

# ARTICLES

## Extraterritorial Common Law: Does the Common Law Apply Abroad?

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*The extraterritorial scope of U.S. law is of profound importance to our courts as they confront transnational tort claims stemming from foreign-based human rights violations, acts of terrorism, and other harms occurring all over the globe. Scholars to date have focused on the extraterritorial application of federal statutes, such as the Alien Tort Statute, while devoting far less attention to the extraterritorial application of state law and almost none to state common law. Recently, however, the Supreme Court has invoked and revitalized the statutory presumption against extraterritoriality to restrict application of federal statutes beyond U.S. borders. Soon, most plaintiffs may be left only to remedies under state law, and courts and scholars alike will confront whether state common law should be subject to the same kind of presumption against extraterritoriality that applies to federal statutes. Our courts cannot sensibly resolve these claims without a principled understanding or theory of the geographical reach of our common law.*

*This Article argues against new or presumptive limits on the extraterritorial application of the common law. It breaks new ground by laying a foundation to establish why the geographical scope of the common law should differ from the geographical scope of statutes. First, this Article shows that, under the Erie doctrine, state courts—not federal courts—should decide the geographical reach of their common law, as they already do under well-established choice-of-law rules. Second, this Article shows how jurisprudential differences between the common law and statutes explain why the common law—perhaps counter-intuitively—should not be subject to a presumption against extraterritoriality. This analysis holds significant implications for the future of human rights and other transnational tort claims in U.S. courts and for the endurance of extraterritorial common law.*

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## INTRODUCTION

Just how long is the “long arm” of U.S. law? When Congress passes a law, does the law screech to a stop at the U.S. border? Or does the law leapfrog abroad to regulate or penalize what people or companies do in foreign countries? What if it is one of the U.S. states—not Congress—that does the regulating: may a state’s law control what people do in foreign countries any differently than a law of Congress? More basically still, what limits exist for our common, unwritten law: does the common law travel abroad?

Most of Congress’s laws are “geoambiguous”—Congress lays down a statutory rule but does not say how geographically far its rule runs.<sup>1</sup> Most state

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1. See Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 114, 119 n.39 (2010) (discussing and cataloging “geoambiguous” federal laws that leave their geographical scope ambiguous).

statutes are the same. But as for the common law, it has no text at all—the common law is inherently and invariably geoambiguous. And it remains mysteriously so because little academic attention has been paid to understanding and theorizing the international extraterritorial reach of the common law. Scholars have devoted great effort to examining how our Constitution and statutes apply abroad,<sup>2</sup> but have given almost no consideration to the geographical reach of our common law.<sup>3</sup>

Still, what academics overlook are questions more than academic. U.S. oil companies allegedly dump waste in Amazon jungles.<sup>4</sup> U.S. fruit and chemical companies allegedly poison laborers with pesticides on African and Central-American banana plantations.<sup>5</sup> U.S. fruit and drink companies allegedly abuse and kill workers in Colombia.<sup>6</sup> Many U.S. companies eventually face lawsuits

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2. See generally KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?* (2009); Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655 (2011); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009); Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225 (2010); Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011); William S. Dodge, *Morrison's Effects Test*, 40 SW. L. REV. 687 (2011); Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55 (2011); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351 (2010); Meyer, *supra* note 1; Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673 (2012) [hereinafter Parrish, *Evading Legislative Jurisdiction*]; Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815 (2009) [hereinafter Parrish, *Reclaiming International Law from Extraterritoriality*].

3. Several scholars have cogently addressed the interests of states in having their law apply extraterritorially and with particular attention to whether federal law preempts internationally extraterritorial application of state law. They have not, however, focused as this Article does on state common law or addressed in detail as this Article does why the conventional statutory presumption against extraterritoriality should not territorially limit state common law claims. See, e.g., Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 712–713 (2012); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1068–92 (2009) [hereinafter Florey, *State Courts*]; Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of Morrison v. National Australia Bank*, 92 B.U. L. REV. 535, 555 (2012) [hereinafter Florey, *State Law*]; Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*, 51 WM. & MARY L. REV. 87, 121–34 (2009).

4. See, e.g., *Chevron Corp. v. Naranjo*, 667 F.3d 232, 234–35 (2d Cir.) (multibillion-dollar lawsuit by residents of Ecuador against Chevron Corporation arising from oil pollution in Amazon region of Ecuador), *cert. denied*, 133 S. Ct. 423 (2012); *Carijano v. Occidental Petrol. Corp.*, 643 F.3d 1216, 1222 (9th Cir. 2011) (lawsuit by residents of Peru against U.S. company and Peruvian subsidiary for dumping of oil waste in Peru).

5. See, e.g., *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1311–12 (S.D. Fla. 2009) (describing history of multibillion-dollar litigation by residents of Nicaragua against Dole Food Company and Dow Chemical Company), *aff'd*, 635 F.3d 1277 (11th Cir. 2011); *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 735 (9th Cir. 2008) (lawsuit by banana and pineapple plantation workers of Ivory Coast against multinational companies allegedly responsible for harm from sterility-causing pesticide).

6. *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1305–06 (S.D. Fla. 2011) (lawsuit by Colombian workers against Chiquita Brands International alleging its complicity in gross violations of human rights by a paramilitary organization in Colombia); see *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 742–43 (9th Cir. 2011) (lawsuit by residents of New Guinea

in U.S. courts from U.S. or foreign plaintiffs, lawsuits that often rely in part on geoambiguous common law claims like assault and negligence.<sup>7</sup> Thousands of plaintiffs have lodged claims for billions of dollars. Our courts cannot sensibly resolve these claims without a principled understanding or theory of the geographical reach of our geoambiguous common law.

When it is Congress that passes a law, the Supreme Court presumes the law to stop at the nation's borders. It is no less than a "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."<sup>8</sup> This so-called statutory presumption against extraterritoriality means that a geoambiguous federal statute—precisely because of its territorial ambiguity—applies only at home. State courts do the same for their own states' statutes.<sup>9</sup>

Not so for the common law. Because the presumption against extraterritoriality is wholly a creature of statutory interpretation, the presumption—like any other rule of statutory application—has no application to the common law. Rather than being subject to a statutory presumption, the geographical range of state common law is subject to limit only by background principles of choice of law.<sup>10</sup>

This difference matters. While the presumption against extraterritoriality is all about imposing presumptive territorial limits on legal obligations, choice-of-law rules are not nearly so territorially deterministic. Indeed, modern choice-of-law rules have morphed away from sole reliance on territoriality and evolved instead toward multifactor, interest-balancing tests that open the door for courts to apply state law to govern disputes involving foreign injuries.<sup>11</sup>

It follows that if a U.S. plaintiff or U.S. defendant is a party to a lawsuit in a U.S. court for injuries sustained in a foreign country, a fair probability exists that modern choice-of-law principles will lead a court to apply the U.S. forum state's common law to the dispute rather than the law of the foreign country where the injury occurred. Thus, the common law—because of its regulation by means of porous, *non*-territorially deterministic choice-of-law principles—is prone to migrate to foreign countries more than statutes that presumptively stop at our border.

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against major British and Australian mining companies arising from alleged human rights abuses), *cert. granted, vacated, and remanded*, 133 S. Ct. 1995 (2013); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1257 (11th Cir. 2009) (lawsuit by Colombian workers against Coca-Cola alleging that it collaborated with Colombian paramilitary forces to murder and torture workers).

7. *See infra* section I.D (citing and discussing transnational tort cases involving state common law claims).

8. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991)).

9. *See infra* section II.A.

10. *See infra* section II.B.

11. *See, e.g.*, LEA BRILMAYER AND JACK GOLDSMITH, *CONFLICTS OF LAW* 724 (5th ed. 2002); Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 724–30 (2009) (describing modern choice-of-law doctrines applied by different states).

This outcome might seem odd and troubling for at least two reasons. First, the common law is conventionally thought to be subordinate to statutory law. Legislatures are free to trump judge-made common law rules. As between a statute-based rule and the common law, why should the weaker form of law enjoy a presumptively broader extraterritorial range? Second, at least since the Supreme Court's landmark decision in *Erie Railroad Co. v. Tompkins*,<sup>12</sup> the common law is principally a creature of state law, not federal law.<sup>13</sup> Yet it is ordinarily our federal government—rather than individual states—that retains primary authority to regulate (if at all) any conduct that occurs abroad.<sup>14</sup> Ultimately, the absence of a common law cognate for the statutory presumption against extraterritoriality paradoxically privileges the common law—a weaker and more traditionally “domestic” form of U.S. law—to the broadest international extraterritorial reach.

Is this a problem? At least one leading judge thinks so. In a recent dissent dealing with whether U.S. contractors should be liable at state common law for the human rights abuses of prisoners at the infamous Abu Ghraib prison in Iraq, Judge J. Harvie Wilkinson warned of the prospect that “the [common law] tort regimes of all fifty states [might] be applied to conduct occurring in every corner of the earth,” and he argued for no less than a “presumption against extraterritorial application of state law.”<sup>15</sup>

In the meantime, the Supreme Court has recently ruled in *Kiobel v. Royal Dutch Petroleum Co.* to apply the statutory presumption against extraterritoriality to severely curtail the extraterritorial application of the Alien Tort Statute (ATS)<sup>16</sup>—a federal statute that to date has served as the primary vehicle for scores of lawsuits in the U.S. courts arising from human rights violations in foreign countries.<sup>17</sup> With U.S. courts now presumptively barred from applying the ATS (as well as other federal tort statutes like RICO) to conduct in foreign

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12. 304 U.S. 64 (1938).

13. See, e.g., *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011) (describing the very limited scope of the “new’ federal common law” after *Erie*); Donald Earl Childress III, *When Erie Goes International*, 105 Nw. U. L. REV. 1531, 1558 (2011) (describing areas of specialized federal common law). But see Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 755 (2013) (contending that federal courts engage in “under-the-radar” efforts to fashion federal common law).

14. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (“Our system of government is such that . . . the interest of the people of the whole nation[] imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.”).

15. *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 234 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting); see *id.* at 225–26 (noting that “[t]he actions here are styled as traditional ones and wrapped in the venerable clothing of the common law” and listing common law causes of action to include assault-and-battery, intentional infliction of emotional distress, and negligent hiring and supervision).

16. 28 U.S.C. § 1350 (2006).

17. *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013); see *infra* notes 60–63 and accompanying text.

countries,<sup>18</sup> the focus in transnational tort cases will soon turn to state common law tort claims,<sup>19</sup> and our courts will doubtlessly be confronted with arguments that state common law—just like federal statutes—should presumptively apply only to conduct within U.S. borders.

This Article argues against imposing new limits on the international extra-territorial application of state common law. It breaks new ground by laying a foundation for understanding why the geographical scope of the common law should differ in principle from the geographical scope of statutes. And it shows on this basis why state common law claims should *not* be subject to new geography-limiting rules such as a categorical presumption against extraterritoriality as applied to statutes. No scholars have addressed this issue in depth, and it has cardinal significance for future transnational tort litigation.

To begin with, the extraterritorial application of state common law is already independently regulated by each state's choice-of-law rules, and these choice-of-law rules in operation often defer to a foreign country's law rather than a state's own law. But, as this Article shows, even when choice-of-law rules permit a state's common law to apply to a tort that occurs in a foreign country (such as when a U.S. citizen is a plaintiff or a U.S. company is a defendant), this case-specific application does not raise federal due process or foreign-affairs preemption concerns of the kind that the Supreme Court has found to be implicated when states have attempted by statute to regulate outside their borders.<sup>20</sup>

Yet, just because the Constitution does not categorically bar a state from applying its common law to torts in foreign countries, this does not explain *why* the courts should treat the common law any differently than statutes that are subject to the presumption against extraterritoriality. Indeed, it could be argued that, because the *Erie* doctrine requires a federal court to treat each state's common law like positive law that is equivalent to statutory law, *Erie* must mean that courts should also impose the same geographical limits on the common law as they apply to statutes by means of the statutory presumption against extraterritoriality. But, as this Article shows below, this argument overlooks the purpose and limits of *Erie*, which sets forth a rule of obedience only for federal courts and does not restrict state judges from developing and

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18. See, e.g., John R. Crook, *Second Circuit Rules RICO Does Not Reach Extraterritorially*, 106 AM. J. INT'L L. 643, 657 (2012) (citing and discussing *Cedeño v. Castillo*, 457 F. App'x 35, 37 (2d Cir. 2012)).

19. See, e.g., Childress, *supra* note 3, at 739 (noting that “[p]erhaps we are about to witness a new wave of human rights litigation not based on the ATS but based on state law or even foreign law”); Florey, *State Law*, *supra* note 3, at 549 (predicting “the replacement of federal actions involving foreigners by equivalent suits under state law”); Christoper A. Whytock, Donald Earl Childress III & Michael D. Ramsey, *Foreword: After Kiobel—International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1, 5 (2013) (noting that, after *Kiobel*, “plaintiffs alleging human rights violations are increasingly likely to consider pursuing their claims in state courts or under state law”).

20. See *infra* section II.A.

applying their own common law (or determining its geographical limits). Moreover, if state courts decide to apply their common law to foreign-based conduct, then *Erie*'s rule requires federal courts to follow suit and to allow for extraterritorial application of common law.<sup>21</sup>

Assuming then that *Erie* empowers state courts to apply their common law more geographically broadly than state or federal statutes that are restrained by the presumption against extraterritoriality, the core question remains: just *why* should courts allow the common law a broader geographical range than statutes? The answer I suggest is because the common law is inherently different from statutes in at least three ways that integrally matter to evaluating the common law's presumptive extraterritorial reach.

First, the common law is truly "common" law in the sense that it draws upon first and historical principles that ordinarily transcend geographical boundaries. For this reason, courts have long presumed the common law to be "common" across international borders in ways that statutes generally are not.<sup>22</sup> Second, the common law is the law of the "commoner" in the sense that it has evolved from the customs and relations of the common people, rather than being legislatively ordained. Common law rules emerge over time from people's everyday relationships, and there is little reason to suppose these rules of relationship and dispute resolution were intended to be aligned along tidy geographical lines.<sup>23</sup> Third, the common law is a "constrained" law, subject to long-established practices that restrain its development more than legislatively driven statutes. In contrast to statutes that ordinarily prospectively regulate classes of actors, the common law is generally retrospective in orientation and developed in the context of resolution of a single dispute. There is little reason to presume that legislatures would want blanket territorial limits on the common law because they understand that the common law, as judge-made law, operates differently from statutory law. Judges are constrained by long-established methodological limits on the making of common law, and the common law applies only in the context of specific disputes and not as a general cross-border regulatory tool.<sup>24</sup>

These inherent and persistent distinctions between the common law and statutes all suggest that a judge's decision to apply a common law duty to foreign-based conduct is far less an intrusion on the coequal regulatory authority of foreign sovereign states than is the extraterritorial application of statutes. Moreover, provided that any extraterritorial application of the common law is subject to the limitations already imposed by modern choice-of-law principles, foreign states have little grounds for complaint because modern choice-of-law principles are highly similar to the customary rules of international prescriptive

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21. See *infra* section II.B.

22. See *infra* section II.C.

23. See *infra* section II.C.

24. See *infra* section II.C.

jurisdiction.<sup>25</sup> In short, the manifold distinctions between the common law and statutes weigh against any contention that the common law automatically should be subject—like statutes—to a general or categorical presumption against extraterritoriality.<sup>26</sup>

Part I of this Article first examines the statutory presumption against extraterritoriality as it has developed and been applied in both federal and state cases. It further examines what few geographical limitations courts have applied to the common law, showing how modern choice-of-law analysis opens the door to extraterritorial application of state common law beyond comparable federal or state statutes. The statutory presumption against extraterritoriality subjects statutes to explicit territorial limits, while the common law remains free to roam across U.S. borders to remedy misconduct abroad. Part II evaluates the arguments for whether the common law should be as geographically bound as statutory law and shows why the common law should not be subject to special geographical limits such as a presumption against extraterritoriality. I conclude that there is and should be extraterritorial common law.

#### I. EXTRATERRITORIALITY—PRESUMPTION OR CHOICE?

The geographical reach of federal statutes has long confounded the courts and commentators alike. That is in part because most federal statutes are “geoambiguous,” in the sense that Congress routinely fails to say whether its laws apply to conduct that occurs outside U.S. borders.<sup>27</sup> And when Congress is silent, that leaves it to the courts to decide whether the duties imposed by federal statutes should apply to what U.S. citizens or others do in foreign countries.<sup>28</sup>

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25. See *infra* section II.C.

