Such creativity would be a mistake. Many nations, Japan and the members of the EU first among them, would do well to explore the expansion of private enforcement of public regulation. The United States, having gone further down this path than any other country, has greater reasons to question what marginal benefits might come from doing more. Those steps, when they come, should reflect the deliberate and contested choice of Congress, not the happenstance of preferences realized through litigation.

CONCLUSION

Guzman’s article has two aspects, one an unqualified success and the other somewhat problematic. Although not the first effort to explore choice of law using economic tools, it is by far the most comprehensive and rigorous. His analysis provides a compelling framework for all future scholarship. As a collateral matter, Guzman contributes to a growing sense that choice of law, not rights of action appears in Cannon v. University of Chicago, 441 U.S. 677, 730 (1979) (Powell, J., dissenting). The author of that critique, however, retreated from the broadest implications of his arguments within months. See Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11, 25 (1979) (Powell, J., concurring). Nor did that critique succeed in mobilizing a majority coalition to reconsider this body of law. See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 381 (1982) (recognizing implied cause of action).

long ago thought an intellectual backwater, offers exciting opportunities for the legal academy as well as a terrain for high policy.

What Guzman chose not to do is use his analytical framework to explain contemporary doctrine. This represents a departure from the law and economics scholarship of an earlier generation, which reflected a belief that positive analysis was the principal means of validating a then-controversial methodology. One can imagine, for example, an article that sought to demonstrate that the seemingly confused and inconsistent doctrines currently invoked in conflicts cases obscure an underlying rationality based on welfare and evolutionary considerations. That, however, is not Guzman’s project.

Over the last decade or so, an increasing number of scholars have sought to go beyond positive analysis to use economic concepts as a basis for advocating law reform. This normative move in law and economics writing has become dominant, and I do not fault Guzman for making it. But his article does reveal some of its pitfalls.

Guzman persuasively makes the case that, under certain limiting assumptions, specified steps to change the rules for choice of law would increase welfare. The obvious comeback, as illustrated by my arguments here, is to show how limiting the assumptions may be. Law reform must take place in a messy world, and reform proposals must account for the mess. Ideas that seem clear in their formulation become muddled in their application. Normative work cannot proceed any other way.