26. Apart from identifying distinctions between the common law and statutes that may warrant allowing the common law a broader extraterritorial reach than statutes, this Article does not join the broader normative debate about the costs and benefits of applying state tort law to transnational disputes involving foreign-based conduct. See, e.g., Anthony J. Colangelo & Kristina A. Kiiik, *Spatial Legality, Due Process, and Choice of Law in Human Rights Litigation Under U.S. State Law*, 3 U.C. IRVINE L. REV. 63, 79 (2013) (raising concerns that “application of uniquely U.S. law, like state tort law, to foreign conduct could defeat defendants’ right to fair notice” and would be unfair if the “activity abroad . . . is compelled by the foreign law governing the place where the activity occurred”); Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127, 136 (2013) (contending on the basis of a comparison of outcomes in U.S. cases under the ATS and British cases under the common law that “the common law approach to business human rights compares quite favorably with the alien tort approach”); Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend?*, 3 U.C. IRVINE L. REV. 25, 27 (2013) (arguing that future state court international human rights litigation is “at best a short-term palliative” and “a poor substitute for more traditional, multilateral, and collaborative international lawmaking”); *id.* at 41 (arguing that there is “something uncomfortable about addressing claims like genocide or torture through state common law claims of wrongful death or battery” and that “state claims potentially undermine the expressive function of human rights cases by belittling the importance of the claims”).

27. See Meyer, *supra* note 1 (discussing and cataloging “geoambiguous” federal laws).

28. I use the term “extraterritorial” law in this Article to refer to “domestic law that regulates conduct abroad.” See Parrish, *Evading Legislative Jurisdiction*, *supra* note 2, at 1678 & n.16 (collecting



This choice whether to apply U.S. law to foreign-based conduct presents a dilemma between respecting the values of traditional Westphalian nation-state sovereignty and taking advantage of the political and economic benefits that the United States might enjoy by propagating its legal values abroad.<sup>29</sup> Scholars have divided on this issue because “extraterritoriality and the norm against it have no consistent valence, or at least the valence is not always so clear in an age of terrorism, international business, and globalization.”<sup>30</sup>

Some scholars—the “territorialists”—affirm the virtues of traditional territorial limits on each state’s power,<sup>31</sup> and they maintain that judges should be very reluctant to interpret a geoambiguous statute to regulate foreign-based conduct.<sup>32</sup> By contrast, other scholars—the “unilateralists”—contend that geoambiguous U.S. statutes should presumptively apply to foreign-based conduct that causes unwanted effects inside the United States.<sup>33</sup> In their view, aggressive application of U.S. law to conduct abroad will tend to counteract systemic underregulation of globally harmful activity, and unilateral action may spur other countries to join with the United States to regulate the same unwelcome conduct.<sup>34</sup>

Still a third group of scholars—the “interests-balancers”—favor a case-by-case balancing approach as reflected in Section 403 of the Restatement (Third) of Foreign Relations Law.<sup>35</sup> When more than one state has some claim to

sources); *see also* *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1664 (2013) (discussing statutory presumption against extraterritoriality in the context of “whether a claim may reach conduct occurring in the territory of a foreign sovereign”).

29. *See Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226, 1228 (2011); Parrish, *Evading Legislative Jurisdiction*, *supra* note 2, at 1688–91.

30. *Developments in the Law: Extraterritoriality*, *supra* note 29.

31. *See, e.g.*, *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) (Marshall, C.J.) (“No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.”).

32. *See* Austen Parrish, *The Effects Test: Extraterritoriality’s Fifth Business*, 61 VAND. L. REV. 1455, 1462, 1493–94 (2008); *see also* Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT’L L. 251, 308–09 (2006) (not advocating a strict territorialist view but contending that foreign state consent should be sought as a prerequisite to application of U.S. regulatory standards to foreign-based conduct).

33. *See* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101, 104–05 (1998) [hereinafter Dodge, *Extraterritoriality*]; *see also* William S. Dodge, *An Economic Defense of Concurrent Antitrust Jurisdiction*, 38 TEX. INT’L L.J. 27, 34 (2003) [hereinafter Dodge, *An Economic Defense*]; Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT’L L. 53, 57 (1995); Jonathan Turley, “When in Rome”: *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 602–03 (1990).

34. Dodge, *Extraterritoriality*, *supra* note 33, at 153; *see also* Dodge, *An Economic Defense*, *supra* note 33, at 34–35.

35. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402–03 (1987) [hereinafter FOREIGN RELATIONS RESTATEMENT] (setting forth potential grounds for state to assert jurisdiction to prescribe and describing multiple “reasonableness” factors to be balanced and weighed when more than one state has an interest in prescribing conduct at issue); *see also* Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL’Y INT’L BUS. 1, 86–90, 100 (1992) (advocating for a test similar to the

regulate a given activity, the interests-balancers would vest judges with power to weigh multiple factors—such as the location of the conduct, the nationality of the actors, and the overall policy interests of each affected state—to decide which nation has the greatest policy interest in regulating the conduct at issue and hence whether a geoambiguous statute should apply to particular foreign-based conduct.<sup>36</sup>

#### A. THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The Supreme Court has not explicitly adopted any of the scholars' approaches,<sup>37</sup> but of late it has steered closest to the territorialist vision by invoking and applying a presumption against the extraterritorial application of federal statutes. As the Court has explained, "[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."<sup>38</sup> The Court has made clear that the presumption against extraterritoriality is "a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate."<sup>39</sup> As Justice Antonin Scalia recently put it, "[t]he legislature need not qualify each law by saying 'within the territorial jurisdiction of this State'" because "[t]hat is how statutes have always been interpreted."<sup>40</sup>

The presumption against extraterritoriality primarily "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign mat-

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Restatement); Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42, 43–52 (1995) (advocating for the Restatement's interests-balancing approach).

36. FOREIGN RELATIONS RESTATEMENT, *supra* note 35, § 403 (listing eight "interests" factors to consider when deciding whether a U.S. law should apply abroad, including not only "the likelihood of conflict with regulation by another state," but also the "importance of regulation to the regulating state," as well as "the extent to which another state may have an interest in regulating the activity," and also more generally "the importance of the regulation to the international political, legal, or economic system").

37. Others have recently proposed more tests. See Colangelo, *supra* note 2, at 1022–24 (arguing that extraterritorial scope of geoambiguous statutes should depend on source of congressional authority and its relation to whether a federal statute is implementing substantive international law); Meyer, *supra* note 1, at 1119 (proposing a rule of "dual illegality" that would allow for the application of geoambiguous statutes to foreign-based conduct in instances (1) when the same conduct is dually illegal or similarly regulated in both the United States and in the jurisdiction where the conduct occurred and (2) where the United States otherwise has a prima facie basis in the customary law of international jurisdiction to regulate such conduct).

38. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (citations and internal quotation marks omitted).

39. *Id.* Scores of federal criminal statutes are explicitly extraterritorial. See Meyer, *supra* note 1, at 181–83 (listing extraterritorial federal crimes involving universal crimes, foreign-based activity of U.S. citizens, and foreign-based activity causing harmful effects inside the United States or harming U.S. government property).

40. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 268–69 (2012).

ters.”<sup>41</sup> In addition, the presumption “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord,”<sup>42</sup> although the Court has made clear that the presumption categorically “applies regardless of whether there is a risk of conflict between the American statute and a foreign law.”<sup>43</sup> Whatever its purposes, the presumption against extraterritoriality means that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”<sup>44</sup>

The Supreme Court has long invoked the presumption against extraterritoriality. More than a century ago, in the landmark case of *American Banana Co. v. United Fruit Co.*, the Court declined to apply the Sherman Act to alleged market-predatory conduct between two U.S. companies in Central America.<sup>45</sup> Justice Holmes explained that “[a]ll legislation is prima facie territorial,” and that “in case of doubt,” a statute such as the Sherman Act should be construed “as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”<sup>46</sup> Indeed, it was the “general and almost universal rule” that “the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”<sup>47</sup>

Although the Supreme Court has sometimes departed from the strict territoriality approach of *American Banana*,<sup>48</sup> it has nonetheless frequently invoked the presumption against extraterritoriality to preclude application of U.S. statutes to foreign-based conduct. Thus, for example, it has declined to apply the protections of federal labor law to regulate the employment of a U.S. citizen by a U.S. company on public-works projects in Iraq and Iran.<sup>49</sup> Similarly, it has barred application of the Civil Rights Act of 1964 to prevent a U.S. company from discriminating against a U.S. employee in Saudi Arabia.<sup>50</sup> Likewise, it has curbed the geographical scope of a federal criminal law to prevent its application in circumstances where one of the elements of the offense involves a defendant’s extraterritorial activity.<sup>51</sup>

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41. *Morrison*, 130 S. Ct. at 2877.

42. *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991)); see also *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007) (“[C]ourts should ‘assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.’” (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004))).

43. *Morrison*, 130 S. Ct. at 2877–78 (citation omitted).

44. *Kiobel*, 133 S. Ct. at 1664 (quoting *Morrison*, 130 S. Ct. at 2878).

45. 213 U.S. 347 (1909).

46. *Id.* at 357 (internal quotation marks omitted).

47. *Id.* at 356.

48. See SCALIA & GARNER, *supra* note 40, at 271 (noting that “courts have often watered down the presumption against extraterritoriality” and “[i]n some cases they have even ignored it” and citing examples of the extraterritorial application of federal securities and antitrust laws).

49. *Foley Bros. v. Filardo*, 336 U.S. 281 (1949).

50. *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244 (1991).

51. *E.g.*, *Small v. United States*, 544 U.S. 385 (2005) (holding that the federal felon-in-possession-of-a-firearm statute does not apply to felons whose predicate felony conviction was sustained in a court of

More recently, in *Morrison v. National Australia Bank Ltd.*, the Court resoundingly reaffirmed the presumption against extraterritoriality en route to curbing the geographical scope of the principal antifraud provision of U.S. securities law.<sup>52</sup> The facts in *Morrison* involved fraudulent misstatements made in Florida by a Florida-based corporate subsidiary of an Australian company; when the Australian company was later forced to write-down the value of the Florida company's assets, the company's share price dropped on the Australian stock exchange.<sup>53</sup> Invoking the categorical presumption against extraterritoriality, the Court rejected a more flexible "conduct-and-effects" test that had long been applied by numerous federal courts of appeals to determine if the securities laws applied to cases involving foreign companies.<sup>54</sup> The conduct-and-effects test had required judges to evaluate on a case-by-case basis the reasonableness of applying U.S. securities law to a given factual context based on "whether the wrongful conduct occurred in the United States" or, if not, "whether the wrongful conduct had a substantial effect in the United States," all in order to purportedly "point[] the way to what Congress would have wished" with respect to the geographical scope of the law.<sup>55</sup>

Justice Scalia's majority opinion derided the conduct-and-effects test on practicality grounds as a test that is "not easy to administer" and that had resulted in "a proliferation of vaguely related variations" concerning what kind of conduct and effects would be taken into account to decide if the antifraud securities law should be applied.<sup>56</sup> He further noted that the conduct-and-effects test improperly took nationality of the victims of stock fraud into account: the test "appl[ie]d differently depending on whether the harmed investors were Americans or foreigners" and in a manner that favored suits brought by U.S. investors.<sup>57</sup>

More fundamentally, Justice Scalia faulted the conduct-and-effects test for its lack of "a textual or even extratextual basis" in the securities statute and also for impermissibly vesting judges with power to "essentially resolv[e] matters of policy" and to "balanc[e] interests and arriv[e] at what seemed the best policy" about the geographical scope of U.S. law.<sup>58</sup> According to Justice Scalia, the conduct-and-effects test amounted to no less than "judicial-speculation-made-law," and he noted that "using congressional silence as a justification for

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a foreign country). The Court has similarly applied the presumption against extraterritoriality in other contexts. *See, e.g.,* *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55 (2007) (patent law); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173–74 (1993) (immigration law prohibiting Attorney General from returning interdicted off-shore refugees to Haiti where they could face persecution); *Smith v. United States*, 507 U.S. 197, 204 (1993) (Federal Tort Claims Act for conduct in Antarctica).

52. 130 S. Ct. 2869 (2010).

53. *See id.* at 2875–76.

54. *Id.* at 2879–81.

55. *Id.* at 2879 (citations and internal quotation marks omitted).

56. *Id.* at 2879–80.

57. *Id.* at 2879.

58. *Id.* at 2879–80.

judge-made rules violates the traditional principle that silence means no extraterritorial application” of U.S. law.<sup>59</sup>

Most recently still, the Court has once again reaffirmed the presumption against extraterritoriality to curb the geographical application of the principal federal statute that has been used in recent decades to litigate transnational human rights claims in U.S. courts.<sup>60</sup> In *Kiobel*, plaintiffs from Nigeria filed suit in a New York federal court against British, Dutch, and Nigerian oil companies alleging that the companies aided and abetted the Nigerian government in committing severe human rights violations in Nigeria.<sup>61</sup> The plaintiffs invoked the federal ATS, which provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>62</sup>

Prior to *Kiobel*, the ATS had been controversially used in recent decades as grounds to litigate in U.S. courts a vast variety of claims involving human rights violations in foreign countries.<sup>63</sup> Indeed, many scholars have noted the central role of the ATS in transnational human rights litigation in the U.S. courts.<sup>64</sup> But the Court ruled in *Kiobel* that because the alleged human rights abuses had occurred in the territory of a foreign sovereign, the presumption against extraterritoriality prevented application of the ATS to the foreign corporate defendants.<sup>65</sup> The Court added that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”<sup>66</sup>

With the ATS now geographically restricted, future plaintiffs will likely press causes of action under state law for foreign-based human rights abuses. Possible

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59. *Id.* at 2881.

60. *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1662–63 (2013).

61. *Id.* The plaintiffs were Nigerian nationals who had been granted political asylum in the United States by the time that the case was heard by the Supreme Court. *Id.* at 1663.

62. 28 U.S.C. § 1350 (1948). As the Court noted in *Kiobel*, the ATS by its terms is a strictly jurisdictional provision, such that a cause of action under the ATS is based on federal common law. 133 S. Ct. at 1664.

63. See Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 458–65 (2011); see also Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991) (describing the phenomenon of transnational public law litigation stemming from litigation under the ATS).

64. See, e.g., Childress, *supra* note 3 (noting that the “importance” of the ATS “cannot be [over]-stated” and summarizing the number of ATS suits filed); *Developments in the Law: Extraterritoriality*, *supra* note 29, at 1233 (stating that the ATS “has become a lynchpin of international human rights activism” in past thirty years); Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2162 (2012) (noting “enormous increase in litigation against corporate defendants” under the ATS in recent years). Scholars have long debated about what the ATS means in terms of the relationship between U.S. law and international law. See, e.g., Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 2–4 (2009) (summarizing the debate among scholars about whether state law incorporates international law); Carlos M. Vázquez, *Alien Tort Claims and the Status of Customary International Law*, 106 AM. J. INT’L L. 531, 532–35 (2012).

65. 133 S. Ct. at 1669.

66. *Id.* at 1659.

state-law alternatives will continue to be significant not only for human rights claims that arise from multinationals' corporate activity but also for a range of claims by U.S. citizens when they are injured abroad, such as when they are victims of foreign terrorist activity.<sup>67</sup>

These developments pose a question of the extraterritorial reach of state law: should state common law causes of action be subject to the same kind of presumption against extraterritoriality that constrains the reach of federal statutes? Should there be—as Judge Wilkinson would have it—no less than a categorical presumption against extraterritorial application of state common law? Before addressing this question, it is necessary by way of additional background to consider the ambit of choice-of-law principles as they might apply to limit application of state law in an international context.

#### B. CHOICE OF LAW

Because many disputes have connections to two or more states or foreign countries, U.S. courts apply choice-of-law principles to decide which state's or country's law should apply to a particular dispute. Any one state's or country's application of its own law to a dispute involving foreign-based conduct essentially amounts to an extraterritorial application of its law.

In similar fashion to the present-day statutory presumption against extraterritoriality, choice-of-law principles used to strongly favor application of the law of the place where an injury occurred—with the result that U.S. law would not ordinarily apply to torts that occurred in foreign countries.<sup>68</sup> Under principles of *lex loci delicti* as embodied in the Restatement (First) of Conflict of Laws, U.S. courts sought to identify a *single* “place of wrong” to govern the choice of which jurisdiction's law would apply.<sup>69</sup> The First Restatement supposed that “[t]he common law selects some particular point in the train of events as the place of wrong”<sup>70</sup> and that “[t]he law of the place of wrong determines whether a person has sustained a legal injury.”<sup>71</sup> Thus, “[w]hether a particular harm which a plaintiff has sustained constitutes an injury for which he may recover compensation is determined by the law of the place of wrong.”<sup>72</sup>

For tort cases, the First Restatement posited the following rule of thumb: “[t]he place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”<sup>73</sup> Thus, for personal injury torts,

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67. See *infra* cases discussed in section I.D.

68. See Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1130–32 (2010) (discussing evolution of choice-of-law doctrines); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 493–95 (2011) (same).

69. See Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 HASTINGS L.J. 337, 345–46 (2009) (describing place-of-wrong approach).

70. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 cmt. a (1934).

71. *Id.* § 378.

72. *Id.* § 378 cmt. b.

73. *Id.* § 377.

“the place of wrong is the place where the harmful force takes effect upon the body.”<sup>74</sup> For example, if “A, standing in state X, fires a gun and lodges a bullet in the body of B who is standing in state Y,” then “[t]he place of wrong is in Y.”<sup>75</sup> As a result, the law of the state where the harm occurred applies, and “[i]t is quite immaterial in what state [the defendant] set the force in motion”; instead, “[t]he question is only where did the force impinge upon [plaintiff’s] body.”<sup>76</sup> The place-of-wrong approach would virtually dictate that a U.S. court, confronted with a foreign plaintiff alleging a foreign tort or human rights violation, would apply the foreign country’s law—even if the wrongdoer was a U.S. citizen or if much of the injury-causing conduct occurred in the United States. As Justice Holmes declared a century ago, “[w]ith very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it.”<sup>77</sup>

But choice-of-law principles have long since evolved from traditional *lex loci delicti*. Since at least the 1960s, this territorially deterministic approach has given way to a variety of “modern” choice-of-law principles that bear varied monikers such as the “significant contacts” test, the “significant relationship” test, and the “governmental interests” test.<sup>78</sup> The advent of these modern theories means that, instead of automatically defaulting to the law of the place where an accident or injury occurred, judges invite the possibility of applying a forum state’s own law to out-of-state injuries: the modern cases ask “whether there were ‘contacts’ between the forum and the controversy, whether application of local law [of the place of injury] was ‘fair,’ and whether the [forum] state had an ‘interest’ in having its law applied.”<sup>79</sup> The modern approach abandons “the single-mindedness of the *lex loci delicti* rule” and instead “rel[ies] on multiple contacts, factors, and policies” to decide which jurisdiction’s law should apply.<sup>80</sup>

Today more than eighty percent of U.S. states have abandoned the *lex loci delicti* rule in favor of a variety of forum-favoring modern approaches.<sup>81</sup> Nearly

74. *Id.* § 377 cmt. a, n.1.

75. *Id.* § 377 cmt. a, illus. 1.

76. *Id.* § 377 cmt. a, n.1; *see id.* § 378 cmt. b (“It is immaterial whether by the law of the forum, or by the law of the place where the actor acted, the harm in question was or was not a legal injury.”).

77. *Cuba R.R. Co. v. Crosby*, 222 U.S. 473, 478 (1912).

78. Lee Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1226–27 (1992) (describing transition to modern choice-of-law principles); Symeonides, *supra* note 69, at 346–47 (same); *see* Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1637–41 (2005) (describing the historical evolution of choice-of-law principles); Whytock, *supra* note 11, at 724–30 (describing the historical transition of choice-of-law principles and noting that only ten of fifty-two U.S. jurisdictions continue to apply the First Restatement approach, while the remaining jurisdictions apply some form of “modern” choice-of-law principles).

79. Brilmayer & Norchi, *supra* note 78, at 1227.

80. Symeonides, *supra* note 69, at 346.

81. *Id.*

half of U.S. states, for example, apply the “significant relationship” test as embodied in the Restatement (Second) of Conflict of Laws.<sup>82</sup> For tort cases, the Second Restatement adopts a highly functional approach that looks to which state has “the most significant relationship” not only to “the occurrence” but also to “the parties” to the tort suit.<sup>83</sup> Courts still consider territoriality, although they use the rubric of territoriality to account not only for the place of injury but also—if different—for “the place where the conduct causing the injury occurred.”<sup>84</sup> Beyond this expanded notion of what counts as territorial, courts also consider factors such as the nationality of the parties and, more generally, the location of the parties’ dealings or relationship.<sup>85</sup>

Although the Second Restatement still prefers the law of the state where a tort injury occurred, it opens the door to application of another state’s law—such as the forum state’s law—if that other state were to have a “more significant relationship” in light of a broad range of policy considerations.<sup>86</sup> For example, courts may decline to apply the law of the place of injury in light of “the relevant policies of the forum” as well as “the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.”<sup>87</sup>

Even more broadly, courts may opt out of the law of the place of injury in light of “the needs of the interstate and international systems” and “the basic policies underlying the particular field of law.”<sup>88</sup> Courts may also decline to apply the law of the place of injury in view of party-specific concerns such as “the protection of justified expectations” or in view of administrative concerns such as the “certainty, predictability and uniformity of result” and the “ease in the determination and application of the law to be applied.”<sup>89</sup>

Even less territorially dependent than the Second Restatement’s “significant relationship” test is the “government interest” test, which primarily looks to

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82. Florey, *State Law*, *supra* note 3, at 555; Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 331 (2011).

83. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971).

84. *Id.* § 145(2).

85. *Id.* (accounting for “the domicile [sic], residence, nationality, place of incorporation and place of business of the parties” and “the place where the relationship, if any, between the parties is centered”); see Whytock, *supra* note 11, at 751–52 & n.171 (describing the dual roles of territoriality and nationality/personality that “permeate choice-of-law doctrine”).

86. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971) (“In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.”). The commentary explains that “[o]ne reason for the rule is that persons who cause injury in a state should not ordinarily escape liability imposed by the local law of that state on account of the injury.” *Id.* § 146, cmt. e. “Moreover, the place of injury is readily ascertainable. Hence, the rule is easy to apply and leads to certainty of result.” *Id.*

87. *Id.* § 6(b), (c).

88. *Id.* § 6(a), (e).

89. *Id.* § 6(d), (f), (g); see *id.* § 145, cmt. b (suggesting that these reliance and administrative factors are of “lesser importance” in tort cases than in contract and other cases).



policy interests to determine which jurisdiction's law should apply. Under government interest analysis, a court "applies the law of the state with the greater interest in having its law applied or the law of the state whose interests would be most impaired if its law were not applied."<sup>90</sup> California, for example, is one significant jurisdiction that has adopted a form of the government interest test, involving

(1) determining if the foreign law 'materially differs' from California law; (2) and if so, next determining each respective state's interest in application of its law; (3) and finally, if the laws materially differ and both states have an interest in the litigation, selecting the law of the state whose interest would be 'more impaired' if its law were not applied.<sup>91</sup>

At least three U.S. jurisdictions apply government interests analysis, and several more apply a hybrid of the Second Restatement's significant relationship analysis and government interests analysis.<sup>92</sup> For these jurisdictions, "[t]he best hope for applying the forum state's law would be if one or more of the parties were a citizen of the forum state—perhaps a corporate defendant with its headquarters in the forum state"—because "[i]n such a case, one could make a reasonable argument that applying the forum state's tort law would serve a deterrent interest and thus justify application of forum law."<sup>93</sup>

Still two more U.S. jurisdictions presumptively apply their own law, *lex fori*, even for disputes stemming from foreign-based torts and injuries.<sup>94</sup> And five U.S. states have applied some variant of the so-called Leflar approach, which essentially allows a judge to put all territorial concerns aside and decide which jurisdiction has the "better rule" that should be applied to the case.<sup>95</sup>

States apply choice-of-law principles the same for domestic choices of law and for international choices of law. Although "one could argue that the identification and weighing of foreign state interests should be a matter for federal rather than state authorities," the fact remains that "state courts have rarely been timid about applying their usual choice-of-law approaches to cases in which international elements are present,"<sup>96</sup> and "in many state choice-of-law systems,

90. Whytock, *supra* note 11, at 725–26 (footnote omitted).

91. *Carijano v. Occidental Petrol. Co.*, 643 F.3d 1216, 1233 (9th Cir. 2011) (quoting *Wash. Mut. Bank v. Superior Court*, 15 P.3d 1071, 1080–81 (Cal. 2001)).

92. Whytock, *supra* note 11, at 725–27.

93. Patrick J. Borchers, *Conflict-of-Laws Considerations in State Court Human Rights Actions*, 3 U.C. IRVINE L. REV. 45, 50 (2013).

94. Whytock, *supra* note 11, at 728 (noting that "the *lex fori* method presumes that the law of the judge's jurisdiction should apply" but that the presumption is subject to rebuttal, for example, "when the forum state lacks significant contacts with the case or the parties" or when "the foreign state has an overwhelming interest in having its law apply" (internal quotation marks omitted)).

95. See Symeon C. Symeonides, *Result-Selectivism in Conflicts Law*, 46 WILLAMETTE L. REV. 1, 3–7 (2009) (describing the Leflar approach and its use in some state courts).

96. BRILMAYER & GOLDSMITH, *supra* note 11, at 724. *But see* Childress, *supra* note 13, at 1554–69 (arguing that *Erie* does not compel U.S. states to defer to international foreign law).

bias toward the application of forum law is common.”<sup>97</sup> Moreover, apart from the evolution of choice-of-law principles that increasingly invite state courts to apply forum law, state courts are prone to apply their own forum law in cases where the parties simply fail to allege the application of foreign law or to demonstrate that foreign law is actually different than the forum’s own law.<sup>98</sup>

### C. PRESUMPTION OR CHOICE?

When we compare the statutory presumption against extraterritoriality with the corpus of choice-of-law principles as discussed above, an important point becomes clear. The emergence of modern choice-of-law principles means that, in all but the handful of U.S. states that continue to apply *lex loci delicti*, the geographical range of a common law cause of action may differ dramatically from the geographical range of either federal or state statutes. If the reach of a statute is at issue, courts look solely to legislative intent and decide if the words of the statute bespeak an intent to regulate conduct that occurs in foreign territory. In the rare case when a statute expressly applies to extraterritorial conduct, courts apply the statute and do so regardless of choice-of-law rules.<sup>99</sup> Far more commonly, however, a statute is geoambiguous, and the presumption against extraterritoriality consequently forecloses the statute’s application to foreign-based conduct. For statutes, then, the choice-of-law decision is binary—it wholly depends on actual (or presumed) legislative intent; courts do not balance or weigh on a case-by-case basis the comparative interests of the parties or the forum jurisdiction in having forum law applied.

But for the common law, there is no legislative intent to consider, and courts are not put to a binary choice; instead, they default to broad-factored, choice-of-law principles that are highly contextual, functional, and policy oriented.<sup>100</sup>

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97. Florey, *State Law*, *supra* note 3, at 537. *But see* Whytock, *supra* note 11, at 764 (concluding on basis of empirical study that “choice-of-law doctrine does influence judges’ international choice-of-law decisions in tort cases” but “that these decisions are not biased in favor of domestic law, domestic parties, and plaintiffs”). Thus, regardless whether “bias” exists for domestic forum law, the modern choice-of-law doctrines allow consideration of forum interests in a way that the presumption against extraterritoriality does not.

98. Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1266–1271 (2011); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 284 (1990); *see* Fed. R. Civ. P. 44.1 (requiring a party who wishes to raise an issue about foreign law to give notice by pleading or writing).

99. *See, e.g.*, *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1138 (9th Cir. 2001) (“Where a federal statute is involved . . . a choice of law analysis does not apply in the first instance. The initial question, rather, is whether Congress intended the statute in question to apply to conduct occurring outside the United States. This is a question of statutory interpretation, not a question of choice of law.” (citation omitted)).

100. Florey, *State Law*, *supra* note 3, at 568–69 (“The application of state law to foreign conduct generally arises in common-law decisions. Thus no legislative intent is at issue [for the common law], and courts cannot simply apply a presumption against extraterritoriality comparable to the federal one.”). William Dodge has observed a similar distinction between how courts decide to apply rules in the “private” and “public” law contexts. *See* William S. Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 DUKE J. COMP. & INT’L L. 371, 372–73 (2008) (noting that “in the private law

Although these principles give considerable weight to applying the law of the place where the harm took place, they also embrace a broader notion of territoriality by considering the law of the place where culpable conduct occurred (if the conduct occurred in a different jurisdiction than where the injury occurred), and they consider *non*-traditional territorial factors such as the national identity and ties of the parties. Moreover, they also take cognizance of the policy interests of a U.S. forum state in applying its own law.

This difference in approach could well be outcome determinative for many transnational tort cases. For example, in *EEOC v. Arabian American Oil Co.*, the Supreme Court invoked the statutory presumption against extraterritoriality to prevent extension of Title VII's antidiscrimination protections for the benefit of an American worker employed by a U.S. company in Saudi Arabia.<sup>101</sup> Had modern choice-of-law principles applied instead to allow consideration of the U.S. identity of the parties and the nature of the legal interests at stake, a far stronger argument would have supported applying U.S. law in light of the U.S. ties of both the plaintiff and defendant in that case.<sup>102</sup> For tort cases generally, the advent of modern, multifaceted choice-of-law analysis has encouraged courts to choose the law that is most favorable to the plaintiff victim.<sup>103</sup>

In short, the breadth and multiplicity of choice-of-law factors opens the door to far broader extraterritorial application of the common law than statutory law. As Jack Goldsmith and Alan Sykes have noted, “modern choice-of-law methodologies are famously indeterminate,” and “compared to the *lex loci* rule [of the First Restatement], the modern rules have one unmistakable consequence: they make it more likely that the forum court will apply local tort law to wrongs that occurred in another jurisdiction.”<sup>104</sup>

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context, the court answers the question of applicable law by resorting to rules that are *external* to the substantive law, specifically by applying the forum's choice-of-law rules,” while “[i]n the context of public law, the court's method is *internal*—it looks for the answer in the substantive law itself,” including by reference to a “perceived need to ground decisions about the applicability of public law in legislative intent”). Noting the difficulty in ascertaining legislative intent, Dodge contends that “[i]t would be better for courts to assume this responsibility themselves” and “to treat public law—like private law—as a proper subject of the conflict of laws.” *Id.* at 393–94.

101. 499 U.S. 244, 259 (1991).

102. *See* Brilmayer & Norchi, *supra* note 78, at 1229–30 (“The United States would have had an interest in protecting the American plaintiff, and Saudi Arabia would have had no interest in application of its law because the defendant was not Saudi Arabian.”).

103. Symeonides, *supra* note 69, at 380–92 (summarizing an empirical study of tort cases involving harm-causing conduct in one jurisdiction and injury-result in another jurisdiction, and concluding that courts were evenly split between choosing law of conduct-state and law of injury-state but that they chose the pro-victim law eighty-six percent of the time).

104. Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economica Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1137 (2007); *see* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 115 (1998) (noting that modern “domestic conflicts theory does not justify any presumption against extraterritoriality at all”).

## D. DIFFERENCES IN THE COURTS

In view of this doctrinal evolution, it is little wonder that federal courts have widely diverged—and sometimes inconsistently so—in determining how or whether state tort law should apply at all to international human rights lawsuits involving U.S. companies. For example, in *Doe v. Exxon Mobil*, plaintiffs filed a federal suit in the District of Columbia alleging that a major U.S. oil company acted to protect its oil operations in Indonesia by paying Indonesian security forces who engaged in severe human rights abuses of Indonesian villagers.<sup>105</sup> Because plaintiffs alleged that Exxon took steps inside the United States to direct and participate in the abuses that occurred in Indonesia, the district court concluded that U.S. state law—rather than the law of Indonesia—should govern the plaintiffs’ state-law claims.<sup>106</sup> “Ultimately, the United States, the leader of the free world, has an overarching, vital interest in the safety, prosperity, and consequences of the behavior of its citizens, particularly its supercorporations conducting business in one or more foreign countries.”<sup>107</sup> But the D.C. Circuit disagreed with this reasoning, concluding that in choosing to apply state law, the district court should not have taken into account “the foreign affairs interest of the United States” as a whole because they “[do] not necessarily reflect the interest of the several states.”<sup>108</sup> Applying the District of Columbia’s choice-of-law methodology (which “blend[s] a ‘governmental interests analysis’ with a ‘most significant relationship’ test”), the D.C. Circuit concluded primarily on the basis of the injuries having occurred in Indonesia that Indonesian law should apply.<sup>109</sup>

In similar fashion, in *Romero v. Drummond Co.*, the Eleventh Circuit declined to apply Alabama common law against an Alabama-based mining company arising from the company’s alleged hiring of a paramilitary group in Colombia that tortured and murdered Colombian trade-union leaders.<sup>110</sup> In choosing to apply Colombian law rather than Alabama law, the court concluded that “Alabama has long followed the rule of *lex loci delicti*,” resulting in the choice of Colombian law despite allegations in the complaint that key decision making by the Alabama-based defendants took place in Alabama.<sup>111</sup> Other

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105. 654 F.3d 11, 69–70 (D.C. Cir. 2011) (noting potential applicability of the laws of four U.S. jurisdictions—Delaware, the District of Columbia, New Jersey, and Texas—where Exxon is a legal resident and where allegedly tortious conduct took place).

106. *Doe v. Exxon Mobil Corp.*, No. Civ.A.01-1357, 2006 WL 516744, at \*3 (D.D.C. Mar. 2, 2006). Plaintiffs’ state-law claims included wrongful death, assault, battery, negligence, arbitrary arrest/detention, false imprisonment, negligent hiring/supervision, negligent/intentional infliction of emotional distress, and conversion. See First Amended Complaint for Equitable Relief and Damages, *Doe v. Exxon Mobil Corp.*, CV 1:01-cv-01357 (RCL) (D.D.C. Jan. 20, 2006).

107. *Doe v. Exxon Mobil Corp.*, 2006 WL 516744, at \*2.

108. *Doe*, 654 F.3d at 70.

109. *Id.* at 69–70.

110. 552 F.3d 1303, 1309, 1318 (11th Cir. 2008). The state-law claims included assault, intentional/negligent infliction of emotional distress, negligent supervision, and false imprisonment. *Id.*

111. *Id.*

federal courts have similarly declined to apply state common law to torts involving extraterritorial harmful conduct by U.S. companies, despite allegations that the companies took actions at their offices in the United States to cause such harms.<sup>112</sup>

By contrast, other federal courts are more disposed to apply state tort law to extraterritorial harms perpetrated by U.S. companies. In *Abdullahi v. Pfizer, Inc.*, for example, the Second Circuit concluded that Connecticut law might properly govern state-law claims against Pfizer—the world’s largest pharmaceutical company, based in Connecticut—that arose from Pfizer’s participation in nonconsensual testing of one of its drugs on children in Nigeria.<sup>113</sup> Despite acknowledging some interest of Nigeria in having its law applied, the Second Circuit faulted the district court for failing to consider the interests of Connecticut in having its law applied or to

analyze what “justified expectations” existed that could have prompted Pfizer reasonably to believe that its conduct in Connecticut [involving research and development of the drug and planning for its experimental use on children in Nigeria] would not expose it to Connecticut law, or how Pfizer would have been disadvantaged by litigating these claims in Connecticut.<sup>114</sup>

In similar fashion, the Second Circuit ruled in *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, that New York law should govern the liability of a bank that was allegedly negligent in financing one of its customers to engage in a terrorist attack in Israel.<sup>115</sup> Rather than focusing on the place of injury (Israel), the court—applying New York’s governmental interests test—focused on the fact that “[a]ll of the challenged conduct undertaken by AmEx [the defendant bank] occurred in New York, where AmEx is headquartered and where AmEx administers its correspondent banking services” and that “New York, not Israel,

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112. See *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 761–63 (D. Md. 2010) (applying Maryland’s traditional *lex loci delicti* rule to conclude that Iraqi law governed claims for assault and battery and infliction of emotional distress by Iraqi civilians against U.S. soldiers stemming from human rights abuses at the Abu Ghraib prison in Iraq, notwithstanding allegation of culpable conduct occurring in the United States), *appeal dismissed*, *Al Shimari v. CACI Int’l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc); *Viera v. Eli Lilly & Co.*, No. 1:09-cv-0495-RLY-DML, 2010 WL 3893791, at \*3 (S.D. Ind. Sept. 30, 2010) (dismissing ATS claim and state-law claims for negligence and wrongful death arising from environmental contamination in Brazil, despite allegation that U.S. corporate defendants “made certain decisions in their U.S. home offices with regard to shipping certain chemicals to their subsidiaries in Brazil, [while] knowing that the chemicals were toxic and would be put into the environment in Brazil”); *Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1024 (S.D. Ind. 2007) (despite allegations of complaint that corporate defendants in Indiana supervised operations in Liberia, Indiana common law would not apply to injuries to Liberian plaintiffs from hazardous child labor practices in Liberia).

113. 562 F.3d 163, 169 (2d Cir. 2009).

114. *Id.* at 191. The Second Circuit remanded to the district court for re-evaluation of the application of the “significant relationship” choice-of-law principles set forth in the Second Restatement. *Id.*

115. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 672 F.3d 155 (2d Cir. 2012), *on reh’g*, 2013 WL 5700963 (2d Cir. Oct. 18, 2013) (reaffirming application of New York law notwithstanding disapproval of initial panel decision by New York State’s intermediate appellate court).

[had] the stronger interest in regulating the conduct of New York-based banks operating in New York.”<sup>116</sup>

Similarly, in *Carijano v. Occidental Petroleum*, the Ninth Circuit emphasized the interest of a U.S. court in resolving a claim by Peruvian residents against a California oil corporation arising from environmental contamination related to its oil-production activities in Peru.<sup>117</sup> The plaintiffs asserted a broad variety of state common law claims—including negligence, strict liability, battery, medical monitoring, wrongful death, fraud and misrepresentation, public and private nuisance, trespass, and intentional infliction of emotional distress—as well as a violation of California’s Unfair Competition Law.<sup>118</sup> In reversing a district court’s forum non conveniens dismissal, the Ninth Circuit concluded that “the district court undervalued California’s significant interest in providing a forum for those harmed by the actions of its corporate citizens” and noted that “California courts have repeatedly recognized the state’s ‘interest in deciding actions against resident corporations whose conduct in this state causes injury to persons in other jurisdictions.’”<sup>119</sup>

Courts in the District of Columbia have used choice-of-law principles to apply state common law for the benefit of victims of terrorist bombings at U.S. embassies in Lebanon, Kenya, and Tanzania.<sup>120</sup> They have also applied the laws of Texas and Tennessee in a lawsuit alleging Syria’s complicity in the kidnapping of U.S. citizens by a terrorist group in Turkey.<sup>121</sup> In doing so, these courts have relied on the District of Columbia’s “governmental interests” choice-of-law analysis. In *Owens v. Republic of Sudan*, the court observed that “[i]n terrorism cases, ‘[t]he United States has a unique interest in having its domestic law—rather than the law of a foreign nation—used in the determination of damages in a suit involving such an attack.’”<sup>122</sup> The court in *Arias v. Dyncorp* similarly assumed that D.C. tort law could govern the conduct of a U.S. company that allegedly wrongfully sprayed pesticides on Ecuadorean citizens as

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116. *Id.* at 158.

117. *Carijano v. Occidental Petrol. Corp.*, 643 F.3d 1216, 1233 (9th Cir. 2011).

118. *Id.* at 1223.

119. *Id.* at 1232–33 (quoting *Stangvik v. Shiley Inc.*, 819 P.2d 14, 21 n.10 (Cal. 1991) (en banc)).

120. *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 154–55 (D.D.C. 2011); *Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1, 21 (D.D.C. 2011). The complaints on behalf of numerous plaintiffs asserted state common law claims under the laws of multiple states for assault, battery, intentional infliction of emotional distress, and loss of consortium. See Fourth Amended Complaint at 14, *Owens*, 826 F. Supp. 2d at 128 (No. 1:01CV0224); First Amended Complaint for Compensatory Damages Pursuant to the Foreign Sovereign Immunities Act, as Amended, 28 U.S.C. § 1605A at 94, *Doe*, 808 F. Supp. 2d at 1 (No. 08-0540).

121. *Wyatt v. Syrian Arab Republic*, 398 F. Supp. 2d 131, 139–141 (D.D.C. 2005).

122. 826 F. Supp. 2d at 155 (quoting *Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, 22 (D.D.C. 2005)); see *Wyatt*, 398 F. Supp. 2d at 138 n.6 (“[T]he United States has a unique interest in applying its own law, rather than the unfamiliar law of a foreign nation (let alone the ‘law’ of a rogue terrorist nation such as Syria), to determine liability involved in a state-sponsored terrorist attack on one of its citizens, particularly when such an attack is directed against its national interests.”).

part of a U.S. drug eradication program.<sup>123</sup>

On yet a different tangent, in *In re Chiquita Brands International, Inc. Alien Tort Statute & Shareholder Derivative Litigation*, a federal court in Florida dismissed state-law claims under the laws of Florida, New Jersey, Ohio, and the District of Columbia for negligence and assault and battery (among other claims) arising from severe human rights abuses by a Colombian paramilitary organization that were allegedly aided and abetted by U.S.-based Chiquita fruit companies against Colombian trade-union activists.<sup>124</sup> Rather than engage at all in choice-of-law analysis, the court concluded that none of the U.S. states had prescriptive jurisdiction under international law to regulate conduct that occurred in Colombia.<sup>125</sup> This analysis was plainly mistaken because it failed to take into account that the defendants were U.S. companies and that it is fully consistent with international law for a state to regulate the extraterritorial conduct of its own nationals.<sup>126</sup> Because of the court's errant conclusion that prescriptive jurisdiction was lacking, it failed altogether to consider each of the affected states' choice-of-law principles and the interests of states such as New Jersey (where Chiquita is incorporated) or Ohio (where Chiquita is headquartered) in governing the conduct of their own companies.<sup>127</sup>

Recently, in *Al Shimari v. CACI International, Inc.*, the Fourth Circuit declined interlocutory review of a Virginia federal district court's decision not to dismiss state common law causes of action alleged by victims of abuses at the Abu Ghraib prison in Iraq against a private military-contracting company

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123. See 517 F. Supp. 2d 221, 228–29 (D.D.C. 2007) (declining to conclude that U.S. foreign policy interests preempted state-law claims of negligence, negligent hiring, negligent supervision, negligent/intentional infliction of emotional distress, nuisance, trespass, battery, strict liability, and medical monitoring).

124. 792 F. Supp. 2d 1301, 1355 (S.D. Fla. 2011) (lawsuit by thousands of Colombians against U.S.-based Chiquita); *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 690 F. Supp. 2d 1296, 1299–1300 (S.D. Fla. 2010) (separate lawsuit by estates, survivors, and heirs of five U.S. missionaries).

125. *In re Chiquita*, 792 F. Supp. 2d at 1355.

126. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(2) (1987) (nationality basis for prescriptive jurisdiction); see *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1984) (noting that “[t]he citizenship of an individual or nationality of a corporation has long been a recognized basis which will support the exercise of jurisdiction by a state over persons” and that “a state has jurisdiction to prescribe law governing the conduct of its nationals whether the conduct takes place inside or outside the territory of the state”).

127. See *In re Chiquita*, 690 F. Supp. 2d at 1301 (“Chiquita is a multinational corporation incorporated in New Jersey and headquartered in Cincinnati, Ohio.”). More puzzling still, in specifically dismissing the Ohio state-law claims brought by the Colombian plaintiffs, the court declined to apply an Ohio state statute providing that “[w]hen death is caused by a wrongful act, neglect, or default in another state or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state or foreign country, such right of action may be enforced in this state.” *In re Chiquita*, 792 F. Supp. 2d at 1356 (quoting OHIO REV. CODE ANN. § 2125.01 (West 2011)). The court concluded that application of this statute “would involve interpreting and ruling on complex and novel issues of Colombian common law” but did not explain how the fact of such complexity or novelty should relieve a court from following the plain dictates of Ohio state law. *Id.* Of course, under the *Erie* doctrine, a federal court is required to apply state law in determining the existence of a cause of action. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

based in Virginia.<sup>128</sup> Although the en banc majority did not decide whether Virginia common law could be applied to conduct at Abu Ghraib, Judge Wilkinson argued in dissent that there is a “presumption against extraterritorial application of state law.”<sup>129</sup> He contended that “there is no indication that the Commonwealth of Virginia intended to apply its laws of assault, battery, sexual assault, intentional and negligent infliction of emotional distress, and negligent hiring and supervision” to conduct of a military contractor in Iraq.<sup>130</sup> In addition, because “the Constitution entrusts foreign affairs to the federal political branches,” he contended that “the presumption against extraterritorial application is even stronger in the context of state tort law.”<sup>131</sup> Judge Wilkinson warned against allowing “Virginia tort law—and the tort regimes of all fifty states—[to] be applied to conduct occurring in every corner of the earth,” and he declared that “[b]y allowing plaintiffs’ causes of action to go forward, the majority lends its imprimatur to the extraterritorial application of state tort law.”<sup>132</sup>

## II. EXTRATERRITORIAL COMMON LAW

The framework above sets the stage for a principal question that courts are likely to confront when presented with state-law claims in future transnational tort cases: is there or should there be some kind of presumption against extraterritorial application of state law? I will suggest below that the answer is mostly “yes” in the case of state statutes but mostly “no” in the case of state common law—and that, somewhat counterintuitively, there is and should continue to be extraterritorial common law.

To develop this argument, I will first explore in section II.A below what federal-law limits exist on extraterritorial application of state law. Next, in section II.B below, I will discuss what state-law limits exist on extraterritorial application of state law.

### A. FEDERAL LIMITS ON EXTRATERRITORIAL STATE LAW

At first glance, one might naturally assume that federal law should principally govern whether any state’s law may apply abroad. To begin with, one might argue a theory of dormant foreign-affairs preemption—that extraterritorial state law inherently conflicts with the federal government’s interest in speaking with one voice in all foreign relations. Alternatively, from an individual-rights perspective, one might argue that the Due Process Clause should strictly limit the authority of a U.S. state to apply its law to conduct in foreign lands. But, as

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128. 679 F.3d 205, 212–24 (4th Cir. 2012) (en banc) (dismissing the appeal for lack of appellate jurisdiction under the final-order and collateral-order doctrines).

129. *Id.* at 233 (Wilkinson, J., dissenting).

130. *Id.*

131. *Id.* at 231.

132. *Id.* at 234.



discussed below, these claims are largely meritless and are especially weak in the context of the extraterritorial application of the common law under modern choice-of-law principles.<sup>133</sup>

### 1. Foreign Affairs Preemption of State Law

For Judge Wilkinson, the Constitution's allocation of foreign-affairs powers to the federal government justified a presumption against the extraterritorial application of state law.<sup>134</sup> As the Supreme Court has noted,

[t]here is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.<sup>135</sup>

Still, the Constitution's text does not distinguish between impermissible attempts by the states to intrude upon the national government's power to regulate foreign affairs from wholly permissible applications of state law that might incidentally affect foreign affairs and foreign-based actors.<sup>136</sup>

Several times the Supreme Court has invalidated state laws on the ground that they interfere with the federal government's conduct of foreign affairs. Recently, for example, in *Arizona v. United States*, the Court invalidated most of an Arizona law that was designed to deter illegal immigration,<sup>137</sup> a regulatory area that is specially vested with the federal government because of "its inherent power as sovereign to control and conduct relations with foreign nations."<sup>138</sup>

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133. Because the focus of this Article is on mostly unexplored issues of state-law limitations on the extraterritorial application of state law, I offer here only an abbreviated treatment of potential federal limits on extraterritorial application of state law; these federal law aspects have been richly explored by many other leading commentators, and their analysis makes clear that state laws are only rarely subject to federal foreign-affairs preemption. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 862–63 (1997) (arguing that "dormant foreign relations preemption is of questionable legitimacy" and that "[a]lthough the Constitution gives the federal political branches full control over U.S. foreign relations, it does not follow that it preempts state law in the foreign relations field in the absence of affirmative political branch action"); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 177 (2000) (arguing that courts should "preempt state law only on the basis of policy choices traceable to the political branches in enacted law"); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 393 (1999) (arguing against the dormant foreign-affairs preemption).

134. *Al Shimari*, 679 F.3d at 231 (noting reasons why "the presumption against extraterritorial application is even stronger in the context of state tort law" than for federal statutes).

135. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)).

136. Whytock, Childress & Ramsey, *supra* note 19, at 7 (noting that "the limits on the extraterritorial application of state statutes and state common law are unsettled").

137. 132 S. Ct. 2492, 2501 (2012).

138. *Id.* at 2498; *see id.* at 2506–07 (invalidating portion of state law that allowed state law enforcement officers to arrest individuals believed to be removable from the United States, because "[a]

Similarly, in *Crosby v. National Foreign Trade Council*, the Court considered a Massachusetts statute that barred state agencies from purchasing goods or services from companies that did business with the government of Burma (also known as Myanmar).<sup>139</sup> The law was plainly an effort by Massachusetts to deter Burma's human rights practices, and the Court concluded that the Massachusetts law could not be reconciled with a federal law that imposed very different kinds of sanctions against Burma.<sup>140</sup>

To the same effect, in *American Insurance Association v. Garamendi*, the Court invalidated a California law that sought to help Holocaust survivors by requiring any insurer in California to disclose information about all policies it had sold in Europe between 1920 and 1945.<sup>141</sup> The Court concluded that the law was preempted because it interfered with the federal government's conduct of foreign relations, specifically with the federal government's ongoing efforts to promote resolution of Holocaust-era claims by more conciliatory means than mandatory disclosure requirements.<sup>142</sup>

In each of the foreign-affairs preemption cases described above, the state law at issue was a *statute* that was manifestly targeted at foreign persons or activity related to foreign affairs, and the statute was at odds with a specific federal statute or federal policy initiative. None of these cases involved state laws of general application, much less background duties of state common law.<sup>143</sup> In the

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decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States," and because "[d]ecisions of this nature touch on foreign relations and must be made with one voice").

139. 530 U.S. 363 (2000).

140. *Id.* at 372–74.

141. 539 U.S. 396, 401 (2003).

142. *Id.* at 426–27; see *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (invalidating an Oregon state inheritance statute that required any real or personal property that was willed to a nonresident alien to escheat to the state unless the alien's home country granted reciprocal rights of inheritance for Oregon legatees).

143. See Bradley & Goldsmith, *supra* note 133, at 866 ("The few instances in which courts have actually preempted state law under a dormant foreign relations theory have involved state acts that discriminate against particular foreign entities or otherwise have the purpose of influencing U.S. foreign relations. In contrast, courts have generally declined to find state acts not targeted at particular countries to be preempted, even if the acts have collateral effects on foreign relations and even if these effects include diplomatic consequences."); *id.* at 866–67 (rejecting the argument "that dormant foreign relations preemption turns on some form of a foreign relations 'effects' test"); see also *Saleh v. Titan Corp.*, 580 F.3d 1, 24 & n.8 (D.C. Cir. 2009) (Garland, J., dissenting) (noting that the foreign-affairs preemption cases "involved preemption of state laws that were *specifically targeted* at issues concerning the foreign relations of the United States, a description the court does not dispute" and that "no precedent has employed a foreign policy analysis to preempt generally applicable state laws"); *Arias v. Dyncorp*, 517 F. Supp. 2d 221, 228–29 (D.D.C. 2007) (holding that there was no foreign-affairs preemption of state-law claims against U.S. government contractor arising from negligent execution of aerial fumigation program for coca and opium fields in South America); *Doe v. Exxon Mobil Corp.*, No. Civ.A.01-1357(LFO), 2006 WL 516744, at \*3 (D.D.C. Mar. 2, 2006) (holding that there was no foreign-affairs preemption of state-law claims against U.S. company for human rights abuses in Indonesia because, unlike *Garamendi*, "no state government has passed any statute in conflict with U.S. foreign policy"). *But see Mujica v. Occidental Petrol. Corp.*, 381 F. Supp. 2d 1164, 1168, 1187–88 (C.D. Cal. 2005) (finding foreign-affairs preemption of California state-law claims for wrongful death

absence of preemption by means of a specific federal statute or policy, the Court has yet to raise foreign-affairs preemption concerns about case-specific application of a state's common law to foreign conduct when applied in accordance with established choice-of-law principles.<sup>144</sup>

Unlike the presumption against extraterritoriality, modern choice-of-law principles ordinarily consider the citizenship of the parties as relevant to the question of which jurisdiction's law to apply. Similarly, the Supreme Court has made clear the constitutional authority of the states to govern the conduct of their own citizenry beyond U.S. borders. In *Skiriotes v. Florida*, the Court upheld the conviction under Florida law of a defendant for engaging in illegal sponge fishing in the Gulf of Mexico.<sup>145</sup> The Court noted that “[s]ave for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign” and that

[i]f the United States may control the conduct of its citizens upon the high seas, [it saw] no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.<sup>146</sup>

Although other decisions have curbed the states' extraterritorial extension of their regulatory authority, in these decisions, the Court was balancing the coequal authority of other U.S. states to regulate the same activity,<sup>147</sup> or the

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and intentional/negligent infliction of emotional distress arising from a California oil company's alleged participation in Colombian air force's bombing of innocent civilians in Colombia).

144. See Florey, *State Courts*, *supra* note 3, at 1088 (noting that “state courts have sometimes differentiated between statutory and common law (or, in some cases, between regulatory prohibitions and tort liability) in their extraterritoriality analysis”); Florey, *State Law*, *supra* note 3, at 560 (noting “fairly minimal constitutional limits that may exist on a state's choice-of-law decisions” and that such constraints “have generally not been found to limit state power to apply state law to traditional tort or breach of warranty actions”); Goldsmith, *supra* note 133, at 189 (noting that although the Constitution “reflects a decided preference for federal over state regulation with respect to some of the traditional ‘high’-agenda foreign relations issues concerning war, peace, and diplomacy,” it does not prefer “federal over state power in the many other regulatory contexts traditionally regulated by states that might cause (and throughout our history have caused) foreign relations controversy—contexts that include tort and contract law, criminal law, family law, procurement law, procedural law, education, and much more”).

145. 313 U.S. 69, 79 (1941).

146. *Id.* at 77; see Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 863–64 (2002) (contending that “[a]s a matter of federal constitutional law, states have a presumptive power to regulate their citizens' extraterritorial conduct” as “part of the inherent sovereign powers that have been retained by states under the Tenth Amendment” and that “[w]hile the scope of these presumptive powers is limited by contemporary due process doctrine, states retain significant extraterritorial powers vis-à-vis their citizens”).

147. See, e.g., *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335–36 (1989) (in light of “the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres,” concluding that “the ‘Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce

decisions involved facts that rendered the extraterritorial extension of a state's law incompatible with standard choice-of-law principles.<sup>148</sup>

## 2. Due Process Limits

The Due Process Clause imposes modest restraints on the power of states to apply their choice-of-law principles in a manner that results in the application of a U.S. state's law to conduct beyond its borders. For example, in *Allstate Insurance Co. v. Hague*, the Supreme Court made clear that Minnesota could apply its law to an insurance coverage dispute stemming from an auto accident in Wisconsin that involved residents of Wisconsin and an insurance policy that was issued in Wisconsin.<sup>149</sup> The Minnesota court opted to apply Minnesota law as a result of applying the very liberal "Leflar" choice-of-law approach, which places primary emphasis on the forum state's interests and on what the forum court considers to be the "better rule of law."<sup>150</sup>

In affirming Minnesota's application of its own law, the Supreme Court disclaimed any preference for a particular choice-of-law methodology and concluded that the Due Process Clause required only that a forum state's decision to apply its own law be based on "a significant contact or significant aggregation of contacts" that "creat[e] state interests, such that choice of its law

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has effects within the State") (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion)); see also *id.* at 336–37 (noting that "the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State" but without imposing any international extraterritorial projection of state law).

148. For example, in *BMW of North America, Inc. v. Gore*, the Court invalidated on due process grounds an Alabama jury award of four million dollars in punitive damages for the buyer of a BMW car who alleged that he was defrauded by BMW when it sold him a car as "new" without disclosing that the car had been repainted because of damage incurred during manufacture or transportation. 517 U.S. 559, 562, 585–86 (1996). The Alabama punitive damages award was principally based on evidence that BMW routinely failed to disclose such repainting in many other U.S. states where it was not required to make such disclosures. *Id.* at 563–65. The Court invalidated the award on the ground that "no single State . . . [may] impose its own policy choice on neighboring States" and that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 571–72. The *Gore* decision is distinguishable because it involved an intrusion by one state on the policy authority of other U.S. states; it did not involve international extraterritorial application of state law. Moreover, it involved a punitive state policy specifically targeted at extraterritorial conduct that had no tie to or impact on Alabama or its citizenry, such that ordinary choice-of-law principles would not have allowed application of Alabama law to out-of-state conduct. See *id.* at 572–73 (noting that "whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, [they] must be supported by the State's interest in protecting its own consumers and its own economy" and that although "Alabama may insist that BMW adhere to a particular disclosure policy in that State," it "does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents"). Although the Court further noted that "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute," *id.* at 572 n.17, the award of punitive damages in *Gore* was governed by an Alabama statute, *id.* at 565.

149. 449 U.S. 302, 305, 320 (1981) (plurality opinion).

150. *Id.* at 306–07. The choice-of-law issue mattered because Minnesota law allowed the decedent's multiple vehicle insurance policy limits to be "stacked" for a higher total recovery, while Wisconsin did not. *Id.* at 307.

is neither arbitrary nor fundamentally unfair.”<sup>151</sup> Notwithstanding the large number of ties between the dispute and Wisconsin, the Court found constitutionally sufficient links to Minnesota because the decedent had been employed in Minnesota, his wife had later moved to Minnesota before filing suit, and the insurance company was licensed to do business not only in Wisconsin but also in Minnesota.<sup>152</sup>

Since *Allstate*, it is clear that the Due Process Clause “only mildly intervenes” in choice-of-law determinations, requiring only that “the choice of law rule governing particular conduct have some measure of predictability and that its application be neither arbitrary nor unfair.”<sup>153</sup> Of course, to the extent that the Due Process Clause might one day be read more broadly to invalidate a particular choice-of-law method or determination, this independent constitutional limit would be an additional reason why there is no need categorically to presume that state law does not apply abroad.

In short, neither foreign-affairs preemption nor due process constraints justify a categorical presumption against extraterritorial application of state law; nor does any federal statute impose a general limit on the authority of states to apply their law to foreign-based conduct. Even accepting that federal preemption might sometimes bar internationally extraterritorial operation of state law, such as where a state statute specifically targets extraterritorial conduct and does so when such conduct does not have any effect within the state, this occasional invalidation is not grounds to impose a general and blanket presumption against the extraterritorial application of state common law.

#### B. STATE-LAW LIMITS ON EXTRATERRITORIAL STATE LAW

Although the federal preemption and due process concerns discussed above have drawn the bulk of scholarly attention with respect to whether state law may apply to conduct in foreign countries,<sup>154</sup> this issue is only one aspect of what future courts should consider when confronted with an argument for a presumption against extraterritorial application of state law. Courts must additionally consider whether *state law itself* constrains the application of state law to

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151. *Id.* at 312–13 (rejecting challenges under the Due Process Clause and the Full Faith and Credit Clause); *id.* at 332 (Stevens, J., concurring) (same). In *Allstate*, the plurality made clear in light of prior precedent that a forum’s choice of law could not be constitutional if the forum’s only contact to the dispute was the “nominal residence” of a party or “a postoccurrence change of residence to the forum State.” *Id.* at 311 (plurality opinion).

152. *Id.* at 315–18; see *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818, 823 (1985) (citing *Allstate* plurality opinion with approval and to note that “the Due Process Clause and the Full Faith and Credit Clause provide[] modest restrictions on the application of forum law” and to “reaffirm [its] observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law”).

153. Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1849 (2006); see Florey, *State Law*, *supra* note 3, at 557 (“[A]pplication of state law to out-of-state conduct only rarely runs the risk of violating constitutional limits.”); Green, *supra* note 98, at 1252 (noting “weak” constitutional constraints on state choice-of-law decisions).

154. See *supra* note 3 (citing articles).

conduct that occurs beyond a state's or U.S. borders. In contrast to the federal preemption and due process analysis discussed above, this issue of state-law constraints has received little or no scholarly attention. The absence is curious because, in a post-*Erie* world in which federal courts must follow state law, a state's own constraints (or lack of constraints) should loom at least equally important to resolving whether any one state's law may apply abroad.

As for state statutes, state courts have long recognized a statutory presumption against their extraterritoriality, just as the Supreme Court does for federal statutes.<sup>155</sup> At least one state (New York) provides by statute that its statutes should not be construed to have extraterritorial effect.<sup>156</sup>

In light of the fact that state statutes are not presumed to apply extraterritorially, why should the same not hold true for state common law? I suggest below

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155. See, e.g., *Sullivan v. Oracle Corp.*, 254 P.3d 237, 248 (Cal. 2011) (applying “the so-called presumption against extraterritorial application” to decline to apply California’s labor statute against a California-based employer that failed to pay overtime for work performed by out-of-state plaintiffs in other States); *J.P. Morgan & Co. v. Superior Court*, 6 Cal. Rptr. 3d 214, 233 (Ct. App. 2003) (refusing to apply California antitrust laws to activities occurring out of state because “a court should not ordinarily construe a statute as regulating occurrences outside the state unless a contrary intention is clearly expressed or reasonably can be inferred from the language or purpose of the statute”); *N. Alaska Salmon Co. v. Pillsbury*, 162 P. 93, 94–95 (Cal. 1916) (holding California workers compensation law not applicable to worker’s injury in Alaska); *Abel v. Planning & Zoning Comm’n*, 998 A.2d 1149, 1157 (Conn. 2010) (“Many state courts have applied this principle [of the presumption against extraterritoriality] to state statutes.”); *Helen B.M. v. Samuel F.D.*, 479 A.2d 852, 854–55 (Del. Fam. Ct. 1984) (refusing to apply the Delaware “poor person” statute to an out-of-state father because “even a liberal construction does not support giving interstate effect to a statute designed primarily to protect intrastate public funds because, in general, absent a contrary legislative intent, no law has effect beyond its jurisdictional bounds”); *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 853 (Ill. 2005) (holding that because “the rule against giving statutes extraterritorial effect unless an intent to do so is clearly expressed, we conclude that the General Assembly did not intend the Consumer Fraud Act to apply to fraudulent transactions which take place outside Illinois”); *Graham v. Gen. U.S. Grant Post No. 2665, V.F.W.*, 248 N.E.2d 657, 660 (Ill. 1969) (noting that “[o]ur past decisions have established the rule that when a statute, such as the Dram Shop Act, is silent as to extraterritorial effect, there is a presumption that it has none,” and holding that the statute had no extraterritorial effect where it creates a cause of action not available at common law and the legislature failed to amend the statute to do so); *Griffen v. State*, 767 N.W.2d 633, 636 (Iowa 2009) (noting that “[i]n general, a statute of one state has no extraterritorial effect beyond its borders,” but applying the Iowa Tort Claims Act to torts committed in a foreign country because the legislature expressly intended this effect (citation and internal quotation marks omitted)); *Howarth v. Lombard*, 56 N.E. 888, 889 (Mass. 1900) (“It is familiar law that statutes do not extend, *ex proprio vigore*, beyond the boundaries of the state in which they are enacted.”); *Planned Parenthood of Kan. v. Nixon*, 220 S.W.3d 732, 742 (Mo. 2007) (en banc) (holding that Missouri abortion laws cannot extend to wholly out of state conduct because “Missouri simply does not have the authority to make lawful out-of-state conduct actionable here, for its laws do not have extraterritorial effect”); *D’Agostino v. Johnson & Johnson, Inc.*, 628 A.2d 305, 315 (N.J. 1993) (discussing the extraterritorial application of the Foreign Corrupt Practices Act and noting that it “[does] not suggest that the ‘whistle blower’ act itself has an extraterritorial effect; rather it reflects our common-law employment law, which will apply extraterritorially only when the underlying clear mandate of public policy is intended to have an extraterritorial effect”); *Global Reinsurance Corp. U.S. Branch v. Equitas Ltd.*, 969 N.E.2d 187, 195 (N.Y. 2012) (declining extraterritorial application of New York antitrust law).

156. See N.Y. STAT. § 149 (McKinney 2013) (“[A]ll laws are co-extensive, and only co-extensive, with the political jurisdiction of the lawmaking power; and every *statute* in general terms is construed as having no extraterritorial effect.” (emphasis added)).

that the answer to this question requires consideration of two issues. First, we must consider whether the Supreme Court's seminal decision in *Erie* requires equal treatment of state statutes and state common law, such that if a state presumes its statutes not to be extraterritorial, then its common law must likewise be presumed subject to the same limits. Second, apart from *Erie*, we must consider whether there are inherent differences between statutes and the common law that would warrant declining to apply a presumption against extraterritoriality to the common law. Both of these issues are addressed below.

### 1. *Erie* and Common Law

As every first year law student knows, the Supreme Court famously ruled in *Erie Railroad Co. v. Tompkins* that, except for matters of law controlled by the Constitution or federal statutes, a federal court must generally follow the law of the state in which it is located.<sup>157</sup> The *Erie* decision arose from an ordinary negligence lawsuit by a Pennsylvania plaintiff in a Pennsylvania federal court against a New York railroad; plaintiff Tompkins had been walking a footpath by railroad tracks in Pennsylvania when he was struck by an open door of a passing train that was owned by the Erie Railroad Company. Tompkins claimed that the “general” common law of negligence allowed relief, and the railroad countered that the specific common law of Pennsylvania precluded relief for persons like Tompkins who had trespassed on railway land.<sup>158</sup>

In deciding which law to apply, the *Erie* Court was faced with a federal statute (now known as the Rules of Decision Act) requiring federal courts to follow the “laws of the several states”; the Court concluded that the term “laws” as used in the statute extends beyond a state’s statutes to include the common law of each state.<sup>159</sup> In so ruling, the Court rejected the notion that had prevailed for decades since Justice Story’s opinion in *Swift v. Tyson* that federal courts need not “in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court” but “are free to exercise an independent judgment as to what the common law of the state is—or should be.”<sup>160</sup> In response, the *Erie* majority famously declared that “[t]here is no federal general common law” and that “[w]hether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”<sup>161</sup>

Key to *Erie*’s reasoning was the Court’s embrace of both legal realism and

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157. 304 U.S. 64, 78 (1938).

158. *Id.* at 69–70.

159. *Id.* at 71, 79–80; see *Cappiello v. ICD Publ’ns, Inc.*, 720 F.3d 109, 113 (2d Cir. 2013) (“The Supreme Court in *Erie* construed the Rules of Decision Act, § 34 of the Judiciary Act of 1789, which provides: ‘The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.’” (emphasis omitted) (quoting 28 U.S.C. § 1652)).

160. *Erie*, 304 U.S. at 71 (citing and discussing *Swift v. Tyson*, 41 U.S. 1, 18 (1842)).

161. *Id.* at 78.

legal positivism—that a common law judge “makes” law rather than merely “finds” law *and* that the common law exists positively by reason of its backing by a single sovereign authority.<sup>162</sup> The “fallacy” of *Swift v. Tyson* was its “assumption that there is ‘a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,’” when in fact “‘law in the sense in which courts speak of it today does not exist without some definite authority behind it.’”<sup>163</sup> Accordingly, as *Erie* explained, “[t]he common law so far as it is enforced in a State . . . is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.”<sup>164</sup>

Some years later the Court would acknowledge that its decision in *Erie* “did not merely overrule [the] venerable case” of *Swift v. Tyson*, but it “overruled a particular way of looking at law.”<sup>165</sup> In this manner,

*Erie* culminated a sea change in how judges view law; it reflected a move from the idea of a body of ‘natural,’ general, or universal legal principles to a more positivistic understanding of law as something specific, a policy choice linked to a particular jurisdiction, and a choice that can vary from one jurisdiction to another.<sup>166</sup>

The Supreme Court soon extended *Erie* to require federal courts not only to apply the forum state’s substantive law in diversity cases but also to apply the forum state’s choice-of-law rules.<sup>167</sup> Thus, if a plaintiff filed a federal suit in New York for an accident in California, the federal court was not free to simply apply the law of California; it must look to whether New York state courts would do so under their own choice-of-law principles. The Court reasoned that deferring to the forum state’s choice-of-law rules was necessary not only for the “principle of uniformity,” which *Erie* strived to advance, but also because each state’s choice-of-law approach reflected “the right to pursue local policies diverging from those of its neighbors” and because “[i]t is not for the federal

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162. See, e.g., Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 693–95 (1988) (reviewing PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988)) (describing the roots of *Erie* in legal realism and recognizing that “adjudication was not, and could never be, wholly mechanical and apolitical” and that “judges unavoidably made law—at least interstitially”); Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 678 (1998) (“*Erie* . . . adopts both an Austinian version of legal positivism and Holmes’s realist gloss on it.”).

163. *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

164. *Id.*; see *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) (“The law of a state does not become something outside of the state court, and independent of it, by being called the common law. Whatever it is called, it is the law as declared by the state judges, and nothing else.”).

165. *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 101 (1945).

166. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1902–03 (2011).

167. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).



courts to thwart such local policies by enforcing an independent ‘general law’ of conflict of laws.”<sup>168</sup>

At first glance, one might conclude that *Erie*’s adoption of a realist/positivist outlook—an approach that seems to merge the juridical status of the common law with statutes—leaves little room to make distinctions between common law and statutes for purposes such as deciding their geographical reach. It could be said that both forms of law, being jurisprudentially equal, should be geographically coextensive. But this conclusion of coextensive geographical application would overlook *Erie*’s primary concern: to vindicate the power that each state has over its own body of law. That was why the Court (controversially) premised its interpretation of the Rules of Decision Act not merely on grounds of statutory interpretation but on constitutional federalism grounds.<sup>169</sup> The Court faulted *Swift v. Tyson*’s “common-law-as-general-law” vision not simply because it was jurisprudentially out of fashion with the realist/positivist revolution but on the ground that it impermissibly allowed “[t]he federal courts [to] assume[], in the broad field of ‘general law,’ the power to declare rules of decision which Congress was confessedly without power to enact as statutes.”<sup>170</sup> As the Court noted, the Constitution “recognizes and preserves the autonomy and independence of the states,” and “[s]upervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States.”<sup>171</sup>

Although *Erie*’s realist/positivist vision of state law binds federal courts for purposes of determining what they must count as constituting a state’s “law,” under the Rules of Decision Act, *Erie* does not bind *state* courts at all. True enough, the Court justified its ruling by means of a particular realist/positivist jurisprudential vision of the nature of law, but the Supreme Court does not have power to enshrine particular jurisprudential theories about the very nature of law (much less to impose them on states).<sup>172</sup> Its holding was a rule of constitutional law and one about the limits of federal—not state—court power.<sup>173</sup>

Accordingly, because *Erie* does not oblige state courts at all, it does not require state courts to follow the law of their sister state courts when, by

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168. *Id.*

169. See generally Bradford R. Clark, *Erie’s Constitutional Source*, 95 CALIF. L. REV. 1289 (2007).

170. *Erie*, 304 U.S. at 72.

171. *Id.* at 78–79. See Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 25 (2012) (discussing the “constitutional *Erie*” rule).

172. HELEN SILVING, *SOURCES OF LAW* 216 (1968) (“Obviously, it is the law of precedents and not the jurisprudence of precedents that must be followed, and the law of precedents is binding in whatever jurisprudential language it may be expressed.”).

173. See Goldsmith & Walt, *supra* note 162, at 675 (“*Erie*’s commitment to legal positivism is conceptually and normatively independent of its constitutional holding. Legal positivism is a general theory about the nature of law. Even if true, it has no implications for the allocation of authority between the state and federal governments.”).

operation of choice-of-law principles, they set out to apply the law of a different state.<sup>174</sup> Even after *Erie*, state courts remain at liberty and, to varying degrees, continue today to apply “general” common law as a surrogate for the common law of other states.<sup>175</sup>

Because *Erie* does not bind state courts at all but rather reaffirms their exclusive constitutional prerogative over the entire realm of state law, it cannot be said that *Erie* obliges state courts to treat their own common law the same as their statutory law. Still, the fact that *Erie* does not compel state courts to treat their common law the same as their statutory law does not explain *why* state courts should give the common law a broader geographical reach than their own state statutes. To this issue I now turn.

## 2. Extraterritorial Common Law

To date, the presumption against extraterritoriality has been applied to curb geographical extension of statutes but not the common law.<sup>176</sup> The presumption has been justified as an expression of implied legislative intent rather than an implied limit on legislative authority or power.<sup>177</sup> As Katherine Florey has noted, the presumption is “first and foremost an interpretive canon . . . [that] has little to say about common law that poses no issue of legislative intent.”<sup>178</sup>

Moreover, it is also a long-established canon of construction that a statute should not be read in derogation of the common law unless the statute so clearly provides.<sup>179</sup> It follows that there is little reason to suppose that the statutory presumption against extraterritoriality should automatically transfer to the com-

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174. See Green, *supra* note 98, at 1289 (discussing how *Erie* “vertically” binds federal courts to follow state law but does not “horizontally” bind state courts to follow other states’ law).

175. *Id.* at 1267–80 (describing how many state courts invoke a presumption that the common law of other states is the same as the forum state and how one state—Georgia—“still accept[s] a *Swiftian* view of the common law” and “if the matter is governed by the common law, [it] will ignore the decisions of the sister state’s courts entirely and come to [its] own judgment about what this common law is”); see also Frank Briscoe, Inc. v. Ga. Sprinkler Co., 713 F.2d 1500, 1503 (11th Cir. 1983) (describing Georgia choice-of-law rules precluding application of outside case law).

176. Curiously, the statutory presumption against extraterritoriality is itself a common law rule like most other canons of statutory construction. See generally Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010).

177. See, e.g., *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (noting that the presumption against extraterritoriality “represents a canon of construction, or a presumption about a statute’s meaning, rather than a limit upon Congress’s power to legislate” and “rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters”).

178. See Florey, *State Law*, *supra* note 3, at 574.

179. See, e.g., *Pasquantino v. United States*, 544 U.S. 349, 359 (2005) (repeating the canon of construction that says that “[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident”) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)). In addition, neither Congress nor state legislatures have seen fit to bar courts from applying the common law abroad in accord with established choice-of-law principles. See, e.g., *Evans v. United States*, 504 U.S. 255, 269 (1992) (“The silence of the body that is empowered to give us a ‘contrary direction’ if it does not want the common-law rule to survive [i.e., Congress] is consistent with an application of the normal [common law] presumption identified in [prior cases].”).

mon law context.<sup>180</sup>

Congress and legislatures are generally free, on a statute-by-statute basis, to prescribe extraterritorial reach to their rules, and this option makes it more reasonable for courts to presume that statutes that are silent about their geographical reach should be restricted to domestic application alone. A legislature can always amend a statute to adjust its geographical reach. By contrast, the common law is invariably geoambiguous, not subject to a legislature's rule-by-rule geographic modulation. In this context, case-specific choice-of-law rules—that look, for example, to the strength of parties' contacts to the U.S. forum—make sense as the arbiter of when a particular common law rule should apply beyond U.S. borders.

What, then, is it about the common law that might otherwise justify not subjecting it to the same presumption against extraterritorial application as a statute? I suggest below that there are three ways in which the common law is generally different from statutes, ways that suggest that the legislature would not want to restrict the geographical application of the common law in the same way that statutes are restricted. First, *the common law is "common" law* in the sense that it draws upon principles that typically transcend geographical boundaries. Second, *the common law is "commoner" law* in the sense that it has evolved from the customs and relations of the common people, rather than being legislatively ordained. Third, *the common law is a "constrained" law*, subject to long-established practices that systemically restrain its change more than statutes.

In drawing these points of distinction between the common law and statutes as forms of law, my claim is *not* that the two forms of law invariably diverge from one another in all respects and all applications. Instead, my more limited claim is that general differences between the common law and statutes suggest not only that common law sometimes has (and should have) a broader geographical reach than statutory law but also that courts should resist urgings to extend the statutory presumption against extraterritoriality to the common law or otherwise to modify their choice-of-law principles for common law claims in

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180. To be sure, in *Kiobel*, the Supreme Court applied the presumption against extraterritoriality to a *federal* common law cause of action under the Alien Tort Statute, but such a specialized federal common law cause of action is unlike state common law causes of action that are not premised on and implied from the existence of a specific statute. Indeed, in contrast to ordinary common law decision making, the Court in *Kiobel* focused its analysis in statutory-interpretation-like terms on specific legislative intent and the historical context of enactment of the ATS. See 133 S. Ct. 1659, 1666–67 (2013) (examining “the historical background against which the ATS was enacted” to determine if it overcame the presumption against extraterritoriality and concluding that the historical context “provide[d] no support for the proposition that Congress expected causes of action to be brought under the [ATS] for violations of the law of nations occurring abroad”); see also *id.* at 1668 (noting that “there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms”).

the international context.<sup>181</sup>

*a. The Common Law as “Common” Law.* Courts have long presumed the common law to be “common” across international borders in ways that statutes generally are not. For this reason, under the “transitory tort” doctrine, it was “the enlightened English rule” and the rule in “every state of the Union” that “all common-law actions for an injury in a foreign country are transitory in their character, and may be brought in another state or country besides that in which they originated.”<sup>182</sup>

But the same was not true for statutory causes of action.<sup>183</sup> Thus, as the Supreme Court long ago noted:

If [an action were] a tort at common law where suit was brought, it would be presumed that the common law prevailed where the occurrence complained of transpired, but, if the cause of action was created by statute, then the law of the forum and of the wrong must substantially concur in order to render legal [redress] demandable.<sup>184</sup>

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181. *But see* Florey, *State Law*, *supra* note 3, at 574–75 (contending that state law should not be subject to a presumption against extraterritoriality but that states should modify application of their choice-of-law principles in the international context).

182. *Mex. Cent. Ry. Co. v. Mitten*, 36 S.W. 282, 283 (Tex. 1896) (quoting *Leonard v. Columbia Steam Navig. Co.*, 88 N.Y. 48, 52 (1881)); *see also* *Davis v. Mills*, 194 U.S. 451, 453–54 (1904) (Holmes, J.) (“The general theory on which an action is maintained upon a cause which accrued in another jurisdiction is that the liability is an *obligatio*, which, having been attached to the person by the law then having that person within its power, will be treated by other countries as accompanying the person when brought before their courts.”); Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 11 (2013) (describing the “transitory tort” doctrine); Chimène I. Keitner, *States Courts and Transitory Torts in Transnational Human Rights Cases*, 3 U.C. IRVINE L. REV. 81, 83–87 (2013) (describing the “transitory tort” doctrine in “early U.S. cases”).

183. *Mitten*, 36 S.W. at 283 (“Where the action is given by statute, and is not one that arose at common law, it becomes necessary for the plaintiff to establish the existence of a law in the foreign state that gives the right of action, as well as in the state where the case is tried.”); *see* *Wooden v. W. N.Y. & Pa. R.R. Co.*, 126 N.Y. 10, 14–15 (1891) (noting that “the common law . . . is presumed to exist in the foreign state” but “that such presumption does not arise where the right of action depends upon a statute which confers it[] and that in such case the action can only be maintained here by proof that the statutes of the state in which the injury occurred give the right of action and are similar to our own”). For cases where a plaintiff sought to enforce a foreign statutory right in a New York court, New York courts would later change the rule not to require the existence of similar statutes in both jurisdictions but to consider whether enforcement of a foreign statutory right would more generally violate New York’s public policy (statute or no statute). *See Loucks v. Standard Oil. Co.*, 120 N.E. 198, 202 (N.Y. 1918) (Cardozo, J.).

184. *Tex. & Pac. Ry. Co. v. Cox*, 145 U.S. 593, 604 (1892). Thus, in *Cox*, the Court noted the “generally recognized” rule allowing an action “where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced.” *Id.* at 605. As to cross-border enforcement of statutory rights, the Court in *Cox* cited *Dennick v. Cent. R.R. Co. of N.J.*, 103 U.S. 11 (1880), *see* 145 U.S. at 604, but implicitly limited its broader statement in *Dennick* that

[w]herever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of

What justified treating the common law differently than statutes? Courts assumed that the rights protected by the common law are generally *common* across jurisdictional lines, such that there was little reason to presume that foreign law would deny these rights.<sup>185</sup> The common law of torts protects many rights that are so basic—for example, a right to be free from arbitrary physical violence and imprisonment—that it is reasonable absent contrary evidence to presume that the same protections apply in foreign lands. As a New York court explained:

*Prima facie*, a man is entitled to personal freedom and the absence of bodily restraint, and to be exempt from physical violence to his person, everywhere. Hence, if one bring a civil action for false imprisonment, or for an assault and battery committed abroad, he need not, in the first instance, offer any proof that such acts are unlawful, and entitle the injured party to a recompense in damages, in the place where they were inflicted; for the courts will not presume the existence of a state of the law in any country by which compensation is not provided for such injuries.<sup>186</sup>

Thus, for “personal injuries recognized as such by universal law,” a Texas court concluded that “the suit may be brought wherever the aggressor is found, irrespective of the provisions of the local law, or whether there be any law at all in force at the place where the wrong was committed.”<sup>187</sup>

The same did not hold true for statutes. As the court in *Whitford* said:

[N]o such presumption [of commonality] obtains respecting the positive statute law of the State. There is, generally, no probability, in point of fact, and there is never any presumption of law, that other States or countries have

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action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

*Dennick*, 103 U.S. at 18 (emphasis added); see *Kiobel*, 133 S. Ct. at 1665–66 (citing and quoting the broader statement of *Dennick* but not *Cox*).

185. *Mitten*, 36 S.W. at 283 (“[W]here the wrong is one for which a remedy was given at common law, the presumption will prevail that the common law is in force in the foreign state, and the remedy will be applied. ‘Actions for injuries to the person committed abroad are sustained without proof as to the *lex loci*, upon the presumption that the right to compensation for such injuries is recognized by the laws of all countries.’”) (quoting *McDonald v. Mallory*, 77 N.Y. 548, 551 (1879)); see *Holbrook v. Libby*, 94 A. 482, 483 (Me. 1915) (“[T]he law of Minnesota is not presumed to be the same as our statute. It is presumed to be like our common law.”); *Leonard*, 88 N.Y. at 52–53 (noting that for transitory tort cases “[t]he right to recover in such cases rests upon the presumption that the common law prevails in such other State, and that the injured party could have recovered there had the action been brought in such State,” but by contrast that “it is not a legitimate presumption that the statute laws of other States or countries are similar to our laws”).

186. *Whitford v. Pan. R.R. Co.*, 23 N.Y. 465, 467–68 (1861) (Denio, J.).

187. *Willis v. Pac. Ry. Co.*, 61 Tex. 432, 434 (1884); see *Gutierrez v. Collins*, 583 S.W.2d 312, 315 (Tex. 1979) (quoting and reaffirming *Willis* to conclude that “[t]he distinction between common law causes of action and those created by statute has long been recognized”).

established, precisely or substantially, the same arbitrary rules which the domestic legislature has seen fit to enact.<sup>188</sup>

Accordingly, for domestic cases involving tort injuries sustained in foreign countries, U.S. state courts ordinarily permitted such actions to proceed if they were based on the common law but not if they were based instead on a cause of action created by state statute (such as a wrongful death statute).<sup>189</sup> The “principle” for this limitation of state statutory duties was “the want of power in a state to give her laws an extraterritorial effect” to the territory where the tortious injury occurred.<sup>190</sup>

Some states have statutes making clear the jurisdiction of their courts to entertain actions based on torts in foreign countries.<sup>191</sup> The courts of Texas, for example, permit U.S. or foreign citizens to maintain a damages action for a death or injury that takes place in a foreign country if “a law of the foreign state or country . . . gives a right to maintain an action for damages for the death or injury.”<sup>192</sup> In one case involving a lawsuit in a Texas state court arising from the death of an Indian oil-rig worker in the Middle East, the Texas Supreme Court made clear that the state courts of Texas are courts of general jurisdiction with power to decide all common law actions but that “this presumption does not apply to actions grounded in statute rather than the common law,” and “[it has] repeatedly reaffirmed this dichotomy between common-law and statutory ac-

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188. *Whitford*, 23 N.Y. at 468.

189. *Whitford*, 23 N.Y. at 468 (declining to allow action based on a train accident in the country of “New Granada” on the isthmus of Panama to proceed on behalf of estate of decedent because right of the estate to recovery depended on New York statute that was inconsistent with the common law rule providing that the cause of action terminates with the death of the victim); *Crowley v. Pan. R.R. Co.*, 30 Barb. 99, 107 (N.Y. Gen. Term 1859) (noting in a train accident case in New Granada, that “the statutes of one state have no force, *ex proprio vigore*, beyond the territorial limits of the state” but that “the courts in all civilized states do, more or less, take cognizance of causes of action arising in other states and countries, in respect to persons within their jurisdiction” and that “[t]his is universally done in all civilized countries, and especially where the common law prevails in respect to personal rights of action, so far as they are transitory”); *Willis*, 61 Tex. at 433 (declining to allow Texas statutory cause of action stemming from train accident in Indian territory); see *McDonald*, 77 N.Y. at 551 (noting a “presumption” of the “right to compensation” for “injuries . . . recognized by [the] laws of all countries” but that the “presumption cannot apply where the wrong complained of is not one of those thus universally recognized as a ground of action, but is one for which redress is given only by statute”); *Kiefer v. Grand Trunk Ry. Co.*, 42 N.Y.S. 171, 171 (N.Y. App. Div. 1896) (noting that if a cause of action is “unknown to the common law,” then “it is now settled beyond controversy that such an action may not be maintained under the statute law of this state to recover damages for the death of a person occasioned by a wrongful act committed in another state or country, unless the existence of a similar statute in such state or country is made to appear”).

190. *Willis*, 61 Tex. at 434.

191. See, e.g., OHIO REV. CODE ANN. § 2125.01 (LexisNexis 2013); S.D. CODIFIED LAWS § 21-5-4 (2010); TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a) (West 2011). Although these statutes do not dictate that the state court apply its own state law, they are indicative of the amenability of state courts to consider tort claims arising from injuries in foreign countries.

192. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a) (West 2011).

tions.”<sup>193</sup>

True enough, some uncertainty has persisted about whether common law rights should always be presumed to be “common” across international borders, especially for countries that do not operate under a common law system.<sup>194</sup> Justice Holmes, for example, did not doubt that “[g]enerally speaking, as between two common-law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state,” while “a statute of one would not be presumed to correspond to a statute in the other.”<sup>195</sup> But he cautioned that commonality of common law duties might not so easily be presumed “when we leave common-law territory for that where a different system prevails.”<sup>196</sup> Accordingly, when confronted with an injured plaintiff’s claim arising from a machinery accident in Cuba—“a country inheriting the [civil] law of Spain”—Holmes concluded that “[t]here is no general presumption that that law is the same as the common law.”<sup>197</sup>

Still, Holmes did not categorically rule out the extraterritorial reach of universal common law-type obligations. He noted that “in dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person, or conversion of goods, courts would assume a liability to exist if nothing to the contrary appeared.”<sup>198</sup> For this Holmes relied, in part, on Massachusetts precedent that, even for non-common law countries, “[t]here is every reason why they should be presumed to recognize fundamental principles of right and wrong which lie at the foundation of human society,” so that “if one should sue for damages suffered from an assault and battery, or from a larceny committed” in a foreign country, then “[t]here ought to be a presumption from common knowledge that a liability exists everywhere in such cases.”<sup>199</sup>

193. *Dubai Petrol. Co. v. Kazi*, 12 S.W.3d 71, 75–76 (Tex. 2000) (upholding subject-matter jurisdiction of a Texas state court to consider a claim by the next of kin of decedent from India arising from accident on oil rig off the coast of the United Arab Emirates).

194. See Damien P. Horigan, *The New Adventures of the Common Law*, 5 PACE INT’L L. REV. ONLINE 1, 2–3 (2009) (discussing historical spread of common law including most recently to some areas of the Arab world).

195. *Cuba R.R. Co. v. Crosby*, 222 U.S. 473, 479 (1912); see *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct 1659, 1666 (2013) (“Under the transitory torts doctrine . . . ‘the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place.’” (quoting *Crosby*, 222 U.S. at 479)).

196. *Crosby*, 222 U.S. at 479.

197. *Id.*

198. *Id.* at 478.

199. *Parrot v. Mex. Cent. Ry. Co.*, 93 N.E. 590, 593 (Mass. 1911). For further support of this proposition, see also *Bank of Augusta v. Earle*, 38 U.S. 519, 535–36 (1839) (argument of D.B. Ogden) (“The common law is said to be ‘common right.’ . . . In all civilized nations, this law is substantially the same. Even in nations not admitted to be within that description, there is a strong resemblance: for example, in the laws of the Hindoos. The reason is obvious. Whether expounded in codes, or disclosed by judicial investigation and decision, the great principles of justice are identical; and it is the aim of all law to cultivate, extend, and enforce them. Statutes are but few in comparison. They are exceptions; the common law is the great body. The legislator acts chiefly upon matters which are indifferent.”).

To be sure, just as *Erie* itself shows that the common law may sometimes vary from state to state, it can hardly be presumed that all common law-type obligations are universally mirrored across U.S. borders. But the point is that the common law is very often “common” across jurisdictions and more so than for rights and duties that stem from statutes. This is reason enough why courts might treat the extraterritorial reach of the common law differently than statutes and refrain from invoking a categorical presumption against extraterritoriality to the common law.

The Supreme Court’s recent discussion of the transitory tort doctrine in *Kiobel* is not to the contrary. To begin with, *Kiobel* did not involve the geographical scope of state common law but the scope of a federal statute, the ATS, and the related, limited federal common law cause of action that it had recognized to stem from the jurisdictional provision of the ATS.<sup>200</sup> The Court in *Kiobel* did not question the geographical scope of the common law or the validity of the transitory tort doctrine but declined instead to conclude under the ATS that a federal court “has authority to recognize a cause of action under U.S. law to enforce a norm of international law.”<sup>201</sup>

*b. The Common Law as Law of the “Commoner.”* The source and origins of the common law are an additional reason why—unlike obligations created by statute—the common law should not be deemed to be presumptively territorial. Statutes issue top-down from legislators who have been elected to govern specific territorial zones; it is most reasonable to presume the intent of legislators only to regulate activity that corresponds to their territorial zone of authority. “[L]egislation is a deliberate and formal command, an attempt to rule within a certain legal order—it purports to apply, from a definite point in time, to persons in a definite spatial area.”<sup>202</sup> Hence, the Supreme Court has justified the presumption against extraterritoriality principally on grounds of “the commonsense notion that Congress generally legislates with domestic concerns in mind.”<sup>203</sup>

By contrast, the common law is not an expression of legislative will or intent.<sup>204</sup> Instead, the common law originates bottom-up from long-established customs and practices of people, including from lawyers and judges as participants in iterative dispute resolution processes. The “root of common law . . . was ancient custom, custom so long established that ‘the memory of man

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200. 133 S. Ct. at 1663–64.

201. *Id.* at 1666.

202. SCALIA & GARNER, *supra* note 40, at 269 n.5 (emphasis omitted) (quoting B.A. WORTLEY, JURISPRUDENCE 138 (1967)).

203. *Small v. United States*, 544 U.S. 385, 388 (2005) (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)).

204. *Kansas v. Colorado*, 206 U.S. 46, 96 (1907) (“The common law includes those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.”) (quoting 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 439 (1826)).



runneth not to the contrary.”<sup>205</sup>

The common law developed not only independent from geographical considerations but independent of the dictates of political authorities.<sup>206</sup> Chief Justice Marshall acknowledged as much when he noted that “[t]he common law has been adopted by the legislature of Virginia,” but that “[h]ad it not been adopted, I should have thought it in force,” because “[w]hen our ancestors migrated to America, they brought with them the common law of their native country,” and “[i]n breaking our political connection with the parent state, *we did not break our connection with each other.*”<sup>207</sup>

Thus, the common law system emerged

as a customary system of law [in the sense] that it consists of a body of practices observed and ideas received over time by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts.<sup>208</sup>

Common law rules emerge over time from people’s everyday relationships and exist without connection to or concern for any particular political subdivision where people or their relationships may happen to be located. There is little reason to suppose these rules of relationship and dispute resolution were intended to be aligned along tidy geographical lines.

That is not to say the common law is simply the “people’s” law.<sup>209</sup> The Court in *Erie* was doubtlessly correct to say of the common law that “‘law in the sense in which courts speak of it today does not exist without some definite authority behind it.’”<sup>210</sup> For that matter, Justice Story himself—the author of *Swift v. Tyson*, which *Erie* overruled—freely acknowledged the relationship between

205. COMMON LAW THEORY 173 (Douglas E. Edlin ed., 2007) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*68–70); see *W. Union Tel. Co. v. Call Publ’g Co.*, 181 U.S. 92, 101–02 (1901) (defining the “common law” and quoting Blackstone).

206. See ALAN BRUDNER, THE UNITY OF THE COMMON LAW 1–2 (1995) (“For most of its history, the common law was an ordering of human interactions independent of the political order directed to common ends. It was a system of rules ordered not to a common good but to individual rights over one’s person and property conceived as existing prior to any association for a common purpose.”); *id.* at 153–54 (describing the historical conception of the common law tort that “[a]n act was tortious not because it jeopardized a goal thought desirable by the community . . . but because it violated an individual right held prior to any human association for a common end” and “the point of the remedy was not to further a communal goal but to actualize the right”).

207. *Livingston v. Jefferson*, 15 F. Cas. 660, 665 (C.C.D. Va. 1811) (Marshall, Circuit J.) (emphasis added).

208. Brian Simpson, *The Common Law and Legal Theory*, in LEGAL THEORY AND COMMON LAW 20 (William Twining ed., 1986).

209. See, e.g., Stuart Banner, *When Christianity Was Part of the Common Law*, 16 LAW & HIST. REV. 27, 58–59 (1998) (describing the historical evolution in the conception of the common law from a “wide range of sources of external to the legal system” to being “made, not discovered, by judges”).

210. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (Holmes, J., dissenting) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928)).

positive governmental authority and the vitality of the common law.<sup>211</sup>

Indeed, by contrast to an amorphous “natural” or “people’s” law that could be said to arise and persist free from governmental authority, the common law depends for its articulation, application, and enforcement on the actions or forbearance of governmental officials. First, it is “judge-made law” insofar as it depends on judges as intermediaries to recognize and declare customs to have ripened into the force of common law. As Judge Learned Hand observed, “[o]ur common law is the stock instance of a combination of custom and its successive adaptations” in that “judges receive it and profess to treat it as authoritative, while they gently mould [sic] it the better to fit changed ideas.”<sup>212</sup> Second, the common law is legislatively connected in that legislators retain residual authority not only to selectively trump the common law through supervening legislative command<sup>213</sup> but also to sanctify the continuance in force of the common law and common law decision making as a parallel form of legal authority to statutory and regulatory edicts.<sup>214</sup> Still, this integral involvement of judicial and legislative actors—what *Erie* calls the “definite authority” that lies somewhere “behind” the common law<sup>215</sup>—does not detract from the fact that the common law arises organically from people’s relationships and that it functions apart from territorially deterministic concerns. For this additional reason, a presumption against extraterritoriality does not appropriately apply to the common law.

*c. The Common Law as Constrained Law.* Legal realists insist that judges

211. Report of Judge Story et al. to the Governor of Massachusetts on the Codification of the Common Law, reprinted in CODIFICATION OF THE COMMON LAW 29 (1882) [hereinafter “Report of Judge Story”] (“[I]t may be generally stated, that the common law consists of positive rules and remedies, of general usages and customs, and of elementary principles, and the developments or applications of them, which cannot now be distinctly traced back to any statutory enactments, but which rest for their authority upon the common recognition, consent and use of the State itself.” (emphasis added)). Story went on to describe why the common law is necessary, precisely because of the impracticability of any legislature’s codification of all manner of legal duties arising from the multitude of relationships among people. See *id.* at 36, 39. In light of these concerns, Story noted:

any attempt at so comprehensive an enterprise [as codifying all law] would be either positively mischievous, or inefficacious, or futile. . . . [T]he common law should be left in its prospective operations in future (as it has been in the past) to be improved, and expanded, and modified, to meet the exigencies of society by the gradual application of its principles in courts of justice to new cases, assisted from time to time, as the occasion may demand, by the enactments of the Legislature.

*Id.* at 40–41.

212. Learned Hand, *Is There a Common Will?*, 28 MICH. L. REV. 46, 50 (1929).

213. *Id.* (“[W]hat we mean by a common-will [of a legislature] is no more than that there shall be an available peaceful means by which law may be changed when it becomes irksome to enough powerful people who can make their will effective.”); see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 4 (1982) (“Legislatures [in the nineteenth century] did, of course, possess the ultimate authority, subject to constitutional requirements, to make law; however, that authority was exercised sparingly by modern standards, and in largely revisionary capacity.”).

214. See *infra* notes 243–44 and accompanying text (discussing state legislative adoption of the common law).

215. *Erie*, 304 U.S. at 79.

“make” the common law no differently than legislators make rules by statutes.<sup>216</sup> But this blinks the reality of how legislators and common law judges actually operate and how they understand their roles differently. To begin with, common law rules develop only in the context of and in response to a need for specific dispute resolution, when judges are compelled by circumstance to articulate some principle to govern the resolution of a legal dispute.<sup>217</sup> “It is the merit of the common law,” observed Justice Holmes, “that it decides the cases first and determines the principle afterwards.”<sup>218</sup> And as Daniel Webster urged, “[g]radual and cautious conformity to circumstances is the merit of the common law, following the universal sense of propriety; for substantial law is eternal and identical, and what is frequently denounced as disorganization, is, in truth, restoration of first principles.”<sup>219</sup>

Legislators, by contrast, do not ordinarily enact statutes to resolve particular disputes.<sup>220</sup> They are free to sit on their hands and to abstain altogether from enacting legislative rules, and when they do act, the resulting law is doubtless an expression of their will and policy preferences.<sup>221</sup>

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216. See BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 13–26 (2010) (discussing historical evidence showing that even before the rise of the legal realist movement in the early 1900s, judges and lawyers understood the role of a common law judge to “make” law in some instances); Dodge, *supra* note 100, at 385–86 (noting “the legal realists’ attack on the public-private distinction . . . that because private-law rights are enforced by the state they should be conceptualized as delegations of public power to private individuals” and that “rules of contracts, torts, property, and the like do reflect considerations of public policy”); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 885–86 (2006) (describing the historical evolution from the nineteenth-century view of common law adjudication as law finding to the later view of common law adjudication as lawmaking and saying that “[i]t is thus no longer especially controversial to insist that common law judges make law”).

217. See JAMES C. CARTER, *THE PROPOSED CODIFICATION OF OUR COMMON LAW* 34–35 (1884) (“[I]f a controversy arise between two men concerning the ownership of property, and there be no statute upon the subject, the unwritten law *must*, nevertheless, decide it. No matter how novel the question, it must be determined. It would not be endurable that one man should hold unchallenged possession of property to which another honestly laid claim, for the reason that the case was so novel as to render it difficult to determine to whom it justly belonged. Society may leave a criminal unpunished; private citizens do not feel an additional burden on this ground; but it cannot leave private controversies undecided, or to be decided by force.”).

218. Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870). *But see generally* Schauer, *supra* note 216 (questioning whether the case-specific context of common law adjudication results in better legal rules than legislative or administrative rulemaking).

219. *Bank of Augusta v. Earle*, 38 U.S. 519, 576 (1839) (argument of Daniel Webster); *see* Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 10 (1936) (“It is unavoidable, and not necessarily an evil, I think, that the continuous practice of searching the past to find, in what has been done, a guide for what is to be done, should develop a certain conservatism. Cultivated sedulously for some centuries by the common law, this conservative habit of mind is a by-product, by no means negligible, of the system of building law by precedent.”).

220. Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 937 (2006) (“Courts *must* resolve the dispute before them and need not declare principles. Legislatures *must* declare general principles and do not generally resolve single disputes.”).

221. Learned Hand critiqued the notion that legislative enactments represent the general will of the people, insisting that “most legislation is not of that kind.” Hand, *supra* note 212, at 50. He argued that legislation instead “represents the insistence of a compact and formidable minority” and that “[w]e may

Relatedly, another general set of differences between statutes and common law is their temporal and regulatory orientations. In the tort context especially, legislators ordinarily use statutes to prescribe prospective rules to guide the conduct of entire populations or classes of people. By contrast, when judges apply the common law, they do so retrospectively for the one dispute before them.<sup>222</sup> “The basic function of courts is dispute-settlement, while rule-making is incident to and parasitic on that basic function.”<sup>223</sup> And this is contrary to the legislative role of “the making of rules, not the settlement of disputes.”<sup>224</sup> As Justice Scalia has noted, “prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be.”<sup>225</sup> Indeed, the “common and traditional” understanding of judicial power runs contrary to “presuppos[ing] a view of [judges’] decisions as *creating* the law, as opposed to *declaring* what the law already is.”<sup>226</sup>

Of course, this dichotomy between “legislative prospective” and “common law retrospective” is far from universally true. Legislators sometimes pass laws for retrospective allocation of liability for past events.<sup>227</sup> Moreover, because of the doctrine of *stare decisis* and the precedential nature of the common law, a judge’s common law decision may also inevitably function for the community as a future conduct-guiding rule.<sup>228</sup> But even legal realist Justice Holmes acknowledged that although “judges do and must legislate . . . they can do so only interstitially” because “they are confined from molar to molecular motions,” and “[a] common law judge could not say, ‘I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.’”<sup>229</sup>

This distinction between statutes and the common law is consistent with the differential default rules of retroactivity in both contexts. A judge applies the common law to a dispute despite the fact that the events forming the basis for the dispute have occurred prior to his or her application of the common law rule. By contrast, absent legislative intent to the contrary, statutes are presumed not to have retroactive application to govern conduct predating their enact-

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say if we like that meanwhile everybody has consented to what exists, but this is a fiction,” as “[t]hey have not; they are merely too inert or too weak to do anything about it.” *Id.*

222. See CALABRESI, *supra* note 213, at 4 (describing how “the incremental nature of common law adjudication [means] that no single judge could ultimately change the law”).

223. PETER CANE, *THE ANATOMY OF TORT LAW* 19 (1997); see Rachlinski, *supra* note 220, at 933 (“Only rarely is legislation designed specifically to resolve a particular dispute.”).

224. CANE, *supra* note 223, at 19; Rachlinski, *supra* note 220, at 944 (noting “the general principle that courts usually act retrospectively and legislatures act prospectively”).

225. *Am. Trucking Ass’n v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment).

226. *Id.*

227. For example, the federal “Superfund” law is primarily a retrospective liability-creating statute for the cleanup of hazardous waste. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009).

228. See, e.g., Schauer, *supra* note 216, at 890 (“[A]ny reason (or any statement of a reason) that has precedential force in future cases operates in largely rule-like fashion.”).

229. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

ment.<sup>230</sup>

Still, there are more differences between common law and statutes. Common law judges are not only restrained by the *context* of retrospective-oriented, case-by-case dispute settlement for which they must articulate some resolution, but common law judges are also constrained by the very *process* of common law adjudication that relies on a judge's explication of reasons that cohere with decisions that have come before. The common law depends "upon conformity with the past" and on what is "transmitted through time as a received body of knowledge and learning."<sup>231</sup> Thus,

whereas the legitimacy of legislation is based largely on the legitimacy of the political process and only secondarily on the content of the legislation, a crucially important source of the legitimacy of any particular judge-made rule is the degree to which it is consistent and coherent with the whole body of related common law rules.<sup>232</sup>

And, as Oona Hathaway has noted, the common law thereby tends to be "path dependent" such that the "courts' early resolutions of legal issues can become locked-in and resistant to change."<sup>233</sup>

These process characteristics constrain common law rule making in ways not applicable to statutes. Put differently, common law rule making is really common law "*decisionmaking* from which particular rules are derived by analogy for application in future cases."<sup>234</sup> As Linda Meyer has observed, "the

230. See *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 108 (1993) (Scalia, J., concurring) ("Fully retroactive decisionmaking was considered a principal distinction between the judicial and the legislative power: [I]t is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases." (internal quotation marks and citation omitted)); SCALIA & GARNER, *supra* note 40, at 261–65. Compare *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997) (reiterating and reaffirming the presumption against retroactive application of statutes), with *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 319–20 (5th Cir. 1999) (interpreting Louisiana law to require retroactive application of common law decisions), and *McHugh v. Litvin, Blumberg, Matusow & Young*, 574 A.2d 1040, 1044 (Pa. 1990) (noting "the common law understanding that all judicial decisions are applied retrospectively unless and until the court exercises its conscience to limit the effect of the decision").

231. Simpson, *supra* note 208, at 20; see *Kansas v. Colorado*, 206 U.S. 46, 97 (1907) ("For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes.").

232. CANE, *supra* note 223, at 19; see ALLAN C. HUTCHINSON, *EVOLUTION AND THE COMMON LAW* 4 (2005) ("What distinguishes the common law is that it is not only a tradition but also a traditional practice that embraces the idea of traditionality—the common law accepts that its past has a present authority and significance for its participants in resolving present disputes and negotiating future meaning.").

233. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001).

234. Emily Sherwin, *Judges as Rulemakers*, 73 U. CHI. L. REV. 919, 927 (2006) ("Another practice associated with the common law is reasoning by analogy. . . . The analogical reasoner studies an array of intuitively related cases and 'abduces' criteria that make them relevantly similar or different.").

most traditional understanding of the common law doctrine of precedent does not locate the binding power of a prior case in its author's intentions or words," but rather it is "the 'material facts' and the result of a case [that] guide[s] later decisions," such that "the judge can find material distinctions and refuse to follow a rule articulated in a prior case even if the case at bar is within the language of the 'rule' of a case as expressed by the prior court."<sup>235</sup>

In the common law decision-making context, judicial "opinions are designed primarily for explanation and justification of decisions rather than for prospective lawmaking," and any precedential "rule" is no more than "implicit in the combination of explanatory statements and background facts offered by the deciding court."<sup>236</sup> Thus, as Frederick Schauer has noted, "the rules of the common law appear to be but rules of thumb," and "[t]hey are defeasible when direct application of their background rationales would generate a different result, and consequently the rules have no normative force of their own."<sup>237</sup> The resulting "rule" from common law decisions "differ[s] so much from our ordinary conception of rules as guides and constraints that it hardly pays to speak of them as rules at all."<sup>238</sup>

In this manner, "the common law' is best regarded as the institutionalized process of adjudication itself, rather than as the body of relatively stable (but nonetheless constantly changing) dispute-settling standards which emerge from that process."<sup>239</sup> A prior judge's common law statement of a "rule" is not "the law" itself but evidence only of how the law will next apply.<sup>240</sup>

This is not to say that common law judges merely "find" the law rather than "make" it, although there will be countless cases that call for rote application of long-established rules. Instead, my claim is that, no matter the factual context, the common law process requires judges to *strive* to find the law rather than attempt to make it.<sup>241</sup> And that means the orientation of judges in a common law context is very different from that of legislators, who view their very purpose as lawmaking and regulatory in function. As Chief Justice Marshall aptly recognized, "[j]udicial power is never exercised for the purpose of giving

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235. Linda Meyer, "Nothing We Say Matters": Teague and New Rules, 61 U. CHI. L. REV. 423, 465, 475 (1994); see also Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 502 (1948) ("[T]he scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced.").

236. Sherwin, *supra* note 234, at 924.

237. Frederick Schauer, *Is the Common Law Law?*, 77 CALIF. L. REV. 455, 455-56 (1989) (reviewing MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988)).

238. *Id.* at 456.

239. Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 O.J.L.S. 215, 257 (1987).

240. See, e.g., *Callet v. Alioto*, 290 P. 438, 440 (Cal. 1930) ("[J]udicial decisions do not themselves constitute the common law, but are merely evidence of the common law.").

241. See, e.g., Sherwin, *supra* note 234, at 925 (noting that in common law context "courts generally view themselves as bound to follow precedents" and "they regularly study prior opinions in search of applicable rules").

effect to the will of the Judge.”<sup>242</sup>

Are common law rules in fact the product of legislative will? Yes and no—yes in the sense that the common law exists but at the theoretical sufferance of the legislature, but no in the sense that the legislature does not “will” any particular common law rule. Around the time of the American Revolution and in our early history, many states by positive law (in their constitutions or by statute) specifically adopted the common law of England.<sup>243</sup> Arguably there was no need for a legislative act of adoption because, as one state supreme court has observed, “the colonists, upon their emigration from the mother country, brought with them to this state the common law of England, so far as it was applicable to their condition and circumstances here.”<sup>244</sup> Because of this positive law adoption of the common law, one might argue that the common law should similarly be subject to the same kinds of presumptions—such as the presumption against extraterritoriality—that limit the operation of ordinary statutes.

But courts have rejected the notion that legislative importation of the entire common law requires in turn that common law “rules” be interpreted as if they were statutory enactments.<sup>245</sup> For example, though a statute retains a meaning that remains fixed over time,<sup>246</sup> the Supreme Court has long recognized that “the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions,” such that “an adoption of the common law in general terms does not require, without regard to local circumstances, an unqualified application of all its rules.”<sup>247</sup>

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242. *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824).

243. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 572 (1874) (noting “[t]he adoption of the common law by the several States of this Union”); Louis F. Del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM. J. COMP. L. 1, 5–6 & nn.31–32 (2010) (listing states and statutes formally adopting the common law). California statute, for example, provides that “[t]he common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.” CAL. CIV. CODE § 22.2 (West 2013).

244. *Bloomfield v. Brown*, 25 A.2d 354, 356 (R.I. 1942); accord *Livingston v. Jefferson*, 15 F. Cas. 660, 665 (1811) (Marshall, Circuit J.) (noting that the “common law has been adopted by the legislature of Virginia,” but that “[h]ad it not been adopted, I should have thought it in force,” because “[w]hen our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applicable to their new situation”).

245. For example, North Carolina enacted a statute in 1778 that remains in force today and that directs that “[a]ll such parts of the common law as were heretofore in force and use within this State . . . are hereby declared to be in full force within this State.” N.C. GEN. STAT. § 4-1 (2011). Still, the North Carolina Supreme Court asserts its authority to change the common law absent contrary command from its legislature. See *State v. Freeman*, 276 S.E.2d 450, 452 (N.C. 1981).

246. See, e.g., *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (noting that it is the intent of the enacting Congress, not of a later Congress, that controls for interpretation purposes); SCALIA & GARNER, *supra* note 40, at 78 (“Words must be given the meaning they had when the text was adopted.”).

247. *Funk v. United States*, 290 U.S. 371, 383–84 (1933); accord *Hurtado v. California*, 110 U.S. 516, 530–31 (1884) (noting that the “flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law” and that “we are not to assume that the sources of its supply have been exhausted”).

This makes plenty of sense. There is nothing to suggest that legislatures adopted the common law *in toto* in order to constrain judges or otherwise to subjugate the common law to statute-like rules of interpretation. Legislatures understood that their adoption of the common law was tantamount to their adoption of a parallel and complementary process of lawmaking or law-recognizing that was not to be governed in the same manner as legislative enactments.<sup>248</sup>

These inherent contextual and methodological constraints are additional reasons to conclude that the extraterritorial application of common law is less problematic than extraterritorial application of prospective legislative rules. Because the common law in general is not aimed at regulating what future actors do, it is reasonable to conclude that the extraterritorial application of the common law does not intrude in the same manner as a prospective regulatory statute upon the sovereign authority of foreign states where conduct has occurred.<sup>249</sup>

Nor does allowing extraterritorial application of the common law run afoul of background principles of international law. To the contrary, modern choice-of-law principles have served as the template for modern notions of the limits of each country's extraterritorial prescriptive jurisdiction.<sup>250</sup> Both approaches emphasize comparative balancing of factors, including territoriality, nationality,

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248. Report of Judge Story, *supra* note 211, at 29–30 (“[T]he common law is not in its nature and character an absolutely fixed, inflexible system, like the statute law, providing only for cases of a determinate form which fall within the letter of the language in which a particular doctrine or legal proposition is expressed. It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade and commerce and the mechanic arts, and the exigencies and usages of the country.”); see Andrew P. Morriss, *Codification and Right Answers*, 74 CHL.-KENT L. REV. 355, 390 (1999) (describing the nineteenth-century debate among lawyers and legal scholars about whether the common law should be entirely codified).

249. Of course, it might be more broadly asserted that *any* extraterritorial assertion of one nation's law implicates diplomatic or “comity” concerns. But the thesis set forth in this Article does not mean that common law cases will engender more controversy with foreign nations than statutes. To the contrary, despite the fact that statutes are presumed not to apply abroad, there is no question that Congress may choose to extend its statutes abroad if it wishes and even in violation of background principles of comity and the customary law of international jurisdiction. See, e.g., Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 311 (“American jurisprudence recognizes that Congress has the authority to violate international law . . .”); Meyer, *supra* note 1, at 125 (“It is now well established that if Congress chooses to do so, it is free to regulate conduct outside the United States and in disregard of any limits posed by international law.”).

250. Dodge, *Extraterritoriality*, *supra* note 33, at 129–34 (describing how the prescriptive international jurisdictional limits of the Restatement (Third) of Foreign Relations Law were premised on the conflict-of-law approach of the Restatement (Second) of Conflict of Law and concluding that scholars have looked to the conflict of laws for guidance in determining the extraterritorial reach of regulatory statutes). But see Brilmayer, *supra* note 249, at 321–22 (suggesting possibility that certain state choice-of-law theories could be applied in manner that violates international prescriptive jurisdictional limits).



and traditional practices of allocations of decisional authority.<sup>251</sup> Thus, as Justice Scalia has recognized, the extraterritorial application of any nation's laws should be governed by "prescriptive comity": the respect sovereign nations afford [one another]."<sup>252</sup>

### 3. Federal Courts and Extraterritorial Common Law

If we assume, then, that state judges remain free to treat the geographical scope of their common law differently than their statutory law for purposes of determining its presumed geographical scope and that there are good reasons for them to do so, this leaves one remaining *Erie* question: must a *federal* court abide by the state's methodology concerning the extraterritorial application of its common law, or do federal courts remain at liberty to apply an overarching "federal" presumption against extraterritorial application of state common law?

This question runs in tandem with those posed by Abbe Gluck in her exploration of whether *Erie* requires federal courts not only to apply the substance of each state's statutes but also to apply each state's principles of statutory interpretation (such as the relevant state courts' methodological approaches to applying a textualist or purposivist approach of interpretation and whether to consider legislative history).<sup>253</sup> As she notes, this issue turns on deciding what is the legal status of statutory interpretive principles and resolving "statutory interpretation's most fundamental jurisprudential question—whether statutory interpretation methodology is 'law' [that is binding under *Erie*], individual judicial philosophy, or something in between."<sup>254</sup>

Just because most states recognize their own statutes to be subject to the presumption against extraterritoriality, must a federal court also apply this presumption? Quite surprisingly, federal courts in transnational litigation suits have seemed unaware of this issue.<sup>255</sup> In any event, the better view is that, just as a federal court must follow a state's choice-of-law rules (even for cases involving extraterritorial conduct),<sup>256</sup> a federal court should also abide by a state-imposed substantive interpretative limit on the application of its own

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251. Compare RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402–403 (1987) (listing factors relevant to establishing prescriptive jurisdiction and resolving jurisdictional disputes), with RESTATEMENT (SECOND) OF CONFLICT OF LAW § 145 (1969) (listing factors relevant to conflict-of-law disputes).

252. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) ("Comity in this sense includes the choice-of-law principles that, in the absence of contrary congressional direction, are assumed to be incorporated into our substantive laws having extraterritorial reach." (internal quotation marks omitted)).

253. See Gluck, *supra* note 166, at 1902; Gluck, *supra* note 13, at 758.

254. Gluck, *supra* note 166, at 1902.

255. See, e.g., *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 190–91 (2d Cir. 2009) (discussing potential application of Connecticut statutes to injuries occurring in Nigeria).

256. *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 3–4 (1975) (per curiam) (requiring a federal court in Texas to apply Texas choice-of-law rules for a tort suit arising from an explosion in Cambodia); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–98 (1941) (remanding and instructing the court of appeals to issue a decision in conformity with Delaware law).

law.<sup>257</sup> The upshot is that before a federal court may impose a presumption against extraterritorial common law, it should consider whether its cognate state court would agree. And for reasons outlined above, state courts should decline to do so.

#### CONCLUSION

More and more, a new age of transnational tort cases in U.S. courts may rely on our oldest form of law: the common law. As the presumption against extraterritoriality is invoked to foreclose statute-based remedies for victims of human rights abuses and other torts in foreign lands, judges will now confront whether the common law too should be as presumptively geographically confined. As this Article has shown, the common law differs from statutes in ways that integrally matter to assessing its presumptive geographical reach. The past and the future encompass our extraterritorial common law.

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257. See Gluck, *supra* note 166, at 1990 (contending under *Erie* that “federal courts should apply state statutory interpretation methodology to state statutory questions” but noting manifold examples where they have not); *cf.* *Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 111 (2d Cir. 2012) (adhering to California’s statutory presumption against extraterritoriality).